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Notice of Pendency of Reinstatement Application 1B

petitioner is afforded considerable leeway by virtue of his self-represented status, it cannot reasonably be said that he has adequately briefed this issue.

Moreover, it is apparent that the evidence proffered by the petitioner in support of his opposition to the respondents' motion for summary judgment, namely, the "Iris S." letters, is inadequate for that purpose. First, as the respondents point out, the letters have never been authenticated. "This court has made clear that [the] rules [of practice] would be meaningless if they could be circumvented by filing [unauthenticated documents] in support of or in opposition to summary judgment. . . . Therefore, before a document may be considered by the court [in connection with] a motion for summary judgment, there must be a preliminary showing of [the document's] genuineness, i.e., that the proffered item of evidence is what its proponent claims it to be. . . . Documents in support of or in opposition to a motion for summary judgment may be authenticated in a variety of ways, including, but not limited to . . . the addition of an affidavit by a person with personal knowledge that the offered evidence is a true and accurate representation of what its proponent claims it to be." (Citation omitted; internal quotation marks omitted.) *Anderson* v. *Dike*, 187 Conn. App. 405, 411–12, 202 A.3d 448, cert. denied, 331 Conn. 910, 203 A.3d 1245 (2019). In the absence of some kind of authentication, the letters cannot reasonably be relied on as probative evidence.[14]

Furthermore, the petitioner has never identified "Iris S." with any particularity, and there is nothing in the record to corroborate the content of the letters she purportedly wrote. Indeed, there is no proof that the respondents received the letters, and the petitioner has made no showing that, if they did receive the letters, they concealed them from the petitioner for the purpose

[14] The petitioner was granted permission by the trial court to subpoena "Iris S." Although the petitioner asserted that he received the letters from

NOTE: These pages (216 Conn. App. 153 and 154) are in replacement of the same numbered pages that appear in the Connecticut Law Journal of 25 October 2022.

of preventing him from seeking a new trial. For all these reasons, the petitioner has failed to present evidence sufficient to establish a genuine issue of material fact with respect to his claim that the three year limitation period of § 52-582 was tolled by the respondents' fraudulent concealment of the letters.[15] Accordingly, the respondents are entitled to summary judgment.

The judgment is affirmed.

In this opinion the other judges concurred.

THE METROPOLITAN DISTRICT COMMISSION *v.* MARRIOTT INTERNATIONAL, INC., ET AL.* (AC 44790)

Prescott, Elgo and Cradle, Js.

Syllabus

The plaintiff municipal water control authority sought to recover damages from the defendants, the state of Connecticut and M Co., a hotel franchisor, for breach of contract and unjust enrichment. The plaintiff entered

"Iris S." and not the respondents, it appears that he did not know her last name or address, thereby rendering him unable to secure her presence or testimony.

[15] As the respondents acknowledge, because the petitioner's fraudulent concealment claim regarding newly discovered evidence also gives rise to a *Brady* claim, the petitioner's right to a new trial may be vindicated by virtue of a petition for a new trial; see *State* v. *McCoy*, 331 Conn. 561, 598, 206 A.3d 725 (2019) ("newly discovered *Brady* claims may . . . be brought by way of a petition for a new trial up to three years after sentencing"); and via a petition for a writ of habeas corpus. In fact, while the present case was pending in the trial court, the petitioner filed a habeas petition based on the same alleged *Brady* violation that he has raised here. He subsequently withdrew that claim, however, without explanation. We express no view with respect to any aspect of any such habeas claim that the petitioner might seek to commence in the future.

Finally, it bears noting that, in cases that do not involve an alleged constitutional violation, a petition for a new trial will almost invariably be the only relief available to an individual seeking a new trial on the basis of newly discovered evidence. This is true, of course, with respect to both criminal and civil cases.

* Vacated. See *Metropolitan District Commission* v. *Marriott International, Inc.*, 348 Conn. 963, 963–64, A.3d (2024).

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CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

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MERCEDES-BENZ FINANCIAL *v.* 1188 STRATFORD AVENUE, LLC, ET AL.
(SC 20754)

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

Syllabus

The plaintiff financing company sought to recover damages from the defendants, a limited liability company and its principal, D, for breach of contract in connection with the defendants' alleged failure to make payments under a motor vehicle lease agreement. After the defendants were defaulted for failure to appear, the trial court granted the plaintiff's motion for judgment and rendered a default judgment for the plaintiff. Less than four months later, and more than two years after the plaintiff had commenced its action, the defendants moved to open and set aside the default judgment pursuant to statute ((Rev. to 2019) § 52-212). In an affidavit accompanying the motion to open, D attested that the vehicle in question had serious defects that made it dangerous to operate and that the defendants had declared the lease void and returned the vehicle to the car dealership from which it was leased. D further attested that he mistakenly thought that the case had been resolved, that there were good defenses to the plaintiff's action, including breach of warranties and misrepresentations, and that the defendants would file a counterclaim when the judgment was opened. The plaintiff objected, and, after a hearing, the trial court denied the motion to open, concluding that the motion had been untimely filed and had no basis. The defendants appealed to the Appellate Court, which acknowledged that the trial court incorrectly had determined that the motion was untimely but determined that the trial court had not abused its discretion in denying the motion on the ground that it had no basis. On the granting of certification, the defendants appealed to this court.

Held that the Appellate Court incorrectly concluded that the trial court had not abused its discretion in denying the defendants' motion to open, and, accordingly, this court reversed the Appellate Court's judgment and remanded with direction to reverse the trial court's judgment and for further proceedings:

* This case originally was scheduled to be argued before a panel of this court consisting of Chief Justice Robinson and Justices McDonald, D'Auria, Mullins, Ecker Alexander and Dannehy. Although Chief Justice Robinson was not present at oral argument, he has read the briefs and appendices, and listened to a recording of the oral argument prior to participating in this decision.

The legal standard set forth in § 52-212 (a) for opening default judgments, pursuant to which a movant must establish that a good defense existed at the time the trial court rendered judgment and that the movant was prevented from asserting that defense because of mistake, accident, or other reasonable cause, applies when the motion to open is timely filed, that is, within four months of the date the trial court rendered judgment, whereas, once that four month window has lapsed, the trial court has the inherent authority to open a judgment when the movant establishes that the judgment was obtained by fraud, duress, or mutual mistake, or, under certain circumstances, when newly discovered evidence exists to challenge the judgment.

In the present case, it was undisputed that the trial court's timeliness determination was incorrect because the defendants had timely moved to open the judgment within four months of the date the trial court rendered it, and this court could not conclude that this critical error did not affect the trial court's determination as to which legal standard to apply in ruling on the merits of the motion or did not adversely impact the trial court's exercise of discretion under the proper legal standard.

Although it was unclear which legal standard the trial court had applied in concluding that there was no basis for the motion to open, the trial court's application of either standard constituted an abuse of its discretion.

Specifically, if the trial court's decision that the motion was untimely led it to deny the motion on the ground that the defendants had failed to establish that the judgment was procured by fraud, duress, or mutual mistake, its decision would have been unfounded both because the motion was timely and there was no discussion or mention by the trial court of fraud, duress, or mutual mistake, and if the trial court determined that the motion was untimely and also had no basis because the defendants had failed to satisfy the two part test prescribed by § 52-212 (a), then its decision would have resulted from the application of an incorrect legal standard, that is, the standard applicable to timely filed motions to open.

Moreover, the trial court's misapprehension of the timeliness of the motion impacted not only which legal standard to apply, but also its consideration of whether the defendants had satisfied § 52-212 (a).

Accordingly, the trial court's decision whether to grant the defendants' motion to open was founded on an improper subsidiary determination, namely, its erroneous determination that the defendants' motion was untimely, reversal of the Appellate Court's judgment was necessary because an injustice apparently occurred, and, on remand, the defendants were entitled to an evidentiary hearing, before a different judge with a correct understanding that the defendants' motion was timely filed, at

which they will have the opportunity to satisfy the requirements of § 52-212 (a).

(*Two justices dissenting in one opinion*)

Argued November 15, 2023—officially released April 16, 2024

Procedural History

Action to recover damages for breach of contract, and for other relief, brought to the Superior Court in the judicial district of Ansonia-Milford, where the defendants were defaulted for failure to appear; thereafter, the court, *Hon. Arthur A. Hiller*, judge trial referee, granted the plaintiff's motion for judgment and rendered judgment for the plaintiff; subsequently, the court denied the defendants' motion to open and set aside the judgment, and the defendants appealed to the Appellate Court, *Bright*, *C. J.*, and *Moll*, *J.*, with *Prescott*, *J.*, dissenting, which affirmed the trial court's judgment, and the defendants, on the granting of certification, appealed to this court. *Reversed*; *further proceedings*.

Daniel D. Skuret III, with whom was *Patrick D. Skuret*, for the appellants (defendants).

Gary J. Greene, for the appellee (plaintiff).

Opinion

D'AURIA, J. In this certified appeal, the defendants, Aniello Dizenzo and his company, 1188 Stratford Avenue, LLC (company), appeal from the Appellate Court's judgment affirming the trial court's denial of their motion to open the judgment rendered in favor of the plaintiff, Mercedes-Benz Financial. On appeal, the defendants claim that the Appellate Court incorrectly concluded that the trial court had not abused its discretion by denying their motion to open as untimely and with no basis, even though the defendants timely filed their motion. We agree and, therefore, reverse the Appellate Court's judgment.

The Appellate Court's opinion aptly recites the facts and procedural history required to resolve this appeal; see *Mercedes-Benz Financial* v. *1188 Stratford Avenue, LLC*, 213 Conn. App. 739, 280 A.3d 120 (2022); which we summarize along with other undisputed facts in the record. In 2012, the defendants entered into a motor vehicle lease agreement (agreement) with a dealership in Fairfield for a 2013 Mercedes-Benz (vehicle). Dizenzo signed the agreement on his company's behalf and also in his individual capacity as guarantor. The agreement provided that the defendants would make monthly lease payments to the plaintiff.

In February, 2017, the plaintiff brought the underlying breach of contract action against the defendants, alleging that they had stopped making the lease payments due under the agreement. Neither defendant filed an appearance. The plaintiff moved to default the defendants for failure to appear, which the trial court clerk granted. The plaintiff then moved for judgment and for an order of weekly payments. On May 13, 2019, the court granted the motion and rendered judgment for the plaintiff in the amount of $11,734.61, and awarded the plaintiff postjudgment interest at the annual rate of 8 percent pursuant to General Statutes § 37-3a. The court further ordered the defendants to pay the plaintiff $35 each week. The plaintiff sent a notice of this judgment to the defendants.

Less than four months after the court rendered judgment for the plaintiff, the defendants, on July 29, 2019, moved to open the judgment pursuant to General Statutes (Rev. to 2019) § 52-212.[1] The defendants contended that the "vehicle continuously [had] serious defects

[1] All references to § 52-212 are to the 2019 revision of the statute. Additionally, although the defendants titled their motion, "motion to set aside judgment," and did not expressly cite any supporting legal authority, it later became clear that § 52-212 was the basis for their motion. The plaintiff does not contend otherwise.

with [it] which made operating it dangerous" and that the required repairs would have taken several months to complete. The defendants declared the lease void and left the vehicle with the dealer because the vehicle could not function properly. As a result, the defendants claimed that they had to expend additional funds to secure a replacement vehicle. The defendants further asserted that, "when they were sued in 2017, [they] mistakenly thought this matter was resolved, and [they] did not hear anything else until June of 2019 when [they] received notice of judgment." The defendants further claimed that they "ha[d] good defenses to the plaintiff's claim based on breach of warranties and misrepresentations and [would] file a counterclaim . . . when the judgment is [opened]." The defendants supported their motion with Dizenzo's affidavit, in which he repeated these claims essentially verbatim.

The plaintiff objected to the motion to open, claiming that the defendants had neither alleged nor demonstrated good cause as to why the court should open the judgment and had failed to offer any valid defenses or affirmative claims against the plaintiff's cause of action. The plaintiff further contended that the defendants "should not be permitted to sit on their rights for over two years during the pendency of this case and now attempt to open the judgment."

Pursuant to the defendants' request, the court conducted a hearing for the parties to present oral arguments on the motion. The court initially questioned whether the defendants had timely filed the motion to open within four months from when judgment was rendered, as § 52-212 requires. The courtroom clerk and the defendants' counsel accurately reported to the court that the July 29, 2019 motion to open was filed within four months of the court's rendering judgment on May 13, 2019, and the court responded: "So, we are barely in time." The defendants' counsel then explained the

basis for the motion. Specifically, he contended that the defendants had taken no action in response to this lawsuit because the plaintiff accepted the vehicle's return, the plaintiff had informed them that this action was not going to go forward, and the plaintiff waited two years to attempt to collect the judgment against the defendants. The defendants' counsel further argued that the defendants were seeking to open the judgment to conduct discovery and to file a counterclaim against the plaintiff based on problems with the vehicle. The plaintiff's counsel denied the defendants' version of events, contending that the defendants' prospective claims and defenses would be time barred because the lease agreement was signed in 2012, and their problems with the vehicle were immaterial because the plaintiff was only the "financing entity," not the car dealer. When the court expressed concern that Dizenzo's affidavit might not suffice to support the motion to open, the defendants' counsel requested a one week continuance to present evidence at an evidentiary hearing to support the motion. The court did not expressly rule on the defendants' request for a hearing. Rather, at the end of hearing, the court orally denied the motion on the grounds that "[i]t's untimely and it has no basis." The same day, the court issued a written order denying the motion, stating: "Motion is untimely with no basis."

The defendants appealed to the Appellate Court, claiming, among other things, that, because their motion to open had been timely filed, the trial court abused its discretion in denying the motion. *Mercedes-Benz Financial* v. *1188 Stratford Avenue, LLC*, supra, 213 Conn. App. 748, 750. The plaintiff agreed that the trial court incorrectly had determined that the defendants' motion was untimely but argued that, in denying the motion, the court nevertheless properly exercised its discretion because the defendants had failed to satisfy

the two part test to determine the timeliness of motions to open under § 52-212 (a). Id., 748–49.

In a split decision, the Appellate Court affirmed the trial court's denial of the motion to open. Id., 740, 755. The majority acknowledged that the trial court incorrectly had determined that the motion to open was untimely. Id., 750. The majority nevertheless held that the trial court had not abused its discretion in denying the motion to open on the additional ground that the motion " 'ha[d] no basis' "; id.; because the motion to open and Dizenzo's affidavit failed to establish the second prong of the § 52-212 (a) test, namely, that the defendants' failure to appear and raise a defense was excused by reasonable cause. Id., 753. Specifically, the majority concluded that the defendants' mistaken belief that the matter was resolved did not suffice to establish "reasonable cause" to excuse their failure to take any action in response to the pending action. Id. Judge Prescott dissented, contending that the trial court's improper timeliness determination likely tainted its decision on the merits of the motion to open and that it was unclear which standard the trial court had applied when it concluded that the motion had no basis. Id., 755–56. In Judge Prescott's view, the defendants "are entitled to have that motion adjudicated by a trial court that is not laboring under the misapprehension that the motion was late." Id., 756. This certified appeal followed.[2]

[2] We granted certification on the following issue: "Did the Appellate Court incorrectly conclude that the trial court had not abused its discretion when it denied the defendants' motion to open the judgment as untimely and without substance despite the fact that the motion was timely filed?" *Mercedes-Benz Financial* v. *1188 Stratford Avenue, LLC*, 345 Conn. 910, 283 A.3d 505 (2022). On appeal to the Appellate Court, the defendants also claimed that the trial court had abused its discretion by denying their oral request to continue the hearing on the motion and to allow them to present evidence in addition to the affidavit to support their motion. *Mercedes-Benz Financial* v. *1188 Stratford Avenue, LLC*, supra, 213 Conn. App. 740. The Appellate Court rejected this claim. See id., 753–55. Although the defendants appear to renew this claim in their brief to this court, we need not address it because we conclude that the trial court abused its discretion in denying the motion to open.

"Whether proceeding under the common law or a statute, the action of a trial court in granting or [denying a motion] to open a judgment is, generally, within the judicial discretion of such court, and its action will not be disturbed on appeal unless it clearly appears that the trial court has abused its discretion." (Internal quotation marks omitted.) *U.S. Bank National Assn.* v. *Rothermel*, 339 Conn. 366, 381, 260 A.3d 1187 (2021). "In determining whether the trial court abused its discretion, this court must make every reasonable presumption in favor of its action. . . . The manner in which [this] discretion is exercised will not be disturbed [as] long as the court could reasonably conclude as it did." (Internal quotation marks omitted.) *Conroy* v. *Idlibi*, 343 Conn. 201, 204, 272 A.3d 1121 (2022).

"The court's discretion, however, is not unfettered . . . ." (Internal quotation marks omitted.) *Harris* v. *Neale*, 197 Conn. App. 147, 157, 231 A.3d 357 (2020); see also *Cook* v. *Lawlor*, 139 Conn. 68, 71, 90 A.2d 164 (1952). "[D]iscretion imports something more than leeway in decision-making. . . . It 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. . . . [T]he court's discretion should be exercised mindful of the policy preference to bring about a trial on the merits of a dispute whenever possible and to secure for the litigant his day in court." (Citation omitted; internal quotation marks omitted.) *Costello* v. *Goldstein & Peck, P.C.*, 321 Conn. 244, 255–56, 137 A.3d 748 (2016). Sound discretion "requires a knowledge and understanding of the material circumstances surrounding the matter . . . ." (Internal quotation marks omitted.) *Krevis* v. *Bridgeport*, 262 Conn. 813, 819, 817 A.2d 628 (2003). Additionally, an "abuse of discretion exists when a court . . . has decided [the matter] based on improper or irrelevant factors." (Internal quotation marks omit-

ted.) *State* v. *Jackson*, 334 Conn. 793, 811, 224 A.3d 886 (2020). "[R]eversal is required where the abuse is manifest or where injustice appears to have been done." (Internal quotation marks omitted.) *Burton* v. *Browd*, 258 Conn. 566, 570, 783 A.2d 457 (2001).

The threshold determination of whether a motion to open is timely filed is critical because it determines which of two different legal standards the trial court must apply when ruling on the motion. First, as the Appellate Court majority accurately noted, a timely motion to open is governed by § 52-212 (a), which provides in relevant part: "Any judgment rendered or decree passed upon a default or nonsuit in the Superior Court may be set aside, *within four months* following the date on which it was rendered or passed, and the case reinstated on the docket . . . upon the complaint or written motion of any party or person prejudiced thereby, *showing reasonable cause, or that a good cause of action or defense in whole or in part existed at the time of the rendition of the judgment or the passage of the decree, and that the plaintiff or defendant was prevented by mistake, accident or other reasonable cause from prosecuting the action or making the defense*." (Emphasis added.) General Statutes (Rev. to 2019) § 52-212 (a); see also Practice Book § 17-43 (a). This rule is "motivated by the policy that [o]nce a judgment [is] rendered it is to be considered final and it should be left undisturbed by [posttrial] motions except for a good and compelling reason. . . . Otherwise, there might never be an end to litigation." (Citation omitted; internal quotation marks omitted.) *Chapman Lumber, Inc.* v. *Tager*, 288 Conn. 69, 107, 952 A.2d 1 (2008). Accordingly, to prevail on a motion to open timely filed within the four month window, § 52-212 (a) requires that the movant make a two part showing: (1) that a good defense, the nature of which must be set forth, existed at the time the trial court rendered judgment, and (2) that the movant was prevented from mak-

ing that defense because of mistake, accident, or other reasonable cause. See, e.g., *In re Joseph W.*, 301 Conn. 245, 264 n.21, 21 A.3d 723 (2011); *Flater* v. *Grace*, 291 Conn. 410, 419, 969 A.2d 157 (2009).

Second, but missing from the Appellate Court majority opinion, is any mention of that part of the test for determining whether to grant a motion to open, which provides that, once the § 52-212 (a) four month window expires, the trial court has inherent authority, "independent of [any] statutory provisions, to open a judgment obtained by fraud, in the actual absence of consent, or by mutual mistake at any time." (Internal quotation marks omitted.) *Wolfork* v. *Yale Medical Group*, 335 Conn. 448, 469, 239 A.3d 272 (2020); see also *Reville* v. *Reville*, 312 Conn. 428, 441, 93 A.3d 1076 (2014). The two part test prescribed by § 52-212 (a) does not apply to untimely motions filed outside the four month window. Rather, to prevail on a motion to open filed outside this window, a movant must establish that the judgment was "obtained by fraud, duress or mutual mistake or, under certain circumstances, where newly discovered evidence exists to challenge the judgment . . . ." *Flater* v. *Grace*, supra, 291 Conn. 418; see also *Reville* v. *Reville*, supra, 441.

We conclude that the trial court abused its discretion by denying the motion to open on the grounds that it was untimely and that it had no basis. It is undisputed by the parties, as well as by the dissent in this appeal and both opinions in the Appellate Court, that the trial court's timeliness determination was incorrect because the defendants' July 29, 2019 motion to open was filed well within four months of the May 13, 2019 judgment pursuant to § 52-212 (a). Even the trial court initially recognized at the hearing that the motion was timely filed within the four month time frame in § 52-212 (a). And yet, its ruling, determining that the motion to open was untimely, manifested a misunderstanding that it

was filed outside the four month window contained in § 52-212 (a).

We cannot conclude that this critical error did not either affect the trial court's determination as to which legal test to apply in ruling on the merits of the motion or adversely impact the court's exercise of discretion under the proper legal test. It is true, as the dissent points out, that a "trial court's ruling is entitled to the reasonable presumption that it is correct unless the party challenging the ruling has satisfied its burden demonstrating the contrary." (Internal quotation marks omitted.) *State* v. *Milner*, 325 Conn. 1, 13, 155 A.3d 730 (2017); see also *AGW Sono Partners, LLC* v. *Downtown Soho, LLC*, 343 Conn. 309, 342 n.28, 273 A.3d 186 (2022) ("when a trial court's memorandum of decision is ambiguous as to the burden of proof applied, it is the responsibility of the appellant . . . to move . . . for an articulation on that point"). However, "[a] presumption of correctness will not carry the day when there is evidence that the trial court failed to follow the applicable law." *Mitchell* v. *State*, 338 Conn. 66, 78, 257 A.3d 259 (2021). Like Judge Prescott in his dissenting opinion in the Appellate Court, we are "unwilling to apply the normal presumption regarding the correctness of a trial court's decision in light of the clear error of the court's determination that the motion was not filed within four months of the date judgment was rendered." *Mercedes-Benz Financial* v. *1188 Stratford Avenue, LLC*, supra, 213 Conn. App. 756 (*Prescott, J.*, dissenting). This is because, although the record does not conclusively establish whether the trial court's alternative determination that the motion had "no basis" resulted from its application of the two part § 52-212 (a) legal standard, or the legal standard for fraud, duress, or mutual mistake,[3] we conclude that the trial court's application of either legal standard constituted an abuse of discretion.

[3] To avoid the need to resort to presumptions, it would have been more prudent for the trial court to state the factual and legal bases for its decision,

Specifically, if the trial court's decision that the motion was untimely led it to deny the motion on the ground that the defendants had failed to establish that the judgment was procured by fraud, mutual mistake, or duress, then its decision was unfounded both because the motion was timely and because there was no discussion or mention of fraud, duress, or mutual mistake. Thus, the trial court could not have properly made such a determination. Alternatively, if, as the Appellate Court majority held and the dissent presumes, the trial court determined that the motion was untimely and also had no basis because the defendants had failed to meet the two part test in § 52-212 (a), then its decision resulted from its application of an incorrect legal standard under the trial court's own reasoning. Because the two part test applies only to *timely* motions to open, we cannot agree with the Appellate Court that the trial court could have erroneously determined that the motion to open was *untimely* and yet properly applied the correct legal standard for *timely* motions to open. See *State* v. *Jackson*, supra, 334 Conn. 811; *Krevis* v. *Bridgeport*, supra, 262 Conn. 819.

Moreover, the trial court's misapprehension of the timeliness of the defendants' motion to open not only impacted *which* legal standard to apply, but also *whether* the defendants had satisfied § 52-212. For example, the first part of the test requires that the movant establish that a good cause of action or defense existed at the time the trial court rendered the judgment. See *Flater* v. *Grace*, supra, 291 Conn. 419. The court's discretionary determination as to whether a good defense existed may potentially include consider-

as required by Practice Book §§ 6-1 (a) and 64-1 (a), or for the defendants to seek an articulation pursuant to Practice Book § 66-5. As we explain, however, under the circumstances of this case, the basis the trial court provided for its decision was indisputably inaccurate such that neither an articulation nor further explication was necessary for us to review and order the reversal of its decision.

ation of whether the defendants' prospective claims would be time barred, or whether the passage of time otherwise hindered their claims. Likewise, the second part of the test in § 52-212 (a) requires the trial court to assess whether the movant established that mistake, accident, or other reasonable cause prevented the movant from prosecuting the action or presenting a good defense. See id. This inquiry has a temporal component because, as the Appellate Court majority noted, depending on the circumstances presented, it may include consideration of the length of time that the defendants were prevented from asserting such a defense and did not appear in this action.[4] See *Mercedes-Benz Financial* v. *1188 Stratford Avenue, LLC*, supra, 213 Conn. App. 751–52. In fact, the temporal component was a primary point of contention at the hearing. The defendants used the existence of the two year delay to support their claim that the plaintiff never intended to pursue this action. In contrast, the plaintiff primarily argued in opposition to the motion to open that the defendants had waited two years to contest the action. The trial court's decision cannot stand under these circumstances.

It is therefore manifest that the court's erroneous timeliness determination impacted its decision as to whether to open the judgment. Although we do not frequently upset a trial court's discretionary rulings, we

[4] As the dissent correctly notes, § 52-212 requires that the "motion must be timely" and that, "the trial court, in concluding that § 52-212 was not satisfied, could have found that any one of these elements, or any combination thereof, had not been established." Thus, to determine whether the defendants had met the § 52-212 standard, the trial court was required to analyze whether the motion was timely, but that determination necessarily was infected by its lone, and erroneous, factual finding that the motion was untimely.

Likewise, the determination of whether to open a judgment beyond the four month limitation in § 52-212 (a) based on fraud, duress, or mutual mistake is partially contingent on how diligent the movant was in attempting to discover and expose the fraud. See *Chapman Lumber, Inc.* v. *Tager*, supra, 288 Conn. 107.

must do so when the court's determination is predicated on a misapprehension of fact or law. See, e.g., *Reville* v. *Reville*, supra, 312 Conn. 450 (trial court abused its discretion in denying motion to open on basis of "unconventional analysis" and improper subsidiary determination); *Austin-Casares* v. *Safeco Ins. Co. of America*, 310 Conn. 640, 653–54, 81 A.3d 200 (2013) (trial court abused its discretion in denying motion to intervene because its decision was predicated on improper legal determination that motion was time barred); *Collins* v. *Anthem Health Plans, Inc.*, 266 Conn. 12, 49, 836 A.2d 1124 (2003) (trial court abused its discretion in denying motion for class certification because it failed to apply proper legal standard); *Burton* v. *Browd*, supra, 258 Conn. 571 (Appellate Court abused its discretion in dismissing appeal because its decision was founded on incorrect fact that plaintiff had failed to move to substitute defendant's estate in trial court); *State* v. *Sierra*, 213 Conn. 422, 436, 568 A.2d 448 (1990) (trial court abused its discretion in admitting evidence because it failed to perform necessary legal test). Here, the trial court's decision constituted an abuse of discretion because it was founded on an improper subsidiary determination.

Finally, reversal of the Appellate Court's judgment is required because an injustice appears to have been done. See, e.g., *Burton* v. *Browd*, supra, 258 Conn. 570. We agree with the sentiment of Judge Prescott, expressed in his dissent in the Appellate Court, that, "regardless of the ultimate merits of the defendants' motion to open . . . they are entitled to have that motion adjudicated by a trial court that is not laboring under the misapprehension that the motion was late." *Mercedes-Benz Financial* v. *1188 Stratford Avenue, LLC*, supra, 213 Conn. App. 756 (*Prescott, J.*, dissenting). On remand, the defendants must have the opportunity to meet the two part test in § 52-212 (a) at an evidentiary hearing

before a different judge with a correct understanding that the defendants had timely filed their motion to open.[5] The trial court should consider the evidence submitted by the parties and decide in the proper exercise of its discretion whether to open the judgment "mindful of the policy preference to bring about a trial on the merits of a dispute whenever possible and to secure for the litigant his day in court." (Internal quotation marks omitted.) *Costello* v. *Goldstein & Peck, P.C.*, supra, 321 Conn. 256.

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to reverse the trial court's judgment and to remand the case to that court for further proceedings in accordance with this opinion.

In this opinion McDONALD, ECKER, ALEXANDER and DANNEHY, Js., concurred.

MULLINS, J., with whom ROBINSON, C. J., joins, dissenting. The trial court denied the motion to open filed by the defendants, Aniello Dizenzo and 1188 Stratford Avenue, LLC, because "[it was] untimely, *and* it ha[d] no basis." (Emphasis added.) This ruling can be read in one of two ways. As the majority contends, it could mean that the court believed that the motion was untimely, and, because it was untimely, the court applied (or at least was required to apply) its inherent, common-law

[5] The need for an evidentiary hearing on remand is evidenced by the dissent's consideration of the substance of the defendants' motion to open. Although the dissent artfully marshals counsels' arguments made at the original hearing, essentially none of those circumstances was established by evidence because the trial court had only Dizenzo's affidavit; indeed, there was a critical factual dispute at the hearing concerning the basis for the defendants' motion to open. Specifically, the parties' counsel at the hearing disputed whether, when, in what manner, and by which entity Dizenzo was informed that the lawsuit was not going forward. On remand, the parties will have the opportunity to submit evidence with respect to all of the substantive elements of § 52-212 (a).

authority to review the untimely motion solely for fraud, duress, or mutual mistake. Another plausible meaning, though, is that the court denied the motion on two distinct, alternative bases: because it was untimely and also because it had no basis, i.e., it failed on its merits under General Statutes (Rev. to 2019) § 52-212.[1] In my view, this second reading is not only plausible but the far better reading, given that the trial court never once mentioned, or questioned the parties on, the elements needed to prevail on an untimely motion to open. Rather, it focused exclusively on the elements necessary to prevail under § 52-212.

Although I believe that the trial court's ruling rests on two separate bases, at worst, the ruling is unclear. Consequently, I believe that reversal is irreconcilable with our well established, highly deferential standard of review. There has been no motion for articulation to clarify which of these two readings the court intended. Under such circumstances, we typically presume that the trial court was correct and affirm the judgment if there is any legitimate basis for doing so. Here, there is such a legitimate basis: nothing in Dizenzo's affidavit in support of the defendants' motion to open established with particularity, as the defendants must under § 52-212, that they were prevented by mistake from raising a valid defense. And, after a hearing at which the trial court focused on the issue of whether the defendants' alleged mistake was a valid one that prevented them from appearing, the court concluded that the motion "ha[d] no basis." Because the defendants failed to provide a reasonable justification for their failure to appear and defend, and because the Appellate Court majority properly applied well established law, I must respectfully dissent.

Although the majority aptly lays out the facts, a few are worth highlighting to illuminate my position. Dizenzo

[1] All references to § 52-212 are to the 2019 revision of the statute.

leased the subject vehicle in November, 2012, using funds provided by the plaintiff finance company, Mercedes-Benz Financial. He drove the vehicle and made his monthly payments under the lease/financing agreement for fifteen months, through February, 2014. At that point, when the dealership was unable to provide service that he deemed satisfactory, Dizenzo unilaterally declared that the agreement was void, simply left the car at the dealership, and ceased making payments to the plaintiff.

In February, 2017, when the defendants undisputedly received notice of this action, they did not file an appearance. They also filed no appearance six months later, in August, 2017, when the defendants received notice of the plaintiff's motion for default; or the following month, in September, 2017, when the defendants received notice that they had been defaulted;[2] or in May, 2019, when the defendants received notice of the plaintiff's motion for judgment; or in June, 2019, when the defendants received notice that the trial court rendered a default judgment. The defendants did not enter an appearance, engage counsel, or take any measures to defend the action until July, 2019, when they were served with postjudgment discovery. In the defendants' motion to open and Dizenzo's supporting affidavit, the only explanation offered for this ongoing failure to appear and defend the suit was the assertion that, "when he was sued in 2017, [Dizenzo] mistakenly thought this matter was resolved . . . ." The affidavit does not indicate why Dizenzo continued to hold that belief *after he was sued*, as he received a series of notices that the plaintiff was pursuing a default and, later, a default judgment.

[2] The notice on the default for failing to appear specifically informed the defendants that, "[i]f you file an appearance in this case before the judgment is entered against you, the default for failure to appear will automatically be set aside by the clerk. Practice Book [§] 17-20 [d]."

I

Like the majority, I am troubled by the trial court's determination that the defendants' motion to open was untimely, after both the defendants' counsel and court staff made the court aware that the motion was timely. Even the court itself acknowledged that the motion was timely.[3] The court's ruling that the motion was untimely was clearly erroneous, as the motion was filed two months after the court rendered judgment. Unlike the majority, I do not find that that erroneous determination could not be untethered from the court's separate determination that the motion also had no basis. Nor do I find that the untimely designation dictated how the court actually conducted the hearing.

My analysis centers on the highly deferential standard by which we review a trial court's denial of a motion to open a default judgment. "Whether proceeding under the common law or a statute, the action of a trial court in granting or [denying a motion] to open a judgment is, generally, within the judicial discretion of such court, and its action will not be disturbed on appeal unless it clearly appears that the trial court has abused its discretion." (Internal quotation marks omitted.) *U.S. Bank National Assn.* v. *Rothermel*, 339 Conn. 366, 381, 260 A.3d 1187 (2021). "In determining whether the trial court abused its discretion, this court must make every reasonable presumption in favor of its action. . . . The manner in which [this] discretion is exercised will not be disturbed [as] long as the [trial] court could reason-

[3] During the hearing, the trial court miscounted the months and, as a result, believed that the defendants had failed to timely file their motion to open within four months from when judgment was rendered, as § 52-212 (a) requires. Specifically, the court thought that five months, rather than two, had passed since the judgment was rendered, but it was promptly corrected by the defendants' counsel that the motion to open was timely. Acknowledging that the motion was timely, the court responded: "All right. So, we are barely in time."

ably conclude as it did." (Internal quotation marks omitted.) *Conroy* v. *Idlibi*, 343 Conn. 201, 204, 272 A.3d 1121 (2022). Indeed, we have long recognized that "the orderly administration of justice *requires* that relief be denied unless the moving party alleges and shows reasonable cause for relief under the statute." (Emphasis added.) *Testa* v. *Carrolls Hamburger System, Inc.*, 154 Conn. 294, 300, 224 A.2d 739 (1966).

In cases in which the record is ambiguous or the basis for the trial court's denial of a motion to open is unclear, and there is no motion for articulation, we consistently have affirmed the judgment, giving the trial court the benefit of the doubt and construing the record in the light most favorable to sustaining the judgment of default.[4] We have deferred to the discretion of the trial court even when it made inconsistent or erroneous findings. See, e.g., *Jenks* v. *Jenks*, 232 Conn. 750, 754–56, 657 A.2d 1107 (1995) (when supporting record was "sparse," trial court made inconsistent findings as to motion to open, and plaintiff did not seek articulation, record was construed to support judgment); *Kiessling* v. *Kiessling*, 134 Conn. 564, 567, 59 A.2d 532 (1948) ("[i]f the default judgment was proper on any of the grounds alleged, it should stand"); *Genung's, Inc.* v. *Rice*, 33 Conn. Supp. 554, 556–59, 362 A.2d 540 (1976) (subjecting trial court's erroneous finding to harmless error analysis and upholding denial of motion to vacate default judgment on alternative grounds).

[4] See, e.g., *Priest* v. *Edmonds*, 295 Conn. 132, 139–40, 989 A.2d 588 (2010) (declining to review defendant's claim when trial court simply marked defendant's motion to open " 'denied' " and could have done so for various reasons); *Flater* v. *Grace*, 291 Conn. 410, 423–24, 969 A.2d 157 (2009) ("[We must assume] . . . that the trial court understood the defendant's claim consistent with the plaintiffs' objection thereto . . . . [The] order . . . leaves open the possibility that the trial court sustained the plaintiffs' objection on the [alternative] ground that the defendant had not demonstrated that he had been 'prevented by mistake, accident or other reasonable cause from prosecuting the action or making the defense.' " (Footnote omitted.)).

In short, the fact that there are two plausible interpretations of the trial court's order does not give rise to the clear abuse of discretion necessary to overturn the judgment, especially in the absence of a motion for articulation. The only question we must answer is whether, drawing every reasonable presumption and construing any ambiguities in favor of upholding the judgment, the trial court reasonably could have concluded that the defendants had failed to satisfy their burden under at least one prong of § 52-212 (a). See, e.g., *Karanda* v. *Bradford*, 210 Conn. App. 703, 713, 270 A.3d 743 (2022) (describing two prongs of § 52-212 (a)). I believe it could.

II

A

The majority employs a mechanical approach to the trial court's decision that I do not share. It concludes that the initial timeliness finding is dispositive and necessarily dictates which standard the court applies: § 52-212 for timely filed motions, or the court's common-law authority to consider untimely motions. This view leaves no room for the common practice by which a court issues alternative rulings denying a motion, such as when a motion is untimely but the defendants also failed to make the showing necessary to satisfy the substantive requirements of § 52-212.

To start, there is no dispute that the defendants' motion to open was filed pursuant to § 52-212; although the motion does not explicitly reference § 52-212, it invokes the language and legal standard of that statute, alleging that the defendants "have good defenses" and that they mistakenly thought that the matter had been resolved. As such, the defendants had to satisfy *all* of § 52-212's requirements: (1) the motion must be timely; General Statutes (Rev. to 2019) § 52-212 (a); (2) it must be verified by the oath of the defendants or their attor-

ney; General Statutes (Rev. to 2019) § 52-212 (c); (3) it must demonstrate that the defendants had a good cause of action or defense at the time of judgment; General Statutes (Rev. to 2019) § 52-212 (a); and (4) it must "particularly set forth" how mistake, accident, or other reasonable cause prevented them from prosecuting or defending the action. General Statutes (Rev. to 2019) § 52-212 (a) and (c). Failure to satisfy any one of these elements is grounds to deny the motion to open. Accordingly, the trial court, in concluding that § 52-212 was not satisfied, could have found that any one of these elements, or any combination thereof, had not been established. Nothing in the law prevents the court from denying a motion as untimely and, in the alternative, denying it because it fails on the merits.

In fact, the very thing that the majority says the trial court cannot possibly have intended to do—determined that the motion to open was untimely but proceeded also to assess whether it satisfied the requirements of § 52-212—is precisely what the Appellate Court did in *Lewis* v. *Bowden*, 166 Conn. App. 400, 141 A.3d 998 (2016). In that case, the defaulted father moved to open a judgment of paternity approximately twenty-seven years after the trial court rendered judgment. Id., 402. The Appellate Court observed that "nearly thirty years [had] passed before he tried to open the judgment." Id., 404. Nevertheless, the court stated that "[a] motion to open a default judgment is governed by . . . § 52-212"; id., 402; it recited the language of that statute establishing the reasonable cause standard, and it proceeded to assess the merits of the father's claim according to that statutory standard. See id., 403–404; cf. *Celanese Fiber, Division of Celanese of Canada, Ltd.* v. *Pic Yarns, Inc.*, 184 Conn. 461, 465–67, 440 A.2d 159 (1981) (with respect to closely related statute, General Statutes (Rev. to 1979) § 52-212a, governing opening of civil judgments and decrees, concluding that motion to open was prop-

erly denied because it was untimely and there was no claim of fraud or mistake under common-law standard, but proceeding to explain that, even assuming arguendo that motion had been timely filed within four month limitation period, trial court would have been well within its discretion to deny motion on merits under statutory standard).

It is not uncommon for courts to follow this sort of belt-and-suspenders approach, determining that a motion, claim, defense, or argument fails on multiple, alternative grounds, both procedural and substantive.[5] Here, the trial court appears to have done just that by ruling that the defendants' motion to open was untimely *and* that it had no basis. I fail to see why that is not one plausible reading of the trial court's decision in this case. And, if it is, we are bound to adopt it.[6]

As noted, the defendants filed their motion to open pursuant to § 52-212—the majority concedes as much, and that is how the parties argued the case. See footnote 1 of the majority opinion and accompanying text. Aside from the trial court's erroneous calculation of the timeliness of the motion, when the court conducted the hearing, it focused on determining whether the defendants

[5] See, e.g., *Mitchell* v. *State*, 338 Conn. 66, 88, 257 A.3d 259 (2021); *In re Angela V.*, 204 Conn. App. 746, 757–58, 254 A.3d 1042, cert. denied, 337 Conn. 907, 252 A.3d 365 (2021); *Henderson* v. *Commissioner of Correction*, 181 Conn. App. 778, 780, 790, 189 A.3d 135, cert. denied, 329 Conn. 911, 186 A.3d 707 (2018); see also, e.g., *Priest* v. *Edmonds*, 295 Conn. 132, 139, 989 A.2d 588 (2010).

[6] The majority suggests that "the record does not conclusively establish" whether the trial court followed this sort of belt-and-suspenders approach. But we have never required that the record conclusively establish that the trial court got it *right*. Rather, we have said time and again that we must make every reasonable presumption in favor of upholding the judgment, construe ambiguities and gaps in the record against the complainant, in the absence of an articulation, and then reverse only if it is clear that the trial court got it *wrong*. See, e.g., *Bell Food Services, Inc.* v. *Sherbacow*, 217 Conn. 476, 482, 586 A.2d 1157 (1991); see also, e.g., *Doe* v. *Bemer*, 215 Conn. App. 504, 517, 283 A.3d 1074 (2022).

had good defenses that they were prevented from raising. There is no mention whatsoever in the motion, the accompanying affidavit, or the hearing transcript of fraud, duress, mutual mistake, or anything else that might invoke, or suggest that the court was applying, the court's inherent, common-law authority to consider untimely motions to open. Again, the majority concedes as much.

Indeed, the entire hearing was focused on, and all the questions posed by the trial court were directed at, the various statutory requirements imposed by § 52-212. The trial court began by questioning the defendants' counsel as to the timeliness of the motion to open. The court then entertained a back-and-forth between the parties as to the first substantive prong of § 52-212 (a), the existence of a potentially meritorious defense. See, e.g., *Karanda* v. *Bradford*, supra, 210 Conn. App. 713. The alleged meritorious defense was that the car was essentially a lemon, given the repeated problems and safety issues Dizenzo had experienced. Thus, the defendants' counsel argued that the defendants had the right to terminate the lease and would raise this as a part of their potential counterclaim. The plaintiff's counsel countered that this defense was time barred. The court also pushed the defendants' counsel on the relevance of the defendants' purported claims against the automobile dealership, which is not the plaintiff, given that the plaintiff finance company is a different entity. During this dialogue, the defendants' counsel invited the court to follow the example of a case in which another judge of the Superior Court had opened a judgment "within the four [month]" limitation period and allowed the defaulted party to plead in a potentially meritorious counterclaim.

As to the second substantive prong of § 52-212 (a), the trial court pressed on the defendants' claim that they were prevented by mistake from asserting a defense.

See, e.g., *Karanda* v. *Bradford*, supra, 210 Conn. App. 713. The court questioned both parties about this prong of the test, seeking any support for the defendants' purported belief that the plaintiff had not intended to proceed with the action. The court questioned the defendants' counsel at length as to the reasonableness of Dizenzo's mistaken belief that the action was not going forward and his attendant decision not to file an appearance or to retain counsel, including the facts that (1) the affidavit itself made no mention of the supposed conversations in which the plaintiff allegedly represented that the action would not proceed, (2) Dizenzo failed to obtain any written confirmation of this purported agreement, despite being an experienced business owner, and (3) any representations that the dealership made to Dizenzo would be irrelevant insofar as the finance company was the plaintiff.

When the trial court ended the hearing and denied the defendants' motion to open, stating that "[the motion is] untimely, and it has no basis," this ruling came directly on the heels of this discussion, in which the court had questioned the parties as to both substantive prongs of § 52-212 (a), and in which the defendants' counsel had been unable to provide any support for the mistake theory, other than counsel's own representations, or any other explanation (aside from negligence) of how the defendants were prevented from appearing. There was no discussion of, or reference to, the common-law standard. On the basis of the foregoing, after the unfounded timeliness determination, the court clearly applied the § 52-212 standard in denying the motion.

B

The record clearly supports the conclusion that the defendants had not met their burden of demonstrating good cause under the second substantive prong of § 52-212 (a). Under § 52-212 (a), a defaulted party must make

a showing that it "was prevented by mistake, accident or other reasonable cause from . . . making the defense." Section 52-212 (c) further requires that the defaulted party "*particularly* set forth the reason why [that party] failed to appear." (Emphasis added.) In the present case, the only reason the defendants offered for the failure to appear is their own mistake. The defendants, in their motion to open and Dizenzo's affidavit, alleged only the conclusory statement that they "mistakenly thought this matter was resolved" when the plaintiff filed suit in 2017. That hardly qualifies as the particularized showing required by § 52-212 (c). See, e.g., *Eastern Elevator Co.* v. *Scalzi*, 193 Conn. 128, 132–34, 474 A.2d 456 (1984).

For the sake of argument, however, suppose we set aside the defendants' burden of production, look beyond the conclusory allegation of mistake, and accept the representations of counsel during the hearing that Dizenzo believed he had the assurances of the plaintiff that the action would not proceed. The question is whether even that would qualify as a *reasonable* mistake under § 52-212 so as to justify a failure to appear and defend. It would not.

We have long held that negligence does not qualify as a "mistake" for purposes of § 52-212 (a). See, e.g., *Pantlin & Chananie Development Corp.* v. *Hartford Cement & Building Supply Co.*, 196 Conn. 233, 240–41, 492 A.2d 159 (1985) ("[n]egligence is no ground for vacating a judgment, and it has been consistently held that the denial of a motion to open a default judgment should not be held an abuse of discretion [when] the failure to assert a defense was the result of negligence"). When a party receives notice that it has been sued, the law expects that the party will enter a timely appearance and take steps to defend the action. See, e.g., *Disturco* v. *Gates in New Canaan, LLC*, 204 Conn. App. 526, 535, 253 A.3d 1033 (2021) ("[§ 52-212] is remedial, but

it cannot be so construed as to authorize relief . . . [when] a defendant indeed has received proper notice of the underlying action and the . . . motion for default yet failed to file an appearance" (citation omitted; internal quotation marks omitted)); *Fontaine* v. *Thomas*, 51 Conn. App. 77, 83, 720 A.2d 264 (1998) ("[A]lthough the defendant had actual notice of the pending case . . . he failed to take any action . . . . [Although] his mistaken perception of what steps he had to take [may have] prevented him from defending, his error does not constitute a . . . mistake . . . ."). Failure to act born of carelessness, indifference, or ignorance of the law simply does not excuse default. See, e.g., 47 Am. Jur. 2d 50–52, Judgments § 659 (2017); see also, e.g., *Dziedzic* v. *Pine Island Marina, LLC*, 143 Conn. App. 644, 652–53, 72 A.3d 406 (2013) ("[t]he fact that the defendant chose to ignore [the legal] process, and now rues this decision, is not a basis to open . . . the judgment" (internal quotation marks omitted)).

Importantly, this rule applies even when the defendant fails to appear out of a mistaken belief that the plaintiff does not intend to prosecute the action. See, e.g., *Giano* v. *Salvatore*, 136 Conn. App. 834, 844, 46 A.3d 996 ("[t]he defendant's mistaken belief that the plaintiff would be withdrawing the case is no excuse for her failure to plead"), cert. denied, 307 Conn. 926, 55 A.3d 567 (2012); *Nelson* v. *Contracting Group, LLC*, 127 Conn. App. 45, 49–50, 14 A.3d 1009 (2011) (motion to open was properly denied when defendant failed to defend because of mistaken belief that plaintiff's counsel would contact him before moving forward with litigation); *Berzins* v. *Berzins*, 105 Conn. App. 648, 652–53, 938 A.2d 1281 ("even if the defendant had relied on any statements made by the plaintiff, his subsequent negligence supersedes his purported reliance . . . [as he] could have called the court at any point to inquire about the status of the action" (internal quotation marks

omitted)), cert. denied, 289 Conn. 932, 958 A.2d 156 (2008); *Rino Gnesi Co.* v. *Sbriglio*, 83 Conn. App. 707, 710, 713, 850 A.2d 1118 (2004) (defendants' alleged misunderstanding following conversation with plaintiff's counsel regarding case status was deemed negligent and, therefore, was not valid justification under § 52-212).

These principles are illustrated nicely in *Pelletier* v. *Paradis*, 4 Conn. Cir. 396, 232 A.2d 925 (1966), cert. denied, 154 Conn. 745, 226 A.2d 520 (1967). The defendant in that case moved to open a default judgment, contending that his attorney had advised him that he need not defend the suit because the applicable one year limitation period had expired, and, thus, the plaintiff had no legal claim against him. Id., 398. He further alleged that, after his attorney offered to discuss the matter with the plaintiff's attorney, he heard nothing more from the plaintiff for nearly one year, and his attorney then inadvertently forgot to respond to the summons. See id., 398–99. On the basis of these representations, the trial court granted the defendant's motion to open the default judgment. Id., 399.

The Appellate Division of the Circuit Court reversed. See id., 400. It acknowledged that a trial court has broad discretion in such matters. See id., 397–98. But it concluded, as a matter of law, that "[t]he defendant's failure to appear and assert his defense . . . was not due to any mistake, accident or other reasonable cause, *unmixed with negligence or inattention*, so as to constitute a sufficient reason to warrant the opening of the judgment." (Emphasis added.) Id., 399–400. The Appellate Division articulated the following rule: "A party to a suit in court must give it the care and attention [that] a man of ordinary prudence usually bestows [on] his important business. If he fails to do so he cannot obtain relief from a judgment resulting from his negligent fail-

ure to take the proceedings required for his protection." (Internal quotation marks omitted.) Id., 399.

The present action fits squarely within the previously mentioned paradigm. Even if there was an initial agreement not to pursue this action, the plaintiff clearly became serious enough about the matter to hire counsel, draft a complaint, pay the filing fee, and file suit. Employees at the Mercedes-Benz dealership may well have told Dizenzo that they did not believe that the plaintiff—the finance company—planned to proceed with the action. The employees might have been mistaken about that. The plaintiff also might have changed course at some point without informing the dealership or the defendants. Dizenzo may have simply misunderstood from the outset whether there was an agreement not to pursue this matter.

The one thing Dizenzo knew for sure, when he received notice of the lawsuit, was that he had been sued. He also knew from the filing of the default notice that the case was moving forward and that, if he simply filed an appearance, the default would be set aside. The defendants' reliance on the prior purported agreement with the plaintiff does not excuse their failure to act, particularly after they had received notice of the action and the default. At minimum, as the Appellate Court noted in *Berzins* v. *Berzins*, supra, 105 Conn. App. 648, they "could have called the court at any point to inquire about the status of the action." Id., 653. Had they taken the minimal, prudent step of filing an appearance, with or without legal representation, then the defendants would not have been defaulted. The law deems the failure to do so negligent, and a mistake arising from or intermixed with one's own negligence is not a valid mistake under § 52-212.

C

The majority says that, even if the trial court did apply the correct legal standard, its application of that

standard was tainted by its mistaken belief that the defendants' motion to open was untimely. This, the majority contends, is because the inquiry embedded in the second prong of § 52-212 (a), which asks whether there was good cause for the default, "has a temporal component because . . . depending on the circumstances presented, it may include consideration of the length of time that the defendants were prevented from asserting such a defense . . . ." The majority suggests that an evidentiary hearing will be required to resolve what it calls this "critical factual dispute . . . ." Footnote 5 of the majority opinion.

I disagree for two reasons. First, as I just discussed, a negligent mistake is not a valid mistake under § 52-212. Failure to file an appearance after receiving notice of the lawsuit, and again after receiving notice of default, was negligent. As the trial court established through its questioning, even if the plaintiff had expressed some hesitation to proceed with the action, failure to get that agreement in writing also was negligent. Because there was no valid mistake that prevented the defendants from filing an appearance and raising a defense at the outset, I fail to see how the passage of additional time could transform what began, and persisted, as a series of negligent decisions into a reasonable mistake, so as to mislead the trial court. Nor is there any factual dispute that could be resolved on remand in a way that would legitimize the defendants' ongoing failure to appear, given our well established law in this area.

Second, the record belies the theory that the trial court's analysis was influenced by its belief that the motion to open was untimely. At the hearing, the parties raised the question of timing. The plaintiff's counsel argued that any defenses relating to the 2012 lease were by then time barred, while the defendants' counsel countered that the plaintiff's two year delay in prosecuting the action was evidence that it never intended to

prosecute it. But the trial court dismissed the importance of the lengthy delay, stating: "That's not proof of anything." Thus, the court itself appears not to have put much stock in the passage of time. It never said that the two year delay influenced its decision, and, without an articulation, I would not presume that it did.

D

Ultimately, the majority recognizes that it is not entirely clear whether the trial court's determination that the defendants' motion to open "ha[d] no basis" resulted from its application of the two part legal standard of § 52-212 (a) for timely filed motions or the common-law legal standard for untimely filed motions. The majority further recognizes that it would have been more prudent for the court to have stated the factual and legal bases for its decision or for the defendants to have sought clarification through a motion for articulation. See footnote 3 of the majority opinion. Normally, we *require* articulation before reading an unclear or ambiguous order in a manner that would result in reversal. See, e.g., *Speer* v. *Dept. of Agriculture*, 183 Conn. App. 298, 302, 192 A.3d 489 (2018) (when bases for trial court's denial of motion to open judgment of nonsuit were unclear from record, Appellate Court *sua sponte* ordered trial court to articulate factual and legal bases for denial). But the majority resolves that concern by concluding that the application of either standard here was an error. I would not brush aside the necessity for an articulation so quickly.

In point of fact, the defendants' motion to open was a timely filed motion, and, as I explained, the trial court clearly applied the statutory standard for timely filed motions in its questioning during the hearing. Thus, in my view, the court got the timeliness analysis wrong, but it got the legal standard right. The majority contends that, even if it is true that the trial court applied the

correct standard and reached a permissible result, that discretionary judgment must be reversed because the court should have used an *incorrect* standard in order to be consistent with its own erroneous timeliness finding. The erroneous timeliness finding was harmless here, and I am not aware of any case in which this court or the Appellate Court has reversed a discretionary judgment of a trial court on such a basis.

In any event, to the extent that the trial court's timeliness determination makes things at all unclear about which standard the court applied—one that is correct, or one that is incorrect—that is not grounds for reversal. In such cases, we either read the ambiguity to support the judgment or we give the trial court a fair opportunity to clarify its ruling. See, e.g., id.[7]

In sum, although the trial court's ruling is not a model of clarity, the majority's interpretation of that ruling is certainly not the only, or, in my view, even the best, interpretation. In the absence of an articulation from the trial court, we are left with two plausible interpretations. I believe that the interpretation that makes the most sense and is supported by the record is that the court ruled alternatively that the defendants' motion to open was untimely, which was wrong, but also that the

[7] The majority contends that following our established practice and ordering the trial court to articulate the basis for its decision would be of no avail under the particular circumstances of this case because "the basis the trial court provided for its decision was indisputably inaccurate . . . ." Footnote 3 of the majority opinion. I disagree. I see no reason to reverse the judgment and start the process from scratch simply because the trial court's error as to timeliness *might have* infected its analysis of the merits. Why not just ask? If we were to order an articulation, sua sponte, and the trial court were to clarify that (1) its determination that the defendants' motion to open had "no basis" was an independent, alternative basis for denying the motion under the second prong of § 52-212, and (2) that determination was unrelated to questions of timeliness and was predicated solely on the court's determination that the defendants had no valid basis for their failure to enter an appearance, aside from their own negligence, then I see no possible grounds for reversing the judgment.

motion had no basis, which was correct. Because the mistake the defendants alleged here was not an excusable one under the law, and there was no demonstration that they were otherwise prevented from raising a valid defense, there is an adequate independent basis in the record to affirm the Appellate Court's judgment upholding the trial court's denial of the defendants' motion to open. Our standard of review dictates that we affirm. Accordingly, I respectfully dissent.

LAURIE HEPBURN *v.* CHANDLER BRILL
(SC 20832)

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

Syllabus

The plaintiff sought visitation with L, the minor child of the defendant and the plaintiff's deceased sister, pursuant to the third-party visitation statute (§ 46b-59). The plaintiff had lived with L and L's mother since L was born in 2010, while the defendant lived elsewhere. After the death of L's mother in 2021, L initially continued to live with the plaintiff, but the defendant eventually took L to live with him full-time. The defendant moved to dismiss the plaintiff's visitation petition for lack of subject matter jurisdiction, claiming that the plaintiff lacked standing under § 46b-59 (b) because she failed to allege sufficient facts to establish that she had a parent-like relationship with L and that L would suffer real and significant harm if visitation were to be denied. The plaintiff then filed an amended petition for visitation with L, in which she alleged that, in a series of video calls that occurred while L was living with the defendant, L appeared very stressed, sad, and anxious. During those calls, L reported, inter alia, that she was miserable living with the defendant and devastated to be cut off from the plaintiff. L stated that she was crying herself to sleep and had lost weight. L also told the plaintiff that the defendant had mocked her for crying about the loss of her mother and had thrown her up against a car. The defendant objected to the amended petition, arguing that it would be improper for the court to consider the amended petition while the motion to dismiss the initial petition for lack of subject matter jurisdiction was pending. Following a hearing, the court granted the defendant's motion to dismiss the initial petition, concluding, without elaboration, that it did not satisfy the requirements of § 46b-59. The court also dismissed, sua sponte, the amended petition, concluding that its allegations, if proven by clear

and convincing evidence, would not establish the plaintiff's parent-like relationship with L or establish that L would suffer real and significant harm if visitation were to be denied. Thereafter, the plaintiff appealed from the trial court's judgment.

Held that the trial court improperly dismissed the plaintiff's amended petition for visitation with L, the plaintiff having adequately alleged therein both the existence of a parent-like relationship and that the denial of visitation would cause L real and significant harm, and, accordingly, this court reversed the trial court's judgment and remanded the case for further proceedings:

1. The trial court improperly treated the defendant's motion to dismiss as implicating the court's subject matter jurisdiction rather than its statutory authority to act pursuant to § 46b-59:

In *Roth* v. *Weston* (259 Conn. 202), this court applied a judicial gloss to a prior version of § 46b-59 to render the statute constitutional and, in doing so, concluded that the parent-like relationship and the real and significant harm requirements were matters of standing that implicated the court's subject matter jurisdiction, but the legislature's subsequent amendment (P.A. 12-137, § 1) to § 46b-59, in accordance with the gloss adopted in *Roth*, created a new statute that carried with it a strong presumption of constitutionality such that the statute no longer required a gloss to function within the bounds of the constitution.

The trial court has plenary and general subject matter jurisdiction over legal disputes in family relations matters pursuant to statute (§ 46b-1), § 46b-1 (a) (12) defines family relations matters to include matters affecting or involving rights and remedies provided for in chapter 815j of the General Statutes, § 46b-59 falls within chapter 815j and expressly provides the court with the power to order visitation to any person who meets the statutory standard, and, accordingly, §§ 46b-1 and 46b-59 together provided the trial court in the present case with subject matter jurisdiction over the plaintiff's third-party visitation petitions.

Because the motion to dismiss implicated the trial court's statutory authority to act pursuant to § 46b-59 rather than its subject matter jurisdiction, this court treated that motion as raising the question of whether the plaintiff had sufficiently proffered specific and good faith allegations that both a parent-like relationship existed between her and L and that the denial of visitation would cause real and significant harm to L.

2. Because the trial court should have allowed the plaintiff to amend her initial petition for visitation, and because the trial court considered the plaintiff's amended petition, it was permissible for this court to consider the allegations therein to determine whether the trial court properly had declined to exercise its statutory authority under § 46b-59:

The defendant's objection to the plaintiff's amended petition was premised on his claim that the plaintiff had failed to comply with the rule of practice (§ 10-60) governing amendments to pleadings in civil matters, but visitation is governed by the less restrictive rule of practice (§ 25-7) pertaining to amendments to pleadings in family matters, and, because the trial court should have allowed the plaintiff to amend her initial petition under the more liberal provision of Practice Book § 25-7, and the trial court actually considered the amended petition, this court also considered the amended petition to determine whether the plaintiff pleaded sufficient facts to demonstrate that she had a parent-like relationship with L and that L would suffer real and significant harm if visitation were to be denied.

3. The trial court incorrectly concluded that the amended petition did not include the specific and good faith allegations necessary to demonstrate the existence of the plaintiff's parent-like relationship with L and that L would suffer real and significant harm if visitation were to be denied:

With respect to the parent-like relationship requirement, the plaintiff alleged, inter alia, that she lived with L for more than ten years, was L's primary caretaker, and was involved in every aspect of L's day, including transporting L to school, assisting L with homework, enrolling L in extracurricular activities, and taking L to medical appointments, and that, after the death of L's mother, she served as L's primary provider of emotional support, comfort, and care, and those allegations establishing the duration, regularity, and magnitude of the care that the plaintiff provided to L were sufficient to plead a parent-like relationship pursuant to § 46b-59 (b) and (c).

This court emphasized that the parent-like relationship and real and significant harm requirements should be analyzed separately and that the severance of emotional ties between a nonparent who has developed a parent-like relationship and a child, without more, should not be the end of the analysis with respect to the harm requirement, but it also recognized that there may be circumstances, such as when a child is coping with the death of a parent in addition to the severance of substantial emotional ties with a nonparent, that the denial of visitation with the nonparent itself could cause serious and immediate harm to that child.

With respect to the real and significant harm requirement, the plaintiff alleged, inter alia, that she was L's primary caretaker and provider of emotional support, that L was abruptly taken away from her home and had been very emotional since she was cut off from her former life, that L was very sad, anxious, fearful, crying excessively, experiencing suicidal ideation, and losing weight, and that the defendant's actions compounded the emotional harm that he caused to L by depriving her of a relationship with the plaintiff, and those allegations were more than sufficiently specific to satisfy the statutory pleading requirement by demonstrating

that L was suffering significant emotional harm, manifesting itself through her conduct, statements, and physical symptoms, as a result of the deprivation of her relationship with the plaintiff.

Igersheim v. *Bezrutczyk* (197 Conn. App. 412), to the extent that it held that it is improper for a trial court to consider an amended third-party visitation petition that is filed during the pendency of a motion to dismiss the initial third-party visitation petition, overruled.

Argued October 26, 2023—officially released April 16, 2024

Procedural History

Petition for third-party visitation with the defendant's minor child, brought to the Superior Court in the judicial district of Fairfield, where the court, *Truglia*, *J.*, granted the defendant's motion to dismiss and rendered judgment thereon, from which the plaintiff appealed. *Reversed*; *further proceedings.*

Samuel V. Schoonmaker IV, with whom were *Thomas A. Esposito* and *Clifford C. Garnett*, for the appellant (plaintiff).

Bruce W. Diamond, for the appellee (defendant).

Opinion

ROBINSON, C. J. This appeal requires us to consider the jurisdictional effects of the 2012 amendments to the third-party visitation statute, General Statutes § 46b-59 (b); see Public Acts 2012, No. 12-137, § 1; on the judicial gloss articulated in *Roth* v. *Weston*, 259 Conn. 202, 234–35, 789 A.2d 431 (2002), which imposed "high jurisdictional hurdles" that individuals petitioning for third-party visitation with a minor child must overcome. The plaintiff, Laurie Hepburn, appeals[1] from the judgment of the trial court dismissing her amended verified petition for third-party visitation (amended petition) with her niece, L, who is the biological child of the

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

defendant, Chandler Brill. On appeal, the plaintiff contends that the trial court improperly treated the defendant's motion to dismiss as presenting a question of subject matter jurisdiction rather than the court's statutory authority to act pursuant to § 46b-59. The plaintiff also contends that the trial court incorrectly determined that the amended petition failed to include the specific and good faith allegations necessary to demonstrate that (1) she had a parent-like relationship with L, and (2) L would suffer real and significant harm if visitation were to be denied. We agree with the plaintiff and conclude that, given the Superior Court's plenary jurisdiction over family relations matters under General Statutes § 46b-1; see, e.g., *Sousa* v. *Sousa*, 322 Conn. 757, 776–77, 143 A.3d 578 (2016); and the 2012 amendments to § 46b-59 (b), the trial court incorrectly determined that it lacked subject matter jurisdiction under *Roth*. We also conclude that the amended petition alleges facts sufficient to warrant an evidentiary hearing under § 46b-59. Accordingly, we reverse the trial court's judgment dismissing the plaintiff's amended petition.

The record reveals the following factual allegations asserted by the plaintiff, which we construe in her favor,[2] and procedural history. The subject of this visitation action is the plaintiff's niece, L, who was born in December, 2010. From the time of her birth until September, 2021, L lived with her mother, Hallie Hepburn, her grandmother, Patricia Hepburn, and Hallie's sister, the plaintiff. The defendant, who is L's biological father, would regularly visit L at the home L shared with Hallie, Patricia, and the plaintiff, but the defendant

[2] See, e.g., *Burton* v. *Dominion Nuclear Connecticut, Inc.*, 300 Conn. 542, 550, 23 A.3d 1176 (2011) ("[i]n ruling [on] whether a complaint survives a motion to dismiss, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader" (internal quotation marks omitted)).

and L would have only about one visit per year outside of the home.

In 2015, Patricia suffered a stroke, and Hallie became her primary caretaker. Because Hallie was focused on taking care of Patricia, at this time, the plaintiff became increasingly responsible for L, acting as her parent by serving as her primary caretaker and provider of emotional support. Specifically, Hallie and the plaintiff shared the responsibility of transporting L to school, assisting with her homework, taking her to medical appointments, and engaging in recreational activities with her, among other tasks. The plaintiff was involved in all aspects of L's day; she woke her up in the morning, provided her with meals, and got her ready for bed. L looked to the plaintiff for comfort and support by, for example, talking to the plaintiff about school issues and her feelings.

In September, 2021, Patricia died, and, two days later, Hallie died by suicide. L looked to the plaintiff for comfort and support during that difficult time, while continuing to live in the same house with the plaintiff. The defendant, who had been living in Massachusetts, eventually moved to Connecticut and started taking L to live with him on the weekends. In November, 2021, the defendant revoked the plaintiff's privileges to pick up L from school and took L to live with him full-time. After unsuccessfully attempting to arrange a visitation schedule with the defendant, the plaintiff filed in the Northern Fairfield County Probate Court (Probate Court) petitions for emergency temporary custody of L, temporary custody of L, removal of the defendant as L's guardian, and her appointment as L's permanent guardian. The Probate Court denied the plaintiff's motion for emergency custody, and the plaintiff subsequently withdrew the remaining petitions. On July 18, 2022, the plaintiff commenced the present third-party

visitation action by filing her initial verified petition for visitation (initial petition) with the trial court.

The defendant, who had relocated back to Massachusetts with L, moved to dismiss the initial petition for lack of personal jurisdiction. When the parties subsequently appeared before the trial court for an evidentiary hearing, that hearing did not go forward. Instead, counsel for the parties met with the court in chambers. During that meeting, the court questioned on its own whether the plaintiff had included sufficient facts in the initial petition to vest the court with subject matter jurisdiction pursuant to § 46b-59 (b). At the conclusion of the meeting in chambers, the plaintiff's counsel indicated that he would file an amended petition. The court did not issue an order with respect to the permissibility of amending the initial petition.

Following the meeting, on October 6, 2022, the defendant filed a second motion to dismiss, claiming that the plaintiff lacked standing under § 46b-59 (b) because the initial petition failed to allege sufficient facts to establish both that she had a parent-like relationship with L and that L would suffer real and significant harm if visitation were to be denied. The following day, the plaintiff filed the amended petition, which alleged additional facts with respect to the plaintiff's parent-like relationship with L and the harm caused by the lack of visitation. The amended petition included additional factual allegations arising from thirteen video calls between the plaintiff and L, which occurred between December, 2021, and February, 2022, prior to the filing of the initial petition. The plaintiff described L as appearing "very stressed and very upset" during the video calls and alleged that L "was desperate to come home and didn't understand why it was taking so long." During one call, L stated that "she was very dizzy, could barely walk . . . [had] a headache," and had vomited several times. During another call, L said that, if it was

not for the plaintiff, her friends, and school, "there would be 'no point in living because [she would] just be miserable with [the defendant].' " L further stated that she could not cry in front of the defendant because he would mock her and swear at her. L "said that, when she [would cry] about [her] mom, [the defendant would tell] her to stop whining." During later video calls, the plaintiff alleged that L "appeared exhausted, pale, and so very sad," and that L had stated that she was "not feeling strong anymore" and had "lost eight pounds." In February, 2022, the defendant ended the plaintiff's video access to L.

Subsequently, in July, 2022, the plaintiff received a phone call from L in the middle of the night, during which L sounded sad, depressed, and anxious. L made several statements during that call that caused the plaintiff great concern with respect to L's mental and emotional well-being. L told the plaintiff that (1) "she sleeps on the floor every night and prays to her mother in heaven to be her guardian angel and [to] get her out of this situation living with [the defendant]," (2) "she often cries herself to sleep," (3) "she is devastated about being cut off from [the plaintiff]," (4) "she desperately wanted to return home to live with [the plaintiff], as she always did," (5) "people think she is fine because she goes to school and looks fine, but she is not fine on the inside," (6) the defendant yells and swears at her "all the time" and "completely ignores her feelings," (7) the defendant "shoved her up against his car" and screamed "the f-word at her," (8) "she constantly tells [the defendant] that she wants to go home," (9) she is " 'not doing well' " and does not want to live with the defendant, (10) "she wants to get away from [the defendant] and then [to] get a restraining order against him because she is scared of him," (11) "her worst fear was staying with [the defendant] and going to school in Massachusetts," and (12) the defendant "is an awful

person and a terrible parent," and she " 'never want[s] to see him again because of what he has done to [her].' " The plaintiff further alleged in the amended petition that L "lost three major live-in, daily relationships and two attachment figures within one year. She has now lost her childhood home, her school, friends, providers, and more." Finally, the plaintiff contends that she is "the only connection [L] currently has to her mother and her entire childhood before her mother died. Even though [the defendant] is aware of [L's] critical emotional needs and the psychological necessity of continuing [their] relationship, he continues to refuse access or contact of any kind. Even more concerning, [L] is reporting that [the defendant] is emotionally insensitive, dismissive, neglectful, and even outright abusive."

The defendant filed an objection to the amended petition, arguing that, under Appellate Court case law, it would be improper for the court to consider the amended petition while a motion to dismiss for lack of subject matter jurisdiction is pending, even if that amended petition purports to cure the alleged jurisdictional defect. See *Igersheim* v. *Bezrutczyk*, 197 Conn. App. 412, 420, 231 A.3d 1276 (2020); *Fennelly* v. *Norton*, 103 Conn. App. 125, 137–39, 931 A.2d 269, cert. denied, 284 Conn. 918, 931 A.2d 936 (2007).

Following a hearing, the trial court issued a memorandum of decision, granted the defendant's motion to dismiss the initial petition, and dismissed the amended petition on its own. With respect to the initial petition, the trial court concluded, without elaboration, that it "did not satisfy the requirements of . . . § 46b-59 . . . ." With respect to the amended petition, the trial court determined that (1) "[t]he allegations, if proven by clear and convincing evidence at trial, would establish that the plaintiff assisted [Hallie] in caring for [L]" but "would not establish that a [parent-like] relationship presently exists between the plaintiff and [L]," and (2)

the allegations did "not set forth specific facts from which the court [could] conclude that denying the plaintiff access and visitation [would] cause [L] to be neglected, uncared for, mistreated, or harmed in some way." This appeal followed.

On appeal, the plaintiff claims that the trial court improperly dismissed both of her petitions for third-party visitation. Relying on, for example, *Amodio* v. *Amodio*, 247 Conn. 724, 729–30, 724 A.2d 1084 (1999), the plaintiff claims that the trial court has "plenary and general subject matter jurisdiction" over petitions for third-party visitation because they are "family relations matters," as defined by § 46b-1; according to the plaintiff, this means that the defendant's motion to dismiss concerned the trial court's statutory authority to act pursuant to § 46b-59, rather than the plaintiff's standing as a jurisdictional matter. See Practice Book § 25-1 (defining "family matters" for purpose of rules of practice).[3] With respect to the merits of the trial court's authority to act, the plaintiff argues that the trial court incorrectly determined that her allegations in both the initial petition and the amended petition concerning a parent-like relationship, when interpreted in the light

[3] Practice Book § 25-1 provides: "The following shall be 'family matters' within the scope of these rules: Any actions brought pursuant to General Statutes § 46b-1, including, but not limited to, dissolution of marriage or civil union, legal separation, dissolution of marriage or civil union after legal separation, annulment of marriage or civil union, alimony, support, custody, and change of name incident to dissolution of marriage or civil union, habeas corpus and *other proceedings to determine the custody and visitation of children* except those which are properly filed in the Superior Court as juvenile matters, the establishing of paternity, enforcement of foreign matrimonial or civil union judgments, actions related to prenuptial or pre-civil union and separation agreements and to matrimonial or civil union decrees of a foreign jurisdiction, actions brought pursuant to General Statutes § 46b-15, custody proceedings brought under the provisions of the Uniform Child Custody Jurisdiction and Enforcement Act and proceedings for enforcement of support brought under the provisions of the Uniform Interstate Family Support Act." (Emphasis added.)

most favorable to her, demonstrate only that she merely assisted L's mother in caring for L. The plaintiff further contends that her allegations of specific instances of neglect, coercive control, and failure to care for L support the statutory element of real and significant harm. Accordingly, the plaintiff argues that the allegations in both her initial petition and her amended petition are sufficient to satisfy the pleading requirements of § 46b-59 (b) and that we should remand this case for an evidentiary hearing on its merits.

In response, the defendant relies on *Roth* v. *Weston*, supra, 259 Conn. 202, and *DiGiovanna* v. *St. George*, 300 Conn. 59, 12 A.3d 900 (2011), to contend that "[a] consistent body of appellate case law makes it clear that the issue . . . before this court is one of subject matter jurisdiction" and, therefore, that "the trial court did not err in dismissing the petition." Relying further on the Appellate Court's decisions in *Igersheim* v. *Bezrutcyzk*, supra, 197 Conn. App. 420, and *Fennelly* v. *Norton*, supra, 103 Conn. App. 137–39, the defendant contends that, because he moved to dismiss the initial petition for lack of subject matter jurisdiction, the court is limited to considering the allegations of the initial petition. He argues that the plaintiff's allegations in the initial petition, even when interpreted in the light most favorable to her, establish only that visitation might be in L's best interest or simply beneficial to her, which does not meet the requirements of § 46b-59 (b). The defendant also argues that, even if we were to consider the allegations in the amended petition in deciding this appeal, those allegations also fail to meet the statute's threshold requirements, and that having to continue to defend against either petition violates his parental rights as guaranteed by the due process clause of the fourteenth amendment to the United States constitution. We agree with the plaintiff and conclude that the trial court improperly dismissed this case because it had

subject matter jurisdiction under § 46b-1 and that the allegations in the amended petition are sufficient to confer statutory authority to act under § 46b-59 (b).

The plaintiff's claims in this appeal, which concern the interpretation of pleadings and whether the trial court has subject matter jurisdiction or statutory authority to act under the statutory scheme governing petitions for third-party visitation, present a question of law over which our review is plenary. See, e.g., *Carpenter* v. *Daar*, 346 Conn. 80, 128, 287 A.3d 1027 (2023); *Reinke* v. *Sing*, 328 Conn. 376, 382, 179 A.3d 769 (2018); *DiGiovanna* v. *St. George*, supra, 300 Conn. 70.

We begin our analysis by recognizing that, "[w]henever the absence of jurisdiction is brought to the notice of the court or tribunal, cognizance of it must be taken and the matter passed [on] before it can move one further step in the cause . . . as any movement is necessarily the exercise of jurisdiction." (Internal quotation marks omitted.) *Federal Deposit Ins. Corp.* v. *Peabody N.E., Inc.*, 239 Conn. 93, 99, 680 A.2d 1321 (1996). Because it affects whether we should consider the plaintiff's initial petition or her amended petition in determining whether her allegations are sufficient to meet the pleading standard set forth in § 46b-59, we must first consider the distinction between a trial court's subject matter jurisdiction and its authority to act pursuant to a particular statute. "Subject matter jurisdiction involves the authority of a court to adjudicate the type of controversy presented by the action before it. . . . A court does not truly lack subject matter jurisdiction if it has competence to entertain the action before it. . . . Once it is determined that a tribunal has authority or competence to decide the class of cases to which the action belongs, the issue of subject matter jurisdiction is resolved in favor of entertaining the action. . . . It is well established that, in determining whether a court has subject matter jurisdiction, every presumption favoring

jurisdiction should be indulged." (Citations omitted; internal quotation marks omitted.) *Amodio* v. *Amodio*, supra, 247 Conn. 727–28; accord *Reinke* v. *Sing*, supra, 328 Conn. 389.

Our jurisdictional analysis is informed by a review of the constitutional principles governing petitions for third-party visitation, which reflect "the status of parents' interest in the care, custody and control of their children" as being "perhaps the oldest of the fundamental liberty interests recognized by [the United States Supreme] Court." (Internal quotation marks omitted.) *Roth* v. *Weston*, supra, 259 Conn. 216. When a parent is fit, "there will normally be no reason for the [s]tate to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Troxel* v. *Granville*, 530 U.S. 57, 68–69, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000). "The essence of parenthood is the companionship of the child and the right to make decisions regarding [that child's] care, control, education, health, religion and *association*." (Emphasis added.) *Roth* v. *Weston*, supra, 216–17. This court also recognized in *Roth*, however, "that there are circumstances in which interests arise that outweigh the parents' fundamental right to make decisions relating to their child." *DiGiovanna* v. *St. George*, supra, 300 Conn. 71. One such limitation occurs when otherwise fit parents deny their child "access to an individual who has a parent-like relationship with the child" and the "decision regarding visitation will cause the child to suffer real and substantial emotional harm . . . . Under such circumstances, the state has a compelling interest in protecting the child's own complementary interest in preserving [parent-like] relationships that serve [the child's] welfare by avoiding the serious and immediate harm to [the] child that would result from the parent's decision to terminate or impair the child's

relationship with the third party." (Citation omitted; footnote omitted; internal quotation marks omitted.) *Boisvert* v. *Gavis*, 332 Conn. 115, 133, 210 A.3d 1 (2019).

This constitutional limitation, which allows courts to grant visitation rights to grandparents and other third parties, is statutorily implemented in Connecticut by § 46b-59. See id., 134. This court's 2002 decision in *Roth* considered the constitutionality of Connecticut's then governing third-party visitation statute in light of the United States Supreme Court's then recent decision in *Troxel* v. *Granville*, supra, 530 U.S. 57. See *Roth* v. *Weston*, supra, 259 Conn. 209–35. In *Roth*, this court held that the statute was "unconstitutional as applied to the extent that the trial court . . . permitted [third-party] visitation contrary to the desires of a fit parent and in the absence of any allegation and proof by clear and convincing evidence that the children would suffer actual, significant harm if deprived of the visitation." Id., 205–206. To save the statute, this court applied a judicial gloss and concluded that, "*to have jurisdiction* over a petition for visitation contrary to the wishes of a fit parent . . . the petition must contain specific, good faith allegations that the petitioner has a relationship with the child that is similar in nature to a parent-child relationship. The petition must also contain specific, good faith allegations that denial of the visitation will cause real and significant harm to the child. . . . [T]hat degree of harm requires more than a determination that visitation would be in the child's best interest. It must be a degree of harm analogous to the kind of harm contemplated by [General Statutes] §§ 46b-120 and 46b-129, namely, that the child is 'neglected, uncared-for or dependent.' The degree of specificity of the allegations must be sufficient to justify requiring the fit parent[s] to subject [their] parental judgment to unwanted litigation. Only if these specific, good faith allegations are made *will a court have jurisdiction* over the petition."

(Emphasis added.) Id., 234–35. In concluding that the matters addressed in the judicial gloss in *Roth* implicated the court's subject matter jurisdiction, this court followed its then recent decision in *Castagno* v. *Wholean*, 239 Conn. 336, 338–40, 684 A.2d 1181 (1996), before casting the judicial gloss as a matter of standing.[4] See *Roth* v. *Weston*, supra, 209–19.

In 2012, the legislature enacted Public Acts 2012, No. 12-137, § 1, which amended § 46b-59 in accordance with the judicial gloss articulated in *Roth*. See *Boisvert* v. *Gavis*, supra, 332 Conn. 134. Subsection (b) of the amended statute requires that "a verified petition," which may be filed by any person, "include specific and good-faith allegations that (1) a parent-like relationship exists between the person and the minor child, and (2) denial of visitation would cause real and significant harm."

[4] Approximately five years prior to *Roth*, in *Castagno* v. *Wholean*, supra, 239 Conn. 336, this court "recognized that a literal reading would place [§ 46b-59] in constitutional jeopardy because of the protection traditionally afforded to a parent's right to family integrity . . . ." *Roth* v. *Weston*, supra, 259 Conn. 210. In order to save the statute, this court applied a judicial gloss that incorporated a threshold requirement "that plaintiffs must demonstrate disruption of the family sufficient to justify state intervention." *Castagno* v. *Wholean*, supra, 338. Because the plaintiffs in *Castagno* did not satisfy the threshold requirement, this court concluded that "the trial court lacked jurisdiction to decide the issue of visitation . . . ." Id. We note that this court framed its analysis in *Castagno* as a matter of subject matter jurisdiction, which was consistent with the arguments of the parties in that case both before the trial court and on appeal; it did not at all question whether the parties' claims actually presented a question of subject matter jurisdiction, rather than the court's authority to act. See id., 338–39, 352; see also id., 338 n.2 (observing that it was undisputed that "a motion to dismiss was the proper procedure in [*Castagno*, in which] the issue [was] whether, under *any* circumstance, *any* third party can satisfy the requirements of § 46b-59" (emphasis in original)).

This court subsequently concluded in *Roth*, however, that "the threshold requirement articulated in *Castagno* fail[ed] to protect adequately the fundamental right to rear one's child and the right to family privacy." *Roth* v. *Weston*, supra, 259 Conn. 217. Accordingly, in *Roth*, this court overruled *Castagno* to that limited extent, but we did not question or disturb the aspects of *Castagno* describing the requirements of § 46b-59 as subject matter jurisdictional in nature. See id.

General Statutes § 46b-59 (b). "In determining whether a parent-like relationship exists between the person and the minor child, the Superior Court may consider, but shall not be limited to, the following factors: (1) The existence and length of a relationship between the person and the minor child prior to the submission of a petition pursuant to this section; (2) [t]he length of time that the relationship between the person and the minor child has been disrupted; (3) [t]he specific parent-like activities of the person seeking visitation toward the minor child; (4) [a]ny evidence that the person seeking visitation has unreasonably undermined the authority and discretion of the custodial parent; (5) [t]he significant absence of a parent from the life of a minor child; (6) [t]he death of one of the minor child's parents; (7) [t]he physical separation of the parents of the minor child; (8) [t]he fitness of the person seeking visitation; and (9) [t]he fitness of the custodial parent." General Statutes § 46b-59 (c). With respect to the second prong of the pleading requirement, subsection (a) (2) provides that " '[r]eal and significant harm' means that the minor child is neglected, as defined in section 46b-120, or uncared for, as defined in said section." General Statutes § 46b-59 (a) (2). "A child may be found 'neglected' who . . . is being denied proper care and attention, physically, educationally, emotionally or morally . . . ." General Statutes § 46b-120 (4) (B). "A child may be found 'uncared for' . . . whose home cannot provide the specialized care that the physical, emotional or mental condition of the child requires . . . ." General Statutes § 46b-120 (6) (B).

With these principles in mind, we examine the source of the court's jurisdiction to issue third-party visitation orders in order to determine whether the trial court properly treated the motion to dismiss in this case as implicating its subject matter jurisdiction. Section 46b-1 provides the Superior Court "with plenary and general

subject matter jurisdiction over legal disputes in family relations matters . . . .'' (Internal quotation marks omitted.) *Reinke* v. *Sing*, supra, 328 Conn. 389. Family relations matters are ''matters affecting or involving,'' among other things, ''all rights and remedies provided for in chapter 815j . . . .'' General Statutes § 46b-1 (a) (12). Section 46b-59, which falls within chapter 815j, expressly provides the court with the power to order visitation to ''any person'' who meets the statutory standard. General Statutes § 46b-59 (b). We conclude that these two statutes provide the trial court with subject matter jurisdiction over the third-party visitation petitions in the present case. See *Reinke* v. *Sing*, supra, 390 (concluding that trial court had subject matter jurisdiction over claim seeking modification of dissolution agreement because trial court has plenary and general subject matter jurisdiction over dissolution actions pursuant to § 46b-1, with authority to ''assign to either spouse all or any part of the [marital] estate'' under General Statutes § 46b-81 (a)); *Sousa* v. *Sousa*, supra, 322 Conn. 760–61 (concluding that it was not '' 'entirely obvious' '' that trial court lacked subject matter jurisdiction to modify property distribution in dissolution of marriage judgment ''given a conflict in the case law . . . and *the Superior Court's plenary jurisdiction over family relations matters*'' (emphasis added)); *Amodio* v. *Amodio*, supra, 247 Conn. 729–30 (concluding that General Statutes §§ 46b-1 (c) and 46b-86 (a) together provide trial court with subject matter jurisdiction over modification claim).

Describing it as a matter of standing, this court applied a judicial gloss in *Roth* to allow § 46b-59 ''to continue to function within the bounds of the constitution.'' *Roth* v. *Weston*, supra, 259 Conn. 233. By amending the statute to include the parent-like relationship and real and significant harm requirements, however, the legislature created a new statute that ''carries with it a strong

presumption of constitutionality . . . .” (Internal quotation marks omitted.) *Doe* v. *Hartford Roman Catholic Diocesan Corp.*, 317 Conn. 357, 405, 119 A.3d 462 (2015). With no challenge to the constitutionality of the amended § 46b-59 in light of the due process principles explained in *Troxel* v. *Granville*, supra, 530 U.S. 57, the statute no longer requires a gloss to function within the bounds of the constitution. If the legislature had intended these requirements to implicate the court's subject matter jurisdiction, it knew how to do so. See, e.g., *Stafford* v. *Roadway*, 312 Conn. 184, 194, 93 A.3d 1058 (2014) (“[i]t is a well settled principle of statutory construction that the legislature knows how to convey its intent expressly” (internal quotation marks omitted)); *Fedus* v. *Planning & Zoning Commission*, 278 Conn. 751, 779, 900 A.2d 1 (2006) (“[w]e . . . require a clear showing of legislative intent that a failure to comply with a particular statutory requirement deprives the court of subject matter jurisdiction”); *Williams* v. *Commission on Human Rights & Opportunities*, 257 Conn. 258, 269–70, 777 A.2d 645 (2001) (acknowledging that, although “mandatory language may be an indication that the legislature intended a . . . requirement to be jurisdictional, such language alone does not overcome the strong presumption of jurisdiction, nor does such language alone prove strong legislative intent to create a jurisdictional bar”). In the absence of any indication that the legislature intended these requirements to implicate the court's subject matter jurisdiction, they serve only to guide the exercise of the court's authority in a manner that protects the constitutional due process rights of fit parents to make decisions concerning the rearing of their children.

Put differently, this “authority to act pursuant to a statute is different from its subject matter jurisdiction. The power of the court to hear and determine, which is implicit in jurisdiction, is not to be confused with

the way in which that power must be exercised in order to comply with the terms of the statute." (Internal quotation marks omitted.) *Amodio* v. *Amodio*, supra, 247 Conn. 728. "As we have stated, the trial court unquestionably has the power to hear and determine [third-party visitation matters]. With subject matter jurisdiction established, the trial court's task is to apply the statute to the facts of a particular case; indeed, interpreting statutes and applying the law to the facts before it [fall within] the traditional province of the trial court." (Internal quotation marks omitted.) *Reinke* v. *Sing*, supra, 328 Conn. 390. Accordingly, we conclude that the trial court has subject matter jurisdiction over the plaintiff's petition for third-party visitation in the present case. We will therefore treat the motion to dismiss as raising the question of whether the plaintiff has sufficiently alleged specific and good faith facts that both (1) a parent-like relationship exists between her and L, and (2) denial of visitation would cause real and significant harm, as specifically defined in the statute.[5] See General Statutes § 46b-59 (a) (2).

Before we consider whether the trial court properly declined to exercise its statutory authority under § 46b-59, we must determine whether it is permissible to consider the amended petition or if we must, as the defendant contends, consider only the initial petition to determine if the plaintiff pleaded sufficient facts to demonstrate that (1) the plaintiff had a parent-like relationship with L, and (2) L would suffer real and signifi-

[5] Given our jurisdictional conclusion, we note that the proper vehicle to challenge the sufficiency of the allegations for third-party visitation would be a motion to strike under Practice Book § 25-16. We further note that, although not jurisdictional in nature, the "specific and good-faith allegations" required by § 46b-59 (b) remain a "necessary [safeguard] to prevent families from having to defend against unjustified petitions for visitation" in the first instance. *Roth* v. *Weston*, supra, 259 Conn. 222. In cases in which pleadings are insufficient to meet that standard, an evidentiary hearing should not be held.

cant harm if visitation was denied. The trial court determined that the Appellate Court's decision in *Igersheim* v. *Bezrutczyk*, supra, 197 Conn. App. 420, precluded it from considering the amended petition during the pendency of the defendant's motion to dismiss the initial petition for lack of subject matter jurisdiction. Nevertheless, the trial court considered the allegations in the amended petition out of concern for fairness to the plaintiff. In *Igersheim*, the Appellate Court concluded that it was improper for the trial court to consider an amended petition filed during the pendency of a motion to dismiss an initial petition for third-party visitation. See id., 419–20. In concluding that it was required to consider only the initial verified petition for visitation, the Appellate Court, consistent with this court's decision in *Roth*, treated the statutory requirements of a parent-like relationship and harm to the child as jurisdictional under § 46b-59 (b). See id., 416 ("[t]he statutory *jurisdictional requirements* relevant to [*Igersheim*] are prescribed in . . . § 46b-59, the third-party visitation statute" (emphasis added; footnote omitted)). The Appellate Court cited this court's decisions in *Federal Deposit Ins. Corp.* v. *Peabody, N.E., Inc.*, supra, 239 Conn. 99, and *Gurliacci* v. *Mayer*, 218 Conn. 531, 545, 590 A.2d 914 (1991), for the proposition that it would be improper to consider an amended petition during the pendency of a motion to dismiss an initial petition for lack of subject matter jurisdiction. See *Igersheim* v. *Bezrutczyk*, supra, 420.

Given our conclusion that the amended statutory requirements presently set forth in § 46b-59 (b) do not implicate the court's subject matter jurisdiction, we overrule the Appellate Court's decision in *Igersheim*. Although the defendant's objection to the consideration of the amended complaint in this case was grounded on his claim that the plaintiff had failed to comply with

Practice Book § 10-60,[6] which is the rule of practice governing amendments to pleadings in civil matters, that rule of practice does not apply in this case. Rather, because visitation is a "family matter" governed by chapter 25 of the rules of practice, the trial court should follow those provisions, rather than chapter 10, which applies to civil matters generally, with respect to amending a petition for third-party visitation. See Practice Book § 25-1 (providing that "[a]ny actions brought pursuant to . . . § 46b-1" are "family matters" under rules of practice). Specifically, Practice Book § 25-4 requires that "[e]very application or verified petition in an action for visitation of a minor child . . . state the name and date of birth of such minor child or children, the names of the parents and legal guardian of such minor child or children, and the facts necessary to give the court jurisdiction."[7] In contrast to the more restrictive civil rule of Practice Book § 10-60, Practice Book § 25-7, which governs amendments to pleadings in family matters, provides in relevant part that, "[i]f . . . [Practice Book §] 25-4 is not complied with, the judicial authority, *whenever its attention is called to the matter*, shall order that the complaint or the application, as the case may be, be amended upon such terms and

[6] Practice Book § 10-60 (a) provides in relevant part: "[A] party may amend his or her pleadings or other parts of the record or proceedings at any time subsequent to that stated in the preceding section in the following manner: (1) By order of judicial authority; or (2) By written consent of the adverse party; or (3) By filing a request for leave to file an amendment together with the amended pleading or other parts of the record or proceedings. . . ."

[7] Given our conclusion that the statutory requirements in § 46b-59 (b) are not a jurisdictional threshold, we observe that the text of Practice Book § 25-4 with respect to the court's jurisdiction would benefit from the attention of the Rules Committee of the Superior Court to render it consistent with the doctrinal changes discussed in this opinion. See, e.g., *Rules Committee of the Superior Court* v. *Freedom of Information Commission*, 192 Conn. 234, 237, 472 A.2d 9 (1984) (noting that "[the] function [of the Rules Committee of the Superior Court] is to consider proposed changes in the rules of practice for the Superior Court, and to recommend amendments to the Practice Book").

conditions as it may direct. . . .'' (Emphasis added.) Because the trial court should have allowed the plaintiff to amend the petition under the more liberal provision of Practice Book § 25-7, and the plaintiff has indeed amended the petition and the trial court has considered it, we, too, will consider the plaintiff's amended petition.

We now turn to whether the amended petition includes the specific and good faith allegations necessary to demonstrate, as required by § 46b-59, that (1) the plaintiff had a parent-like relationship with L, and (2) L would suffer real and significant harm if visitation was denied. It is well established that the ''interpretation of pleadings is always a question of law for the court . . . . Our review of the trial court's interpretation of the pleadings therefore is plenary. . . . Furthermore, we long have eschewed the notion that pleadings should be read in a hypertechnical manner. *Rather*, [*t*]*he modern trend*, *which is followed in Connecticut*, *is to construe pleadings broadly and realistically*, *rather than narrowly and technically*. . . . [T]he complaint must be read in its entirety in such a way as to give effect to the pleading with reference to the general theory [on] which it proceeded, and do substantial justice between the parties. . . . Our reading of pleadings in a manner that advances substantial justice means that a pleading must be construed reasonably, to contain all that it fairly means, but carries with it the related proposition that it must not be contorted in such a way so as to strain the bounds of rational comprehension.'' (Emphasis in original; internal quotation marks omitted.) *Carpenter* v. *Daar*, supra, 346 Conn. 128.

Guided by the Appellate Court's decision in *Jeanette-Blethen* v. *Jeanette-Blethen*, 172 Conn. App. 98, 159 A.3d 236 (2017), we first conclude that the amended petition adequately alleges the existence of care provided with sufficient duration, regularity, and magnitude to establish a parent-like relationship between the plaintiff and

L, as that term is defined by § 46b-59 (c). In *Jeanette-Blethen*, the Appellate Court upheld the trial court's finding that a parent-like relationship existed in granting a grandmother's motion to intervene, pursuant to § 46b-59, in a custody modification proceeding. See id., 99. In concluding that the trial court's finding was not clearly erroneous, the Appellate Court observed that the children had lived with the grandparents for six years, during which time "the grandparents provided care for the children, including . . . preparing their meals, bathing them, getting them ready for school, caring for them when they were sick, and transporting them to [health-care] appointments." Id., 100; see id., 102–103. The trial court additionally "found that the grandparents 'provided a constant example of strength, discipline, sacrifice, stability, and unconditional love on which [the children] . . . could rely.' " Id., 100; see also *Boisvert* v. *Gavis*, Superior Court, judicial district of Windham, Docket No. WWM-FA-16-6010965-S (August 11, 2017) (65 Conn. L. Rptr. 81, 82, 84) (finding existence of parent-like relationship when grandmother provided various types of care, including feeding child, transporting child to day care, as well as school and doctor appointments, and taking child on day trips and on vacation), aff'd, 332 Conn. 115, 210 A.3d 1 (2019); *Germano* v. *Germano-Delorfano*, Docket No. HHD-FA-12-4064585-S, 2014 WL 1647094, *2, *7 (Conn. Super. March 26, 2014) (finding existence of parent-like relationship when child resided with plaintiffs for majority of first ten years of her life, and plaintiffs provided "regular daily care," including feeding her, finding educational programs for her, enrolling her in activities, and transporting her).

In the present case, the plaintiff alleges that (1) she lived with L for more than ten years, (2) she was L's primary caretaker and was involved in every aspect of L's day, from waking her up in the morning to getting her ready for bed at night, (3) she shared the responsibil-

ity of transporting L to school, assisting with her homework, enrolling her in extracurricular activities, and taking her to medical appointments, and (4) after Patricia's stroke, she provided comfort and support to L as L's primary giver of emotional support and care. Indeed, the petition alleges that, for all practical purposes, the plaintiff acted as a co-parent of L while Hallie was alive and was, perhaps, L's most attentive parent following Patricia's stroke. When construed in the light most favorable to the plaintiff, the allegations establishing the duration, regularity, and magnitude of the care that the plaintiff provided to L, which are akin to those found proven by clear and convincing evidence in *Jeanette-Blethen*, are sufficient to plead a parent-like relationship pursuant to § 46b-59 (b) and (c). Accordingly, we conclude that the plaintiff alleged facts sufficient to demonstrate that a parent-like relationship exists between her and L.

We next consider whether the amended petition contains specific, good faith allegations to establish that the denial of visitation would cause L real and significant harm, namely, that L "is being denied proper care and attention, physically, educationally, emotionally or morally . . . ." General Statutes § 46b-120 (4) (B). We conclude that it does. However, before examining the harm caused to L, we emphasize that it is important to analyze the two prongs of the threshold requirements separately. Although severance of the emotional ties between a nonparent and a child who have developed a parent-like relationship, without more, should not be the end of the analysis with respect to the harm prong, in *Roth*, this court concluded that there could be "circumstances in which a nonparent and a child have developed such substantial emotional ties that the denial of visitation could cause serious and immediate harm to that child." *Roth* v. *Weston*, supra, 259 Conn. 225; see also, e.g., *In re Marriage of Howard*, 661

N.W.2d 183, 191 (Iowa 2003) ("when a grandparent has established a substantial relationship with a grandchild, as required under [the Iowa] statute, an emotional bond can be created that, if severed, can inflict harm on the child"); *Blixt* v. *Blixt*, 437 Mass. 649, 664, 774 N.E.2d 1052 (2002) (observing that bond between grandparent and grandchild may "become crucial to the child's physical or emotional security" and that state "intervention may be necessary to secure the child's well-being from traumatic separation from the grandparent"), cert. denied, 537 U.S. 1189, 123 S. Ct. 1259, 154 L. Ed. 2d 1022 (2003); *Moriarty* v. *Bradt*, 177 N.J. 84, 117, 827 A.2d 203 (2003) ("the termination of a long-standing relationship between the grandparents and the child . . . [can] form the basis for a finding of harm"), cert. denied, 540 U.S. 1177, 124 S. Ct. 1408, 158 L. Ed. 2d 78 (2004).

It may be sufficient, however, when, as in the present case, the child is coping with the death of a parent in addition to the severance of substantial emotional ties with a nonparent.[8] For example, in *In re Estate of S.T.T.*, 144 P.3d 1083, 1095–96 (Utah 2006), the Supreme Court of Utah upheld an order of third-party visitation, concluding that the loss of a substantial relationship between a child, whose mother had recently died, and her grandparents would be harmful to the child. The

[8] We find instructive several Superior Court decisions in the wake of the amended statute in which the court has concluded that the petition sufficiently alleged that denial of visitation would result in substantial emotional harm to the child, particularly in situations, such as that in the present case, in which the child had already experienced the death of a parent. See, e.g., *Alexopoulous* v. *Alexopoulous*, Superior Court, judicial district of Fairfield at Bridgeport, Docket No. FBT-FA-13-4042568-S (August 7, 2013) (56 Conn. L. Rptr. 622, 626) (grandparents adequately alleged that children would be harmed if visitation was denied because (1) disruption in grandparents' "ability to continue to forge a strong bond with their grandchildren [would] cause substantial harm to the children's emotional health," and (2) removal of "caring, loving, consistent and supportive role models from [the children's] lives" after death of their father would "cause them more pain and irreparable damage" (internal quotation marks omitted)).

Utah court relied on the trial court's decision to credit, in its finding that the grandparents had rebutted the presumption that parents act in the best interest of their children, the conclusions reached by an expert that "(1) the child demonstrated an 'emotional attachment to her grandparents [that] was as strong as [that] seen between parents and children'; (2) the attachment could be explained by the grandparents' role as primary caregivers; (3) the loss of her mother remained a deep emotional wound for the child that had not been resolved; (4) the child kept the memory of her mother alive through her relationship with her grandparents; (5) *the child would be unable to work through the loss of her mother without frequent access to her grandparents*; and (6) the loss of contact with the [grandparents] would be devastating and cause the child to suffer." (Emphasis added.) Id., 1095; see also *In re A.S.A.*, 21 Wn. App. 2d 474, 486, 507 P.3d 28 (2022) (Pennell, J., concurring) ("[t]rauma might be especially likely when a child has experienced the death of a parent and continued contact with the deceased parent's family is necessary for grief and healing").

In the present case, the plaintiff alleges that (1) she was L's primary provider of emotional support and primary caretaker, (2) L would look to her for comfort and support, (3) she is concerned about L's emotional well-being following the deaths of Patricia and Hallie, (4) L was abruptly taken away from her home and her primary caretaker, and (5) L has been very emotional since being cut off from her former life. The plaintiff also alleges in the amended petition that "[L] has reported feeling stressed, sick, and rundown. She has been sad, anxious, fearful, and confused. She reports excessive crying and crying herself to sleep because she has been cut off from [the plaintiff]. She sleeps with objects that remind her of 'home,' even though these objects are not comfortable for sleep. She had lost a lot of weight. She stated that she isn't doing well. She

has made statements that show suicidal ideation." The plaintiff further alleges that the defendant's actions compounded the emotional harm that he caused to L by depriving her of a relationship with the plaintiff. During that time, the defendant mocked L for crying about the loss of her mother, yelled at her, cursed at her, and threw her up against a car. The allegations in the amended petition are more than sufficiently specific to satisfy the statutory pleading requirement by demonstrating that L is suffering significant emotional harm, manifesting itself through her conduct, statements, and physical symptoms, as a result of the deprivation of her relationship with the plaintiff. Given our long-standing mandate to construe pleadings broadly and realistically; see, e.g., *Carpenter* v. *Daar*, supra, 346 Conn. 127; it is necessarily implied by the plaintiff's allegations that L will be emotionally harmed—and is currently being harmed emotionally—from being cut off from the plaintiff in such an abrupt and complete manner. If the plaintiff produces clear and convincing evidence to support these allegations, a fact finder may well conclude that visitation is necessary to help L work through her grief, cope with the other significant changes imposed on her daily life, and otherwise overcome the suffering that she has experienced as a result of her mother's death, among other things. Construing the allegations in the manner most favorable to the plaintiff, we conclude that the amended petition adequately pleads facts that would establish that L "is being denied proper care and attention . . . emotionally . . . ." General Statutes § 46b-120 (4) (B). Accordingly, the trial court incorrectly determined that the amended petition does not contain specific, good faith allegations that the denial of visitation would cause real and significant harm.

The defendant relies on the Appellate Court's decisions in *Fuller* v. *Baldino*, 176 Conn. App. 451, 168 A.3d 665 (2017), and *Romeo* v. *Bazow*, 195 Conn. App. 378, 225 A.3d 710 (2020), in arguing that the trial court prop-

erly dismissed the petition. This reliance is misplaced. With respect to the second prong of § 46b-59 (b), the petitions in *Romeo* and *Fuller* contained only the most general and conclusory allegations of harm, without the supporting factual basis found in the amended petition in the present case. Specifically, in *Romeo*, the Appellate Court concluded that the only harm alleged in the plaintiffs' petition was that " '[t]here can be no greater harm to a child than the neglecting to promote and foster a child's roots in family [and] friends which directly affect the child's emotional growth and moral compass. The harm to the children, by deracinating their family roots is real and significant because it undermines a substantial part of who they are.' " *Romeo* v. *Bazow*, supra, 392. Similarly, in *Fuller*, the plaintiff alleged only that he had "a 'very strong bond' with the child and that the child 'suffers' and is 'very emotional' when unable to see [the plaintiff] . . . ." *Fuller* v. *Baldino*, supra, 459. In contrast, the amended petition in the present case contains specific factual allegations of harm, namely, that L is being harmed emotionally by being denied the ability to work through the death of her mother and grandmother, and the disruption of her entire life, with her primary provider of emotional support, the plaintiff.

Because the plaintiff adequately had alleged both the existence of a parent-like relationship and that the denial of visitation would cause real and significant harm, we conclude that the trial court improperly dismissed the amended petition. On remand, the plaintiff is entitled to an evidentiary hearing at which she must prove by clear and convincing evidence that she has a parent-like relationship with L and that denial of visitation would cause L real and significant harm. See General Statutes § 46b-59 (b).

The judgment is reversed and the case is remanded for further proceedings according to law.

In this opinion the other justices concurred.

ORDERS

CONNECTICUT REPORTS

Vol. 348

FABIOLA IS RA EL BEY *v.* U.S. BANK, NATIONAL ASSOCIATION, TRUSTEE, ET AL.

The plaintiff's petition for certification to appeal from the Appellate Court, 222 Conn. App. 904 (AC 45847), is denied.

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

Fabiola Is Ra El Bey, self-represented, in support of the petition.

Joseph J. Cherico, in opposition.

Decided April 2, 2024

MARTIN A. RADER, JR. *v.* PAUL J. VALERI ET AL.

The named defendant's petition for certification to appeal from the Appellate Court, 223 Conn. App. 243 (AC 45407), is denied.

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

Alexander Copp, in support of the petition.

Brandon B. Fontaine, in opposition.

Decided April 2, 2024

STATE OF CONNECTICUT *v.* SCOTT TORELL

The defendant's petition for certification to appeal from the Appellate Court, 223 Conn. App. 21 (AC 45444), is denied.

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

Kevin Semataska, assistant public defender, in support of the petition.

Meryl R. Gersz, assistant state's attorney, in opposition.

Decided April 2, 2024

VIRGINIA SILANO *v.* DIANA COONEY ET AL.

The plaintiff's petition for certification to appeal from the Appellate Court, 223 Conn. App. 692 (AC 45538), is denied.

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

Virginia Silano, self-represented, in support of the petition.

Decided April 2, 2024

STATE OF CONNECTICUT *v.* ANTHONY DYOUS

The defendant's petition for certification to appeal from the Appellate Court, 223 Conn. App. 901 (AC 45830), is denied.

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

Nancy L. Chupak, senior assistant state's attorney, in opposition.

Decided April 2, 2024

LASCELLES A. CLUE *v.* COMMISSIONER OF CORRECTION

The respondent's petition for certification to appeal from the Appellate Court, 223 Conn. App. 803 (AC 45984), is granted, limited to the following issue:

"Did the Appellate Court correctly conclude that, in the absence of fraud, duress or mistake, a habeas court has equitable authority, after the four month period set forth in General Statutes § 52-212a has elapsed, to open a judgment based on the ineffective assistance of habeas counsel?"

Laurie N. Feldman, assistant state's attorney, in support of the petition.

James E. Mortimer, assigned counsel, in opposition.

Decided April 2, 2024

NATIONAL BANK TRUST *v.* ILYA YUROV ET AL.

The petition of the defendant Sergey Belyaev for certification to appeal from the Appellate Court, 223 Conn. App. 637 (AC 46023), is denied.

Jeffrey Hellman, in support of the petition.

Jeffrey M. Sklarz, in opposition.

Decided April 2, 2024

TACHICA CALLAHAN *v.* HEALTHCARE SERVICES GROUP-MERIDEN CARE CENTER ET AL.

The plaintiff's petition for certification to appeal from the Appellate Court, 223 Conn. App. 902 (AC 46035), is denied.

Tachica Callahan, self-represented, in support of the petition.

Decided April 2, 2024

ROBERT S. BUIE *v.* COMMISSIONER OF CORRECTION

The petitioner Robert S. Buie's petition for certification to appeal from the Appellate Court, 223 Conn. App. 903 (AC 46337), is denied.

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

Judie Marshall, assigned counsel, in support of the petition.

Danielle Koch, assistant state's attorney, in opposition.

Decided April 2, 2024

IN RE AVA M.

The petition of the respondent mother for certification to appeal from the Appellate Court, 223 Conn. App. 590 (AC 46676), is denied.

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

David E. Schneider, Jr., assigned counsel, in support of the petition.

Nisa Khan, assistant attorney general, in opposition.

Decided April 2, 2024

U.S. BANK TRUST, N.A., TRUSTEE *v.*
SUSAN G. CLARKE ET AL.

The defendants' petition for certification to appeal from the Appellate Court (AC 47042) is denied.

Susan G. Clarke and *Wayne A. Clarke*, self-represented, in support of the petition.

Jeffrey M. Knickerbocker, in opposition.

Decided April 2, 2024

THE METROPOLITAN DISTRICT COMMISSION *v.*
MARRIOTT INTERNATIONAL, INC., ET AL.
(SC 20814)

McDonald, D'Auria, Mullins, Ecker, Alexander,
Dannehy and Ficeto, Js.

This court, having requested by order dated February 28, 2024, supplemental briefing from the parties on, inter alia, the issue of whether this appeal would be rendered moot by virtue of certain actions taken by the plaintiff, it is hereby ordered that the appeal is dismissed, and the judgment of the Appellate Court is vacated.

April 16, 2024

PER CURIAM. As a result of actions taken by the plaintiff, the Metropolitan District Commission, since the Appellate Court rendered judgment in its favor; see *Metropolitan District Commission* v. *Marriott International, Inc.*, 216 Conn. App. 154, 179, 284 A.3d 985 (2022); and after oral argument before this court, the appeal by the named defendant has been rendered moot. Consequently, the appeal is dismissed, and the judgment of the Appellate Court is vacated. See, e.g., *State* v. *Charlotte Hungerford Hospital*, 308 Conn. 140, 143, 60 A.3d 946 (2013) (vacating judgment of lower court is appropriate "[w]hen, during the pendency of an

appeal, events have occurred that preclude an appellate court from granting any practical relief through its disposition of the merits, [thereby rendering the] case . . . moot" (internal quotation marks omitted)); see also *Private Healthcare Systems, Inc.* v. *Torres*, 278 Conn. 291, 303, 898 A.2d 768 (2006) ("[a] party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment" (internal quotation marks omitted)).

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CONNECTICUT APPELLATE REPORTS

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CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

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MATHEW BURR ET AL. *v.* GROSSMAN CHEVROLET-NISSAN, INC.
(AC 45867)

Cradle, Seeley and Norcott, Js.

Syllabus

The plaintiffs, B, E, and M Co., sought to recover damages from the defendant car dealership for alleged breach of contract, fraud, theft, and violation of the Connecticut Unfair Trade Practices Act (CUTPA) (§ 42-110a et seq.) in connection with the purchase and sale of a plow truck. B, the managing member of M Co., testified that, on January 21, 2015, he signed an instalment contract on behalf of M Co. for the purchase of the plow truck. E, who was not a member of M Co., cosigned the contract, and B drove the truck off the lot. The plaintiffs did not submit this purported contract as an exhibit in the trial court. A few days later, B returned to the showroom at the request of D, one of the defendant's salesmen, to return the purchase documents so that corrections could be made. B was assured that the terms of the documents would not change. B and E claimed that they never signed any other documents in connection

with the sale of the plow truck. Both parties, however, submitted into evidence an instalment contract dated January 26, 2015, which identified the plow truck as the purchased vehicle and listed an increased sales price, a higher loan interest rate, and a longer loan period than that which the plaintiffs alleged had been quoted by D and incorporated into the original contract. The plaintiffs claimed that the defendant forged their signatures on the January 26, 2015 contract documents. They also alleged that the window sticker on the plow truck, known as a Monroney sticker, did not reflect the vehicle's true price. D died sometime after the purchase of the plow truck and was never deposed in this action. G, the owner of the defendant, was called to testify at the trial by the plaintiffs. She stated that, although she did not have firsthand knowledge of the events surrounding the transaction, she had discussed it with D and there was no indication that there had been a deal or contract that reflected the terms the plaintiffs claimed were set forth in the January 21, 2015 contract. She stated that two contracts were signed in connection with the sale of the plow truck, the first on January 21, 2015, and the second on January 26, 2015; however, she claimed that both contracts reflected the same cash price of the truck and the same amount financed. She stated that the January 26, 2015 contract was signed because the defendant was able to secure more favorable approval terms with a second lender, A Co., and that D had asked the plaintiffs to return to the defendant to rescind the January 21, 2015 contract so they could take advantage of those terms. The trial court rendered judgment in favor of the defendant, finding that the plaintiffs failed to sustain their burden of proof regarding their claims of breach of contract, fraud, and theft and that they failed to establish that the defendant engaged in unfair or deceptive acts or practices, and the plaintiffs appealed to this court. *Held*:

1. The plaintiffs' claim that the trial court misinterpreted their legal claims was unavailing: to the extent the plaintiffs claimed that the trial court failed to make certain factual findings or that it overlooked claims made by the plaintiffs, this court did not agree with such claims, and the plaintiffs failed to file a motion to reargue, a motion for clarification, or a motion for articulation seeking to have the trial court address the alleged deficiencies; moreover, in its memorandum of decision, the trial court explicitly addressed each of the counts of the plaintiffs' complaint, and each of the claims B asserted at trial when the court asked him to summarize their claims, before holding that the plaintiffs had not met their burden of proof as to each count.
2. The plaintiffs' arguments challenging the trial court's credibility determinations were not convincing: contrary to the plaintiffs' contention, there was no indication that the trial court did not base its credibility determinations on the conduct, demeanor and attitude of the witnesses; moreover, after finding G's testimony credible, the trial court stated that her testimony was supported by documentary evidence and properly

explained its determination by citing to various portions of her testimony and the other evidence admitted at trial, and it was not the role of this court to second-guess the trial court's credibility determinations.

3. The plaintiffs' claim that the trial court made findings contrary to the evidence that undermined appellate confidence in the trial court's fact-finding process and required a new trial failed:

a. This court was not left with a definite and firm conviction that the trial court had erred in finding that there was no evidence to support the plaintiffs' claims and that the plaintiffs had signed the documents related to the sale of the plow truck: the trial court's finding that it "defie[d] common sense" that the defendant would allow the plaintiffs to drive the truck off the defendant's property without a deal in place was not clearly erroneous because the court explicitly credited G's testimony, which supported a finding that the defendant did not engage in a yo-yo scam and that the plaintiffs executed a contract for the purchase of a plow truck before leaving the defendant's premises on January 21, 2015; moreover, in asserting that the trial court erred in finding that the evidence did not support their claims because they had been forced to return to the defendant the only copy of the alleged original contract, the plaintiffs misapprehended the burdens of proof related to their complaint, implying that the defendant had the burden of proving that the plaintiffs had signed the documents in evidence when, in fact, the burden was on the plaintiffs to prove that the signatures were not genuine; furthermore, the plaintiffs did not submit any credible evidence that their signatures on the documents in evidence had been forged, that any of the documents in evidence had been improperly fabricated or changed, that there was ever a January 21, 2015 contract with A Co., or that any of the defendant's behavior amounted to a CUTPA violation, and they offered only the testimony of B and E in support of their complaint, which the trial court found not to be credible.

b. This court declined to review the plaintiffs' remaining challenges to the trial court's findings: in making their claims that it was clearly erroneous for the trial court to find that it was not logical or reasonable that E would make payments to A Co. with respect to a January 26, 2015 contract that he had never signed and that the trial court could not reconcile the claim that someone else put E's name, as a member of M Co., on the January 26, 2015 documents with the fact that M Co. bought the plow truck, the plaintiffs were questioning the trial court's interpretation of their claims at trial, which they should have addressed by filing a motion to reargue, a motion for clarification, or a motion articulation; moreover, the trial court's finding that the plaintiffs ratified the January 26, 2015 contract was unnecessary to its holding because the court had already found that M Co. agreed to the contract, and, as such, the plaintiffs could not have been aggrieved by any alleged error as to the court's finding; furthermore, the plaintiffs failed to preserve for appellate review their claim that the trial court erred in finding that the defendant's failure

to supplement the Monroney sticker on the plow truck to reflect that the truck had been equipped with a plow was insignificant because, in the trial court, they did not cite to any law or make any argument to explain the significance of affixing an addendum to the Monroney sticker.

Argued January 16—officially released April 16, 2024

Procedural History

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of Middlesex, and tried to the court, *Hon. Edward S. Domnarski*, judge trial referee; judgment for the defendant, from which the plaintiffs appealed to this court. *Affirmed.*

Jack G. Steigelfest, for the appellants (plaintiffs).

Michael R. McPherson, with whom, on the brief, was *Laura Pascale Zaino*, for the appellee (defendant).

Opinion

CRADLE, J. The plaintiffs, Mathew Burr, Elmer Blackwell, and MPK Property Maintenance, LLC (MPK), appeal from the judgment of the trial court, rendered in favor of the defendant, Grossman Chevrolet-Nissan, Inc.[1] On appeal, the plaintiffs claim that the court erred in (1) misinterpreting their legal claims, (2) relying on the testimony of the defendant's representative to reach its conclusion, and (3) finding certain facts in support of its judgment for the defendant. We affirm the judgment of the trial court.

The plaintiffs' four count complaint, dated September 6, 2018, alleged breach of contract, fraud, theft, and violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq. Following a three day bench trial, the court, *Hon. Edward S.*

[1] References in this opinion to the defendant are to Grossman Chevrolet-Nissan, Inc. References in this opinion to Grossman are to the defendant's representative, Linda Grossman, who testified at trial on behalf of the defendant.

Domnarski, judge trial referee, set forth the following relevant procedural and factual history in a memorandum of decision dated September 12, 2022. "The plaintiffs' claims arise out of MPK's purchase, in January, 2015, of a 2015 Chevrolet Silverado truck equipped with a snowplow (plow truck). The court heard evidence on April 26 and 27 and May 3, 2022. The parties filed post-trial briefs on August 15, 2022.

"The complaint contains 126 paragraphs; the first seventy-three paragraphs contain allegations related to the plaintiffs' purchase, from the defendant, of another vehicle, a 2014 Chevrolet Silverado dump truck (dump truck), in May of 2014. Although much of the testimony and many of the exhibits related to the purchase of the dump truck, the court finds that the plaintiffs' claims against the defendant relate to the purchase and sale of the plow truck.

"Burr, the managing member of MPK, testified to the following events. On or about January 21, 2015, he discussed purchase of the plow truck with Lewis Davidson, a salesman at the defendant. The court notes Davidson has since passed away and was never deposed in this action. Davidson quoted Burr a price of $41,916 for the plow truck. The evidence established the plow had previously been installed on the truck by a company known as Dejana Truck & Utility Equipment Company, Inc. . . . Financing for the purchase of the plow truck was arranged by Davidson. Davidson told Burr that the financing would be at a rate of 4.3 percent spread out over seventy-two months. Burr signed an instalment contract on behalf of MPK on January 21, 2015, and drove the plow truck off the defendant's lot. A few days after purchasing the plow truck, Burr was asked to return to the defendant's showroom. Burr met with Davidson who told Burr that he needed to return the purchase documents to Davidson so that corrections

could be made to the documents. Burr gave his purchase documents to Davidson, who assured Burr that the terms of the purchase documents would not be changed. In their posttrial brief, the plaintiffs refer to the [January 21, 2015] contract returned to Davidson as 'Contract #1.' The plaintiffs did not submit this purported contract as an exhibit. Burr testified he did not return to the defendant to sign any other documents. . . .

"Blackwell, who is described as a very close family friend, testified that he cosigned documents to help Burr purchase the dump truck and the plow truck.[2] Blackwell also testified that he went to the defendant's showroom on January 21, 2015, to cosign the documents so Burr could purchase the plow truck. Blackwell also testified that he never went back to the defendant after January 21, 2015. It should be noted that on a retail instalment contract dated January 26, 2015 . . . Blackwell is listed as a co-buyer of the plow truck, along with MPK.

"Both the plaintiffs and the defendant have submitted a retail instalment contract dated January 26, 2015, which identifies the [plow truck]. . . . The contract contains the following relevant terms. The cash price for the vehicle, without tax, is $45,509. The amount financed is $43,745.16, with an annual percentage rate of 5.45 percent, payable by seventy-five monthly payments of $691.10. Burr and Blackwell both testified that they never signed the retail instalment contract . . . dated January 26, 2015.

"It is the plaintiffs' claim that the defendant created new purchase and financing documents for the plow truck that were never signed by the plaintiffs. The new

[2] The plaintiffs allege in their complaint that Blackwell cosigned the documents in his individual capacity and that Blackwell was never a member of MPK.

financing documents stated an increased sales price for the plow truck, a higher loan interest rate, and a longer loan period than had been quoted by Davidson. The plaintiffs also claim that the defendant forged the plaintiffs' signatures on the documents. In addition, the plaintiffs claim the window sticker on the plow truck, known as a Monroney sticker,[3] did not reflect the true price of the plow truck.

"The plaintiffs did not provide a computation of their claimed damages at the trial. In their posttrial brief, the plaintiffs state that the improper actions of the defendant imposed a higher debt burden on the plaintiffs, which entitles them to compensatory damages for breach of contract in the amount of $9909.

"[Linda] Grossman is the owner and general manager of the defendant. Although she did not have firsthand knowledge of the events surrounding the plaintiffs' purchase of the plow truck, she was familiar with the circumstances of the transaction and the numerous documents involved that were admitted as exhibits.[4] . . . Grossman testified that there is no indication that there was a deal or contract for the defendant to sell the plow truck for a price of $41,916 with financing at 4.3 percent interest, payable over seventy-two months. . . .

"[Grossman] testified that two retail instalment contracts were prepared for [the] sale of the plow truck. The first contract was dated January 21, 2015, in which financing was provided by [JPMorgan Chase Bank, National Association (Chase)]. . . . That contract showed an amount financed of $43,745.16, an annual

[3] A Monroney sticker is "the label placed on new automobiles with the manufacturer's suggested retail price and other consumer information, as specified at 15 U.S.C. [§§ 1231 through 1233] (also known as the 'Automobile Information Disclosure Act label')." 49 C.F.R. § 575.401 (c) (4) (2015).

[4] Grossman testified that she spoke with Davidson about this case.

percentage rate of 7.59 percent, eighty-four payments of $674.95, with total payments of $56,695.80. The second contract, dated January 26, 2015, provided for financing by [Ally Financial, Inc. (Ally)]. . . . This second contract also showed an amount financed of $43,745.16 but had a lower annual percentage rate of 5.45 percent, seventy-five payments of $691.10, with total payments [of] $51,832.50—$4863.30 less. Both contracts show a cash price of the vehicle, excluding sales tax, of $45,509.

"[Grossman] also testified that after the first contract was signed, the defendant's business manager was able to secure more favorable approval terms with Ally. A representative of the defendant reached out to the plaintiffs to let them know of the favorable terms and asked them to come back to the defendant to rescind or 'unwind' the Chase contract to take advantage of the Ally contract terms. She understood that the Ally contract was signed on January 26, 2015." (Citations omitted; footnotes added.)

After considering the testimony of the parties and reviewing the exhibits, the court concluded that the plaintiffs "have not sustained their burden of proof regarding their claim of breach of contract set forth in count one. After careful consideration of the evidence presented and the elements of fraud, the court finds the plaintiffs have not sustained their burden of proof regarding the claim of fraud set forth in count two. The plaintiffs have not sustained their burden of proof regarding their claim of theft contained in count three. As to count four, which alleges violation of CUTPA, the plaintiffs have failed to establish that the defendant engaged in unfair or deceptive acts or practices." The court, therefore, rendered judgment in favor of the defendant. This appeal followed.

I

The plaintiffs first claim on appeal that the court misinterpreted their legal claims. Specifically, the plaintiffs contend that the court erred by deciding claims

that they never made and by failing to decide the claims they did make. We disagree.

The following additional facts and procedural history are relevant to the resolution of this claim. In the first 125 paragraphs of their complaint, the plaintiffs made allegations as to the events surrounding their purchase of the dump truck and the plow truck and then incorporated those allegations by reference in their counts of breach of contract, fraud, theft, and violation of CUTPA. Paragraph 126 of each count in the complaint alleges that, as a result of the defendant's behavior, the plaintiffs suffered financial harm. At the conclusion of trial, after the plaintiffs had presented numerous exhibits and offered the testimony of Grossman, Blackwell, and Burr, the court asked Burr, who was on the stand, to summarize the plaintiffs' claims. Burr testified that the defendant had improperly (1) signed Blackwell's name to MPK's articles of organization in order to get the plaintiffs a loan that should not have been approved, (2) failed to include the price of the plow on the plow truck's Monroney sticker, and (3) manipulated the plaintiffs' signatures to create a January 26, 2015 contract that the plaintiffs had never signed. The plaintiffs' posttrial brief largely reflected these claims and further alleged that, "on January 21, 2015, the plaintiffs agreed to purchase the plow truck for specific terms and conditions" and that the defendant "destroyed [the January 21, 2015 contract] and manufactured a new one . . . showing a later purchase date of January 26, 2015," with "a higher price . . . a higher interest rate . . . and a longer loan period . . . ." In their posttrial brief, the plaintiffs, for the first time, provided legal citations to specify which laws they accused the defendant of violating.

In its memorandum of decision, the court stated that it could not "reconcile [the claim that Blackwell had no authority to sign documents on behalf of MPK] with

the fact that MPK bought a truck from the defendant, drove it off the lot, made all of the payments due to Ally under the financing arranged by the defendant, and still is in possession of the plow truck. If Blackwell was not authorized to buy the plow truck, there was no reason for MPK to keep and pay for the plow truck." As to the plaintiffs' claim regarding the Monroney sticker, the court found that "[i]t is not logical for the plaintiffs to think they were getting [the plow] for free. The plaintiffs and the defendant agreed on a price for the plow truck, which included a snowplow. The court cannot attach significance to the fact an addendum that showed the price of the plow may or may not have been a part of the [Monroney] sticker." Regarding the plaintiffs' claim that they did not sign the January 21 and 26, 2015 contracts in evidence, the court found that "[i]t defies common sense that the defendant would allow Burr to drive the truck away without a signed deal being in place."

On appeal, the plaintiffs claim that the court "never decided the actual issues presented by the pleadings and evidence." The plaintiffs specifically contend that the court failed to make findings as to whether (1) "[the] documents [in question] were or were not signed by . . . Burr and . . . Blackwell," (2) the defendant "altered [MPK's articles of organization]," and (3) the Monroney sticker reflected the price of the truck with the plow. The plaintiffs also claim on appeal that the trial court, in some instances, "ignore[d] the plaintiffs' actual claim . . . and substitute[d] a wholly invented scenario . . . ." Specifically, the plaintiffs contend that certain of the court's findings respond to a claim that the plaintiffs did not make—i.e., that they never entered into a contract to buy the plow truck—instead of to their actual claim that the terms under which they purchased the plow truck had been illegally altered.[5] The

[5] To support this claim, the plaintiffs point to the court's findings that " '[i]t defies common sense that the defendant would allow Burr to drive

defendant, in its appellate brief, suggests that the plaintiffs should have filed a motion to reargue and then a motion for articulation if the court had not addressed their causes of action. We agree with the defendant.

"It is well established that a party cannot obtain appellate review of a claim challenging a finding or determination that the court did not make. It is the responsibility of the appellant to provide an adequate record for review. . . . It is well established that [a]n articulation is appropriate where the trial court's decision contains some ambiguity or deficiency reasonably susceptible of clarification. . . . [P]roper utilization of the motion for articulation serves to dispel any . . . ambiguity by clarifying the factual and legal basis upon which the trial court rendered its decision, thereby sharpening the issues on appeal. . . . Our role is not to guess at possibilities . . . but to review claims based on a complete factual record developed by a trial court. . . . Without the necessary factual and legal conclusions furnished by the trial court . . . any decision made by us respecting [the appellant's claims] would be entirely speculative. . . . It is, therefore, the responsibility of the appellant to move for an articulation or rectification of the record where the trial court has failed to state the basis of a decision . . . to clarify the legal basis of a ruling . . . *or to ask the trial judge to rule on an overlooked matter*." (Citations omitted;

the truck away without a signed deal being in place' " and that "MPK kept and paid for the plow truck it bought . . . ." They explain that "the plaintiffs never claimed that [the defendant] allowed . . . Burr to drive the truck off the lot without a signed deal in place. To the contrary, the plaintiffs explicitly alleged that MPK had entered into a contract to purchase the plow truck before driving the truck off the lot. . . . [T]heir disagreement was over the terms of that deal." (Citation omitted.) Further, they argue that the observation that MPK kept and paid for the truck "does not remotely refute the plaintiffs' arguments regarding the terms under which MPK bought the plow truck or the allegations that the defendant substituted forged documentation in place of the original terms."

emphasis in original; internal quotation marks omitted.) *D2E Holdings, LLC* v. *Corp. for Urban Home Ownership of New Haven*, 212 Conn. App. 694, 712–13, 277 A.3d 261, cert. denied, 345 Conn. 904, 282 A.3d 981 (2022).

Here, to the extent the plaintiffs claim that the court failed to make certain factual findings or that it overlooked claims made by the plaintiffs, a determination we do not make, the plaintiffs failed to file a motion to reargue, a motion for clarification, or a motion for articulation seeking to have the trial court address those alleged deficiencies. "If the defendant believed that the trial court overlooked individualized proof required for any particular element of any particular cause of action that was of such consequence that it outweighed those cited by the trial court, it was free to seek an articulation." *Standard Petroleum Co.* v. *Faugno Acquisition, LLC*, 330 Conn. 40, 66, 191 A.3d 147 (2018).

Moreover, we note that the court, in its memorandum of decision, explicitly addressed each of the counts of the plaintiffs' complaint, holding that the plaintiffs had not met their burden of proof as to each count. The court also addressed each of the claims Burr asserted when the court had asked him to summarize the plaintiffs' claims at trial. Accordingly, the plaintiffs' claim that the court misinterpreted their legal claims is unavailing.

II

The plaintiffs next claim that the court "erred in relying upon the testimony of . . . Grossman to defeat [their] claims and to impugn the testimony of . . . Burr and . . . Blackwell." They argue that there are limits to this court's deference to a trial court's credibility determinations and that the bases upon which the court

found Grossman credible were improper.[6] We are not persuaded.

The following additional facts and procedural history are relevant to the resolution of this claim. In its memorandum of decision, the court stated that, "[a]s is often the case, the outcome of this trial is determined by the credibility of the witnesses that testified." The court further stated: "Having considered the testimony of the parties, and after reviewing the exhibits, the court finds . . . Grossman's testimony regarding the events surrounding the sale of the plow truck to be credible. Her version of events is supported by the exhibits related to the transaction. . . .

"The terms of the January 26, 2015 contract with Ally does have more favorable financing terms than the January 21, 2015 contract with Chase. [Grossman's] testimony that the [defendant] wanted to save an established customer money by way of reduced financing charges is credible. It is undisputed that Ally provided the financing for the plow truck. The plaintiffs made payments to Ally pursuant to the contract and, in fact, have paid Ally in full.

"The court takes no pleasure in stating that it finds Burr's testimony regarding the terms of the sale and financing is not credible. . . . [T]here is a lack of documentation to support Burr's testimony as to the sales price of the truck and the financing terms. The only document that supports the plaintiffs' version of events is [an] Ally offer to the defendant for financing [that states the pricing and financing terms the plaintiffs argue applied to the deal]. [Grossman] has credibly explained how this offer is between the [defendant] and Ally and was not an offer or agreement between Ally and the plaintiffs. . . .

[6] We note that Grossman's testimony was offered by the plaintiffs.

"Blackwell repeatedly testified that he did not sign the documents related to the January 26, 2015 transaction. The court does not find Blackwell's testimony to be credible. The documents appear to bear his signature. When asked if he could identify his signature on the documents at his deposition, and at trial, Blackwell gave evasive and contradictory answers. The court was struck by the fact that Blackwell testified that, before he could identify his signature on a document, he needed to know the date of the document and the contents of the document." (Citations omitted.)

On appeal, the plaintiffs claim that the court improperly made its credibility determinations by comparing the testimony of the witnesses to the documentary evidence instead of on the basis of an assessment of the demeanor of the witnesses. "[A]s a reviewing court [w]e must defer to the trier of fact's assessment of the credibility of the witnesses that is made on the basis of its firsthand observation of their conduct, demeanor and attitude. . . . The weight to be given to the evidence and to the credibility of witnesses is solely within the determination of the trier of fact." (Internal quotation marks omitted.) *McLeod* v. *A Better Way Wholesale Autos, Inc.*, 177 Conn. App. 423, 450, 172 A.3d 802 (2017). "[I]t is the sole province of the trial court, as the trier of fact, to determine the credibility of the witnesses. . . . The court's determination that [a party's] witnesses were credible is beyond the scope of this court's review." (Citation omitted.) *Fishbein* v. *Menchetti*, 165 Conn. App. 131, 136, 138 A.3d 1061 (2016).

Here, contrary to the plaintiffs' contention, there is no indication that the court did not base its credibility determinations on the conduct, demeanor and attitude of the witnesses. After stating that it found Grossman's testimony credible, the court simply stated that it was supported by the documentary evidence. The court then

properly explained that determination by citing to various portions of Grossman's testimony and the other evidence admitted at trial. Although the plaintiffs argue that the court should have rejected Grossman's testimony as not credible and, thus, come to a different conclusion on the basis of the evidence admitted, it is not the role of this court to second-guess a fact finder's credibility determinations, nor do we "review the evidence to determine whether a conclusion different from the one reached could have been reached." (Internal quotation marks omitted.) *Osborn* v. *Waterbury*, 197 Conn. App. 476, 482, 232 A.3d 134 (2020), cert. denied, 336 Conn. 903, 242 A.3d 1010 (2021). Accordingly, we are not convinced by the plaintiffs' arguments challenging the court's credibility determinations.

III

We now turn to the plaintiffs' claim that the court "erred in making findings contrary to the evidence" and that those findings, "[t]aken independently or together . . . undermine appellate confidence in the trial court's fact-finding process and require a new trial." We disagree.

"The trial court's findings are binding upon this court unless they are clearly erroneous in light of the evidence and the pleadings in the record as a whole. . . . We cannot retry the facts or pass on the credibility of the witnesses. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed . . . ." (Internal quotation marks omitted.) *AAA Advantage Carting & Demolition Service, LLC* v. *Capone*, 221 Conn. App. 256, 279–80, 301 A.3d 1111, cert. denied, 348 Conn. 924, 304 A.3d 442 (2023), and cert. denied, 348 Conn. 924, 304 A.3d 442 (2023). The

plaintiffs challenge several of the court's findings on appeal. We address them in turn.

A

Only two of the plaintiffs' challenges to the court's findings are reviewable.[7] First, the plaintiffs contend that the trial court's finding that it " 'defies common sense' " that the defendant would allow the plaintiffs to drive the truck away without a deal in place was "wholly unsupported by the evidence" because "allowing a customer to drive off with the car is the first step in a yo-yo scam—there is nothing about it that defies common sense."[8] Taking this claim at face value, we conclude that the court's finding is not clearly erroneous. A yo-yo scam likely works *because* it defies common sense that a dealer would allow a purchaser to drive away before a deal has been struck. Moreover, this claim fails because the court explicitly credited Grossman's testimony, which supports a finding that the defendant did not engage in a yo-yo scam and that the plaintiffs executed a contract for the purchase of the plow truck before leaving the defendant's premises on January 21, 2015.

Second, the plaintiffs claim that the court erred in finding that the evidence did not support their claims because they had been forced to return to the defendant the only copy of the alleged original contract. Similarly,

[7] We address the plaintiffs' unreviewable claims in part III B of this opinion.

[8] The plaintiffs explain yo-yo scams in their posttrial and appellate briefs. "In a yo-yo scam, the consumer drives off with the car before financing is finalized, often with the dealer's assurances that everything will be fine and that there is just a little final paperwork to be received from the lender. A few days later, however, the dealer then contacts the consumer to say that the loan was not approved, so the consumer will have to return the car unless the consumer will agree to different and more onerous loan terms. Sometimes this is because the original loan was not in fact approved by the lender, but it can also simply be an opportunity for the dealer to increase its markup." (Footnote omitted.) A. Levitin, "The Fast and the Usurious: Putting the Brakes on Auto Lending Abuses," 108 Geo. L.J. 1257, 1304 (2020).

they claim that "there was no basis for the trial court to reach the . . . conclusion . . . that the [plaintiffs'] signatures were genuine," asserting that "[t]here was no evidence before the trial court that . . . Blackwell or . . . Burr signed the [January 26, 2015] agreement form or any documents related to it."

As a preliminary matter, the plaintiffs misapprehend the burdens of proof related to the counts of their complaint. They imply here that the defendant had the burden of proving that the plaintiffs had signed the documents in evidence. The cases they cite in support of the assertion that a signature on a document is not proof of the signature's authenticity, however, relate to the authentication of documents for admission as evidence. See *United States* v. *Vigneau*, 187 F.3d 82, 85 (1st Cir. 1999) (finding that certain documents were improperly admitted into evidence in criminal money laundering case, in part, because government had not offered direct or circumstantial evidence that defendant had completed those forms); *State* v. *Jones*, 8 Conn. App. 177, 183–84, 184 n.5, 512 A.2d 932 (1986) (stating, in response to defendant's claim that handwriting exemplars were not properly authenticated, that "the admission of the document, did not, in and of itself, establish the authenticity of the defendant's signatures on the documents"). The plaintiffs do not argue on appeal that the court improperly admitted the contracts as evidence. Where, as here, the plaintiffs accuse the defendant of fraud, the burden was on the *plaintiffs* to prove that the signatures were *not* genuine. See *Wieselman* v. *Hoeniger*, 103 Conn. App. 591, 595 n.7, 930 A.2d 768 ("[i]n common-law fraud cases, the plaintiff has the burden of proving fraud by clear and convincing evidence"), cert. denied, 284 Conn. 930, 934 A.2d 245 (2007). Similarly, the plaintiffs bore the burden of proving that there had been a January 21, 2015 contract with Ally. See *Downing* v. *Dragone*, 216 Conn. App.

306, 330–31, 285 A.3d 59 (2022) ("[i]t is well settled that the party seeking to establish the existence of an enforceable contract bears the burden of proving a meeting of the minds between the parties" (internal quotation marks omitted)), cert. denied, 346 Conn. 903, 287 A.3d 601 (2023).

Here, the plaintiffs submitted no credible evidence that (1) their signatures on the documents in evidence had been forged, (2) that any of the documents in evidence had been improperly fabricated or changed, (3) that there was ever a January 21, 2015 contract with Ally, or (4) that any of the defendant's behavior amounted to a CUTPA violation. In support of the four counts in their complaint, the plaintiffs offered only the testimony of Burr and Blackwell, which the court found not to be credible. Therefore, we are not left with a definite and firm conviction that the court erred in finding that there was no evidence to support the plaintiffs' claims and that they had signed the documents related to the sale of the plow truck.

B

We decline to address the plaintiffs' remaining three challenges to the findings of the court. First, the plaintiffs claim that it was clearly erroneous for the court to find that it was not logical or reasonable that Blackwell would make payments to Ally with respect to a January 26, 2015 contract he never signed and, similarly, that the court could not reconcile the claim that someone else put Blackwell's name, as a member of MPK, on the January 26, 2015 documents with the fact that MPK bought the plow truck. The plaintiffs explain that "[t]here is no dispute [that] the plaintiffs bought the plow truck, drove it off the lot and made payments on it . . . ." In making this claim on appeal, the plaintiffs question the court's interpretation of their claims at

trial. In part I of this opinion, we disposed of the same claim. Thus, we will not review it further here.

Second, the plaintiffs claim that the court erred in finding that they ratified the January 26, 2015 contract. At trial, the plaintiffs asserted that Blackwell never had been a member of MPK despite the appearance of his name on a copy of MPK's articles of organization used in the loan application process and the word "member" written next to his signature on contracts in evidence. In its memorandum of decision, the court found that, "[w]hatever the merits of the plaintiffs' claim regarding Blackwell's authority to purchase the truck on behalf of MPK, the claim is rendered moot by MPK's implied ratification of the transaction by keeping and paying for the vehicle."

The defendant, in its appellate brief, asserts that the court's finding as to ratification was not necessary to its holding and was, therefore, dictum. We agree with the defendant. "A party is not aggrieved by a court's statements that are considered dicta." *Healey* v. *Mantell*, 216 Conn. App. 514, 525, 285 A.3d 823 (2022). "Dictum includes those discussions that are merely passing commentary . . . those that go beyond the facts at issue . . . and those that are unnecessary to the holding in the case. . . . [I]t is not dictum [however] when a court . . . intentionally takes up, discusses, and decides a question germane to, though not necessarily decisive of, the controversy . . . . Rather, such action constitutes an act of the court [that] it will thereafter recognize as a binding decision." (Internal quotation marks omitted.) *Cruz* v. *Montanez*, 294 Conn. 357, 376–77, 984 A.2d 705 (2009). Here, the court's finding that the plaintiffs ratified the January 26, 2015 contract was unnecessary to its holding because the court had already found that MPK agreed to the January 26, 2015 contract. Thus, the plaintiffs could not have been aggrieved by any alleged error as to the court's finding

of ratification, and we decline to review their claim to that effect.

Last, the plaintiffs claim that the court erred in finding "that the [defendant's] failure to supplement the Monroney sticker is insignificant." They argue that they had "offered evidence that the Monroney sticker on the [plow truck] did not in fact show the suggested retail price of the vehicle because the [plow truck] had been equipped with a plow that added approximately $5000 to its cost." Although, in their appellate brief, the plaintiffs provide legal citations that allegedly support their contention that a failure to supplement the Monroney sticker constitutes a violation of CUTPA, the plaintiffs cited no such law and made no such argument before the trial court. "Our rules of practice provide that we are not bound to consider a claim unless it was distinctly raised at trial or arose subsequent to the trial. Practice Book § 60-5. . . . A claim is distinctly raised if it is so stated as to bring to the attention of the court the precise matter on which its decision is being asked." (Emphasis omitted; internal quotation marks omitted.) *A & R Enterprises, LLC* v. *Sentinel Ins. Co., Ltd.*, 202 Conn. App. 224, 229, 244 A.3d 660, cert. denied, 336 Conn. 921, 246 A.3d 2 (2021). In light of the plaintiffs' failure in the trial court to cite any law or to make any argument that would have explained the significance of affixing an addendum to the Monroney sticker, this claim is not preserved for appellate review and we decline to review it. For the foregoing reasons, the plaintiffs' claims fail.[9]

The judgment is affirmed.

In this opinion the other judges concurred.

[9] The defendant, in its appellate brief, asserts as an alternative ground for affirmance that the plaintiffs' fraud, theft, and CUTPA claims are barred by the applicable three year statutes of limitations. We need not address that alternative argument in light of our affirmance of the trial court's decision on other grounds.

JEFFERSON SOLAR, LLC *v.* DEPARTMENT OF ENERGY AND ENVIRONMENTAL PROTECTION ET AL.
(AC 45630)

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

Syllabus

Pursuant to statute (§ 16-244z (a) (1) (C)), the state Department of Energy and Environmental Protection (department) is required "to develop program requirements and tariff proposals for shared clean energy facilities" subject to the approval of the state Public Utilities Regulatory Agency (PURA).

Pursuant further to statute (§ 4-176 (a)), any person may petition an agency for a declaratory ruling as to the applicability to specified circumstances of a provision of the General Statutes, a regulation, or a final decision on a matter within the jurisdiction of the agency.

The plaintiff, a renewable energy developer, brought an action for a declaratory judgment pursuant to statute (§ 4-175), seeking to have the Superior Court issue a ruling as to whether a bid submitted by the defendant F Co. in response to a 2020 request for proposals for shared clean energy facilities satisfied a site control program requirement developed by the defendant department pursuant to § 16-244z (a) (1) (C). I Co., an electric company, had issued the request for proposals seeking bids for shared clean energy facility projects in its service territory, and the plaintiff and F Co. submitted bids to I Co. Bidders were required by the department's program requirements to show that they had control of the generation site or an unconditional right to acquire control or an unconditional option agreement to purchase or lease the site. F Co.'s bid, which contained an option to lease agreement, was selected by I Co. and was ultimately approved by PURA. The plaintiff petitioned the Commissioner of Energy and Environmental Protection to issue a declaratory ruling stating that the department erred in concluding that F Co.'s bid satisfied the site control program requirement and that the department's failure to remove the bid from the rankings was arbitrary and capricious. The commissioner declined to issue the ruling, stating that the plaintiff failed to identify any statute, regulation or final decision of the department to serve as a basis for the declaratory ruling and that the department lacked the authority to issue such a ruling on the basis of the specified circumstances laid out in the petition. The plaintiff thereafter initiated the underlying declaratory judgment action pursuant to the Uniform Administrative Procedure Act (UAPA) (§ 4-166 et seq.). The department filed a motion to dismiss, contending that no statute, final decision, or regulation interfered with the plaintiff's legal rights. The trial court granted the department's motion, concluding that the department's

review of F Co.'s bid was not a final decision, that the program requirements pursuant to § 16-244z were neither General Statutes nor regulations, and that it could not consider the program requirements pursuant to statute (§ 16-35), which barred appeals from PURA energy procurement processes. On the plaintiff's appeal to this court, *held* that the trial court properly dismissed the plaintiff's action seeking a declaratory judgment under § 4-175, as the plaintiff's requested ruling did not ask the court to determine whether a regulation was valid or to determine the application to specified circumstances of a provision of a regulation, a statute, or a final decision: the legislature did not intend for the department's program requirements pursuant to § 16-244z (a) (1) (C) to be regulations subject to the rule-making process under the UAPA, as the language of that statute did not direct the department to establish regulations as the legislature expressly has done in other sections of the same chapter; moreover, the plaintiff did not have a right to judicial review, as the legislature directed the department to develop the program requirements under § 16-244z for PURA's approval, which implicated § 16-35, and that statute expressly provided that such procedures would be uncontested, and to conclude that the program requirements constituted regulations subject to a declaratory judgment under § 4-175 would render meaningless the express language of both §§ 16-35 (c) and 16-244z (a) (1) (C) exempting the procurement process from judicial review.

Argued October 19, 2023—officially released April 16, 2024

Procedural History

Action for, inter alia, a declaratory judgment as to the applicability of a certain provision of the named defendant's shared clean energy program requirements with respect to a certain request for proposals seeking bids for shared clean energy facility projects, and for other relief, brought to the Superior Court in the judicial district of New Britain and transferred to the judicial district of Stamford-Norwalk, Complex Litigation Docket, where the court, *Ozalis*, *J.*, granted the motion to dismiss filed by the named defendant and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Thomas Melone, for the appellant (plaintiff).

Jill Lacedonia, assistant attorney general, with whom, on the brief, was *William Tong*, attorney general, for the appellee (named defendant).

Erick M. Sandler, with whom, on the brief, were *Johanna S. Lerner* and *Lauren G. Moscato*, for the appellee (defendant FuelCell Energy, Inc., et al.).

Opinion

BRIGHT, C. J. The plaintiff, Jefferson Solar, LLC, appeals from the judgment of the Superior Court dismissing its action for a declaratory judgment pursuant to the Uniform Administrative Procedure Act (UAPA), General Statutes § 4-166 et seq. After the defendant Department of Energy and Environmental Protection (department) declined to issue the plaintiff's requested declaratory ruling pursuant to General Statutes § 4-176 (e), the plaintiff sought a declaratory judgment in the Superior Court pursuant to General Statutes § 4-175 (a). On appeal, the plaintiff claims that the court improperly determined that it lacked subject matter jurisdiction over its declaratory judgment action. We disagree and, accordingly, affirm the judgment.[1]

The trial court set forth the following undisputed facts and procedural history in its memorandum of decision. General Statutes § 16-244z[2] "established, among other things, a new statewide program for shared clean energy facilities ([program]). The . . . program is intended to incentivize the creation of new energy projects through awarding long-term contracts for the purchase of electricity produced by the projects. . . . [Section] 16-244z lays out specific tasks for four entities involved in [shared clean energy facility] procurements:

[1] The plaintiff also listed as defendants FuelCell Energy, Inc., and SCEF1 Fuel Cell, LLC (collectively, FuelCell). FuelCell filed an appellate brief with this court asserting several alternative grounds for affirming the judgment. Because we agree with the court's reasoning and affirm the judgment on that basis, we do not consider those alternative grounds.

[2] We note that the legislature amended § 16-244z subsequent to the events at issue. See, e.g., Public Acts 2023, No. 23-102, § 25. Because those amendments are not relevant to this appeal, we refer in this opinion to the current revision of § 16-244z.

The Public Utilities Regulatory Authority (PURA), [the department], and the state's two major electric distribution companies ([electric companies]), The Connecticut Light and Power Company doing business as Eversource Energy (Eversource) and The United Illuminating Company ([United Illuminating]). PURA is the state agency responsible for regulating Connecticut's [electric companies]. . . . Through its energy arm, [the department] is a state agency that has many responsibilities for developing and implementing energy policies and programs. See General Statutes § 22a-2d. Section 16-244z (a) (1) (C) requires [the department] 'to develop program requirements and tariff proposals for shared clean energy facilities . . . .' These requirements are all subject to the review, modification and approval of the PURA. . . .

"Pursuant to that statutory obligation, [the department] prepared new . . . program requirements and submitted them for PURA's review on July 1, 2019. . . . PURA responded to [the department's] filing of the proposed . . . program requirements by initiating an uncontested administrative proceeding for review and approval purposes. Through this proceeding, PURA modified and approved [the department's] proposed . . . program requirements in a final decision issued on December 18, 2019. . . . These program requirements delineate program elements, including the [program's] procurement process, the [program's] structure, the bid evaluation and selection process, project eligibility, and bidder eligibility. . . . The selection of contracts was made pursuant to the bidding process administered by [the department] and the [electric companies]. . . .

"On April 30, 2020, pursuant to [the department's] program requirements, the [electric companies] issued a joint request for proposals ([request]) seeking bids for [shared clean energy facility] projects in their service territories. . . . The program requirements, tariff, and

[the request] required the bidders to demonstrate that they have 'control of the generation site, or an unconditional right, granted by the property owner, to acquire such control.' . . . According to the terms of the [request], an unconditional option to lease agreement was sufficient to satisfy the requisite site control requirement. . . . The program requirements gave [the electric companies] broad discretion and decision-making authority over the evaluation and initial selection of bids submitted in response to the [request]. . . . The program requirements permitted [the department] to audit any selected bidder to ensure compliance with the program. . . . The program requirements also stated that '[the department] shall review and approve the [electric companies'] final selection before the [electric companies] submit them to PURA . . . .' Moreover, pursuant to the program requirements, all selected bids must be approved by PURA. . . .

"At a June 9, 2020, city of Derby Board of [Aldermen/Alderwomen] public meeting, the board approved an option to lease agreement between the city of Derby mayor and FuelCell Energy, Inc., and SCEF1 Fuel Cell, LLC (collectively, FuelCell), for a fuel cell power generating facility on Coon Hollow Road in Derby, Connecticut ([property]). . . . On July 1, 2020, the city of Derby entered into an option to lease agreement with FuelCell for the property. . . .

"In response to [the request], the plaintiff submitted a bid for a 4.0 megawatt solar energy project located in North Branford. . . . FuelCell submitted a bid for a 2.8 megawatt natural gas-powered fuel cell located on the property. . . . The option to lease agreement that FuelCell submitted with its bid was signed by the Mayor of Derby and provided FuelCell with the 'sole and exclusive right, privilege and option to lease [the property] from [Derby], for good and valuable consideration and

upon terms and conditions to be negotiated upon exercise of [the] Option . . . .' The option to lease provides in relevant part: 'Within ninety (90) days after the date of the Notice, the City and [FuelCell] shall enter into a lease agreement upon the terms and conditions set forth in Exhibit B attached hereto and made a part hereof, and such other terms and conditions as the City and [FuelCell] shall negotiate in good faith ([lease]).' . . . Section 4 of Exhibit B to the option to lease provides a specific dollar amount that the annual rent (including the amount of any agreement for payment in lieu of taxes) shall not exceed. . . . [United Illuminating] selected FuelCell's bid as the winning bid for a 2.8 megawatt natural gas-powered fuel cell on the property. . . . Additionally, [United Illuminating] selected a 1.5 megawatt solar project in Milford. . . . [United Illuminating] also selected the plaintiff's bid, but limited the award to a 700 kilowatt facility. . . . On January 22, 2021, PURA approved [United Illuminating's] selections in PURA Docket No. 19-07-01 Ruling to Motion No. 46. . . . On May 13, 2021, the city of Derby Board of [Aldermen/Alderwomen] voted in favor of granting FuelCell the lease in connection with the 2.8 megawatt [shared clean energy facility] project. . . . On August 31, 2021, the city of Derby and FuelCell executed a final lease for the property.

"The plaintiff avers that FuelCell did not satisfy the program requirements' site control provision because it relied on an invalid option to lease. The plaintiff contends that the option to lease had no legal effect because § 22 of the Derby City Charter, which requires a sealed bidding process for any right to use real property, was not complied with as no sealed bidding process took place. The plaintiff also alleges that FuelCell did not have site control of the property because when the city of Derby conveys a property interest, the Derby City Charter does not authorize option leases, it only

authorizes actual leases and outright grants of property interests. The plaintiff further claims that the option to lease did not provide FuelCell with the unconditional right to control because General Statutes § 7-163e was not complied with as there was no public hearing on the proposed option to lease. Moreover, the plaintiff alleges that the option to lease was nothing more than a letter of intent and unenforceable under the statute of frauds because it did not specify a lease price. The plaintiff contends that FuelCell also did not satisfy the site control requirement because the option to lease was conditioned on further approval and the program requirements required bidders to have an unconditional option agreement to purchase or lease the site. Thus, the plaintiff asserts that [the department] was required to not approve [United Illuminating's] selection of FuelCell's bid and [to] remove its bid from the rankings because FuelCell did not meet the site control requirement.

"On February 1, 2021, pursuant to . . . § 4-176[3] and § 22a-3a-4[4] of the Regulations of Connecticut State Agencies, the plaintiff requested that the [Commissioner of Energy and Environmental Protection (commissioner)] issue the following declaratory ruling: '[The department] erred in concluding that the bid submitted by [FuelCell] in the response to the [request] satisfied

[3] General Statutes § 4-176 (a) provides: "Any person may petition an agency, or an agency may on its own motion initiate a proceeding, for a declaratory ruling as to the validity of any regulation, or the applicability to specified circumstances of a provision of the general statutes, a regulation, or a final decision on a matter within the jurisdiction of the agency."

[4] Section 22a-3a-4 (a) of the Regulations of Connecticut State Agencies provides in relevant part: "(1) Any person may petition the Commissioner in writing to issue a declaratory ruling as provided by section 4-176 of the General Statutes. The petition shall identify clearly and with particularity the facts and circumstances which give rise to the petition; any statute, regulation, or final decision of the Department at issue and the particular aspect of it to which the petition is addressed; and the question or questions as to which the declaratory ruling is sought. . . ."

the site control requirements of the [request], and . . . [the department's] failure to remove it from the rankings was clearly erroneous and arbitrary and capricious.' . . . On April 1, 2021, [the commissioner] declined to issue a declaratory ruling." (Citations omitted; footnotes added.)

In the written decision declining to issue the requested declaratory ruling pursuant to § 4-176 (e),[5] the commissioner explained that the plaintiff failed to identify any statute, regulation or final decision of the department "to serve as the [basis] for a declaratory ruling. . . . [A] declaratory ruling must relate to 'the validity of a regulation or the applicability of the provision of the general statutes, the regulation, or the final decision in question to the specified circumstances . . . .' In reviewing and approving the selections of the [electric companies], [the department] is executing the program requirements embodied in a PURA final decision, not a statute, a [department] regulation, or a [department] final decision. Accordingly, the [department] finds that it lacks the authority to issue a declaratory ruling based on the specified circumstances laid out in the petition." (Footnote omitted.)

In response, the plaintiff initiated the underlying declaratory judgment action in the Superior Court pursuant to § 4-175 (a)[6] seeking "a declaratory judgment

[5] General Statutes § 4-176 (e) provides in relevant part: "Within sixty days after receipt of a petition for a declaratory ruling, an agency in writing shall . . . (5) decide not to issue a declaratory ruling, stating the reasons for its action."

[6] General Statutes § 4-175 (a) provides in relevant part: "If a provision of the general statutes, a regulation or a final decision, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the plaintiff and if an agency . . . decides not to issue a declaratory ruling under subdivision . . . (5) of subsection (e) of . . . section 4-176 . . . the petitioner may seek in the Superior Court a declaratory judgment as to the validity of the regulation in question or the applicability of the provision of the general statutes, the regulation or the final decision in question to specified circumstances. . . ."

as to the applicability of the provision of [the department's] regulation (i.e., its [shared clean energy] program requirements, as described herein) as to the specified circumstances of the 2020 [request] . . . ."[7]

The department moved to dismiss the underlying action, claiming that the plaintiff could not seek a declaratory judgment pursuant to § 4-175 because no statute, final decision, or regulation interfered with the plaintiff's legal rights. It argued that its October 22, 2020 review of the bids was not a final decision under § 4-175 and that the program requirements are not regulations under the UAPA because § 16-244z specifically directed the department to develop "program requirements" rather than regulations and because those program requirements are not "generally applicable" under the statutory definition of the term "regulation." See General Statutes § 4-166 (16).

The court agreed with the department, concluding that the department's "mid-level review" of FuelCell's bid was not a final decision and because the program requirements are neither General Statutes nor regulations. The court reasoned that "the plain language of

[7] The present case is the second in a trilogy of cases initiated by the plaintiff in which it has sought to invalidate FuelCell's winning bid. See *Jefferson Solar, LLC* v. *FuelCell Energy, Inc.*, 213 Conn. App. 288, 288 A.3d 1032 (2022), cert. denied, 346 Conn. 917, 290 A.3d 799 (2023) (*Jefferson Solar I*); *Jefferson Solar, LLC* v. *FuelCell Energy, Inc.*, 224 Conn. App. 710, A.3d (2024) (*Jefferson Solar III*). In *Jefferson Solar I*, the plaintiff brought an action against FuelCell asserting, inter alia, a claim for a violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110 et seq., based on FuelCell's allegedly false bid certification. *Jefferson Solar, LLC* v. *FuelCell Energy, Inc.*, supra, 213 Conn. App. 291. The trial court dismissed the CUTPA claim for lack of standing, and this court affirmed that judgment on appeal. Id., 298. In *Jefferson Solar III*, the plaintiff initiated an action against FuelCell and United Illuminating asserting various counts against each defendant based on the award of the contract to FuelCell. *Jefferson Solar, LLC* v. *FuelCell Energy, Inc.*, supra, 224 Conn. App. 710. The trial court again dismissed the action for lack of standing, and we affirmed that judgment. See id.

§ 16-244z does not use the word 'regulation' when empowering [the department] to develop the program requirements. Throughout Title 16, the legislature has repeatedly used the word regulation when it intended to give an agency the power to adopt regulations pursuant to the UAPA. Moreover, if the court were to consider the . . . program requirements regulations, it would run contrary to [General Statutes § 16-35 (c)]. . . . [Section] 16-35 (c) bars appeals from PURA energy procurement processes because the legislature expressly stated that these proceedings 'shall be uncontested.' If the . . . program requirements were regulations, every time a decision was made pursuant to the program requirements, the decision could be appealed under [the] UAPA, however, the legislature did not intend for unsuccessful bidders to file administrative appeals from PURA [energy] procurement proceedings according to the plain language in § 16-35 (c). . . .

"Additionally, these program requirements were not promulgated pursuant to the UAPA formalities for enacting regulations. . . . The conclusion that the . . . program requirements are not regulations is further supported by the nature of the program that these requirements govern. The . . . program requirements are not generally applicable because this is a highly specialized clean energy program, and the requirements apply to a very limited [number] of potential bidders. . . . Section 16-244z is the procedure that the legislature laid out for PURA and [the department] to implement the program . . . . Thus, the . . . program requirements are not regulations." (Citations omitted.) Accordingly, the court granted the department's motion to dismiss, and this appeal followed.

On appeal, the plaintiff claims that the court improperly dismissed its declaratory judgment action under § 4-175 because the program requirements are regulations under the UAPA. Before addressing the parties'

arguments, we set forth the applicable standard of review and relevant legal principles that guide our analysis.

"Administrative agencies are tribunals of limited jurisdiction and their jurisdiction is dependent entirely [on] the validity of statutes vesting them with power and they cannot confer jurisdiction [on] themselves. . . . [A]n administrative body must act strictly within its statutory authority, within constitutional limitations and in a lawful manner. . . . It cannot modify, abridge or otherwise change the statutory provisions, under which it acquires authority unless the statutes expressly grant it that power. . . .

"[T]he question of subject matter jurisdiction is a question of law . . . and, once raised, either by a party or by the court itself, the question must be answered before the court may decide the case. . . . [B]ecause [a] determination regarding . . . subject matter jurisdiction is a question of law, our review is plenary." (Citation omitted; internal quotation marks omitted.) *Kleen Energy Systems, LLC* v. *Commissioner of Energy & Environmental Protection*, 319 Conn. 367, 380–81, 125 A.3d 905 (2015).

"There is no absolute right of appeal to the courts from a decision of an administrative agency. . . . Appeals to the courts from administrative [agencies] exist only under statutory authority . . . . Appellate jurisdiction is derived from the . . . statutory provisions by which it is created, and can be acquired and exercised only in the manner prescribed. . . . In the absence of statutory authority, therefore, there is no right of appeal from [an agency's] decision . . . ." (Internal quotation marks omitted.) *Trinity Christian School* v. *Commission on Human Rights & Opportunities*, 329 Conn. 684, 692–93, 189 A.3d 79 (2018). In the

present case, the relevant statutory authority is §§ 4-175 and 4-176.

Pursuant to § 4-176 (a), "[a]ny person may petition an agency . . . for a declaratory ruling as to the validity of any regulation, or the applicability to specified circumstances of a provision of the general statutes, a regulation, or a final decision on a matter within the jurisdiction of the agency." When the agency declines to issue a declaratory ruling pursuant to § 4-176 (e) (5), "the petitioner may seek in the Superior Court a declaratory judgment as to the validity of the regulation in question or the applicability of the provision of the general statutes, the regulation or the final decision in question to specified circumstances." General Statutes § 4-175 (a). Thus, "a complaint brought pursuant to § 4-175 must set forth facts to support an inference that a provision of the general statutes, a regulation or a final decision, or its threatened application, interferes with or impairs, or threatens to interfere with or impair the legal rights or privileges of the plaintiff." (Internal quotation marks omitted.) *Emerick* v. *Commissioner of Public Health*, 147 Conn. App. 292, 296–97, 81 A.3d 1217 (2013), cert. denied, 311 Conn. 936, 88 A.3d 551 (2014).

Whether the plaintiff has a statutory right to seek a declaratory judgment under § 4-175 (a) "is a question of statutory interpretation over which our review is plenary. . . . Relevant legislation and precedent guide the process of statutory interpretation. General Statutes § 1-2z provides that, '[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.' " (Citation omitted.) *Middlebury* v.

Dept. of Environmental Protection, 283 Conn. 156, 166, 927 A.2d 793 (2007).

On appeal, the plaintiff notes that the dispositive issue in the present case is "whether [the department's] program requirements under the [shared clean energy facility] program are a 'regulation' (i.e., a statement of general applicability that implements, interprets, or prescribes law or policy), such that a declaratory ruling can be requested under [§] 4-176."[8] It argues that the program requirements are regulations under the UAPA because they "are a statement of general applicability implementing law or policy that apply to an entire industry—energy generators that wish to compete under the [shared clean energy facility] program—and thus constitute an agency statement of general applicability, and thus a regulation, under § 4-166 (16)."[9] For its part, the department contends that "the program requirements are not regulations" and that this court "should not endorse the use of § 4-175 as an end run around § 16-35." In its reply brief, the plaintiff argues that "the contested case/final decision [issue under § 16-35 (c) is] irrelevant here. What [§] 16-35 (c) does is remove a PURA energy procurement from the status as a contested case before PURA. But a contested case never included 'a petition for a declaratory ruling under [§] 4-176.' Controlling case law makes it clear that proceedings on a petition

[8] The parties agree that the program requirements do not constitute provisions of the General Statutes and that the department's "mid-level" determination that FuelCell's proposal complied with the program requirements was not a final decision under § 4-175 (a).

[9] General Statutes § 4-166 provides in relevant part: "As used in this chapter . . . (16) 'Regulation' means each agency statement of general applicability, without regard to its designation, that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency. The term includes the amendment or repeal of a prior regulation, but does not include (A) statements concerning only the internal management of any agency and not affecting private rights or procedures available to the public, (B) declaratory rulings issued pursuant to section 4-176, or (C) intra-agency or interagency memoranda . . . ."

for a declaratory ruling under [§] 4-176 are, and have always been, appealable under the UAPA." We agree with the department, as the plaintiff's claim that the program requirements constitute regulations for purposes of § 4-175 is contrary to the clearly expressed intent of the legislature in both §§ 16-35 (c) and 16-244z (a) (1) (C).

We begin with the relevant statutory language. First, § 16-244z (a) (1) (C) provides in relevant part that the department "shall . . . initiate a proceeding to develop program requirements and tariff proposals for shared clean energy facilities eligible pursuant to subparagraph (C) of subdivision (2) of this subsection . . . . On or before July 1, 2019, the department shall submit any such program requirements and tariff proposals to [PURA] for review and approval. On or before January 1, 2020, [PURA] shall approve or modify such program requirements and tariff proposals submitted by the department. . . ." It is significant that the legislature did not direct either the department or PURA to establish "regulations," as it has done expressly in other sections of the same chapter. See, e.g., General Statutes § 16-32a (if "competitive bidding seems likely to reduce procurement costs without impairing quality, continuity or dependability of service or the ability to respond to emergencies, [PURA] may, after notice and public hearing, establish such regulations as it deems necessary to provide for competitive bidding in appropriate cases"); General Statutes § 16-244c (g) ("[PURA] shall establish, *by regulations adopted pursuant to* [*the UAPA*], procedures for when and how a customer is notified that his electric supplier has defaulted and of the need for the customer to choose a new electric supplier within a reasonable period of time or to return to standard service" (emphasis added)). It is a basic rule of statutory interpretation that, 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." (Internal quotation marks omitted.) *In re Cole*, 347 Conn. 284, 297, 297 A.3d 151 (2023). Thus, the fact that the legislature has directed PURA to act by regulation in a related statute but declined to direct either PURA or the department to do so in § 16-244z in developing the program requirements, demonstrates that the legislature did not intend for the program requirements to be regulations subject to the rule-making process under the UAPA. That conclusion is further supported by the overall legislative scheme governing PURA energy procurement proceedings, of which the shared clean energy facility program is a part.

Specifically, the legislature directed the department to develop the program requirements for PURA's approval, which implicates § 16-35 (c). Section 16-35 (c) expressly provides that, "[n]otwithstanding any provision of this title and title 16a, proceedings in which [PURA] conducts a request for proposals or any other procurement process for the purpose of acquiring electricity products or services for the benefit of ratepayers shall be uncontested." By designating proceedings that involve an energy procurement process as "uncontested," the legislature elected not to provide a right to judicial review in such proceedings because "[a] party seeking review of a state agency's action . . . must establish that the injury resulted from a final decision in a *contested case*." (Emphasis added.) *Ardmare Construction Co.* v. *Freedman*, 191 Conn. 497, 503, 467 A.2d 674 (1983). Again, it is significant that "the legislature has, elsewhere in our statutory scheme, expressly provided for judicial review of agency decisions by calling the decision a 'contested case' or by referring to § 4-183." (Footnote omitted.) *Ferguson Mechanical Co.* v.

Dept. of Public Works, 282 Conn. 764, 776–77, 924 A.2d 846 (2007); see also id., 777 nn.12 and 13 (noting statutes that grant right of judicial review by reference to § 4-183 as well as statutes denying basis for appeal under UAPA).

It is axiomatic that "the legislature, rather than the agencies, has the primary and continuing role in deciding which class of proceedings should enjoy the full panoply of procedural protections afforded by the [act] to contested cases, including the right to appellate review by the judiciary. Deciding which class of cases qualif[ies] for contested case status reflects an important matter of public policy and the primary responsibility for formulating public policy must remain with the legislature." (Internal quotation marks omitted.) *Middlebury* v. *Dept. of Environmental Protection*, supra, 283 Conn. 170. Thus, given that the legislature has stated expressly its intent that there be no right to judicial review in PURA initiated procurement proceedings broadly and that it directed the department to develop "program requirements"—not regulations—to be approved by PURA, we cannot agree with the plaintiff that the program requirements constitute regulations that are subject to a declaratory judgment action under § 4-175. To conclude that they are regulations would render meaningless the express language of both §§ 16-35 (c) and 16-244z (a) (1) (C) exempting the procurement process from judicial review. As our Supreme Court has observed, "the absence of judicial review is consistent with the purpose of the public bidding statutes, which is promot[ing] the public interest in the efficient completion of public works projects." (Internal quotation marks omitted.) *Ferguson Mechanical Co.* v. *Dept. of Public Works*, supra, 282 Conn. 778.

In light of that statutory scheme, the plaintiff's reliance on *Walker* v. *Commissioner, Dept. of Income Maintenance*, 187 Conn. 458, 446 A.2d 822 (1982), is

misplaced. In *Walker*, the plaintiff, a recipient of public assistance benefits under a program administered by the defendant agency, sought payment for expenses she had incurred when she moved her residence. Id., 459. The defendant denied the request because "the plaintiff had failed to obtain approval of the expenses prior to moving." Id. Although the regulation under which the plaintiff sought payment did not require prior approval, it was the defendant's policy "not generally available to the public . . . [that] expressly include[d] moving expenses among those special items requiring prior approval . . . ." Id., 460. In determining whether the unstated policy had "a sufficiently substantial effect upon the rights of a party as to constitute a regulation" under the UAPA; id.; our Supreme Court explained that "[i]t is not conclusive that an agency has, or has not, denominated its action a regulation or that it has, or has not, promulgated it procedurally in the fashion that would be required of a regulation. . . . The test is, rather, whether a rule has a substantial impact on the rights and obligations of parties who may appear before the agency in the future." (Citations omitted; internal quotation marks omitted.) Id., 462.

Applying that test, the court reasoned that "[t]he prior approval policy is a statement of general applicability because it applies to all [assistance] recipients seeking help with their moving expenses. . . . The policy also affects the substantial rights of potential recipients in ways in which purely procedural requirements, such as requiring particular information on specific forms, do not. The policy has the effect of denying the payment of moving expenses to anyone who would otherwise qualify . . . . [The prior approval] policy, therefore, concerns more than the [defendant's] internal management; it affects the substantial rights of the potential recipients. Because the prior approval policy is a statement of general applicability . . . that implements,

interprets, or prescribes law or policy and is not a statement concerning only the internal management of the defendant which does not affect private rights, it is a regulation under the UAPA." (Citation omitted; footnote omitted; internal quotation marks omitted.) Id., 463–64.

In the present case, the plaintiff argues that, "[a]s in *Walker*, here [the department's] rules concern more than the department's internal management; [they] affect the substantial rights of the potential [bidders]." According to the plaintiff, "just like a typical regulation, the agency (here, [the department]) administers it and is in charge of implementing it and applying it to specified circumstances. . . . The decision of whether a bidder satisfies [the department's site control rules] resides with [the department]. PURA does not second-guess [the department]. . . . Here, [the department's] rules apply to an entire industry . . . and regulate billions of dollars worth of contracts. Here, as in the normal situation with rules, the [department's] site control rules provide the law that determines who is entitled to the public benefit of the contracts." (Citations omitted.)

The critical distinction between the present case and *Walker*, however, is that here, the department acted in accordance with an express legislative directive to develop "program requirements" to be adopted by PURA, whereas, in *Walker*, the agency developed its policy for administering its own regulation without an express legislative directive to act in a particular manner. Accordingly, the present case does not involve an agency's characterization of its own action, but, rather, it involves the legislature's express directive to the department to develop "program requirements"—not regulations. Moreover, those program requirements were adopted by PURA in an uncontested proceeding, as defined by § 16-35 (c). Consequently, *Walker*'s analysis is not controlling in the present case.

For the same reason, the out-of-state cases on which the plaintiff relies also are unpersuasive. Specifically, the plaintiff cites two cases, *Academy Bus Tours, Inc.* v. *New Jersey Transit Corp.*, 263 N.J. Super 353, 622 A.2d 1335 (N.J. App. Div.) (*Academy*), cert. denied, 134 N.J. 485, 634 A.2d 531 (1993), and *Sa-Ag, Inc.* v. *Minnesota Dept. of Transportation*, 447 N.W.2d 1 (Minn. App. 1989) (*Sa-Ag*), in support of its contention that other state courts have found that bidding requirements constitute rules or regulations under the UAPA. Neither of those cases, however, involved a statutory scheme comparable to that at issue in the present case.

First, in *Academy*, the New Jersey Appellate Division held that the policy of the defendant, New Jersey Transit Corporation (NJ Transit), establishing criteria for contracting out for its bus routes was a rule under the New Jersey Administrative Procedure Act, because the policy was "an agency statement of general applicability and continuing effect that implements or interprets law or policy." (Internal quotation marks omitted.) *Academy Bus Tours, Inc.* v. *New Jersey Transit Corp.*, supra, 263 N.J. Super. 361. In that case, the relevant statutes simply provided that, "[i]n the provision of public transportation services, it is desirable to encourage to the maximum extent feasible the participation of private enterprise and to avoid destructive competition. . . . [NJ Transit] may enter into contracts with any public or private entity to operate motorbus regular route, paratransit or motorbus charter services or portions or functions thereof. Payments shall be by agreement upon such terms and conditions as the corporation shall deem necessary." (Citation omitted; internal quotation marks omitted.) Id., 356. Under those statutes, NJ Transit "adopted a contracting-out policy evidencing its intention to contract out approximately five percent of its existing service and to contract out new and

restructured service. It interpreted the legislative mandate to mean that private carriers should be used when they can maintain quality service; improve the financial position of the state significantly on the route or routes in question; ensure continued responsiveness; and operate in a coordinated system and safely." Id. The court reasoned that the agency "adopted a policy which is intended to be applied generally and uniformly to the prospective ability of outside carriers to bid on bus routes. It prescribes a standard, not expressly provided in the statute, for the participation of outside carriers in the operation of [its] bus routes." Id., 362.

Similarly, in *Sa-Ag*, "the Minnesota Department of Transportation issued a statement . . . (the addendum), to all bidders on state contracts. The addendum purported to explain which haulers of sand, gravel or stone to state highway construction projects would have to adhere to prevailing wage and hourly rates. Claiming that this addendum was an interpretation of [a Minnesota statute], [the] respondents asserted the addendum constituted a rule, the adoption of which is subject to the rulemaking procedures set forth in the Minnesota Administrative Procedure Act (MAPA) . . . . Determining that the addendum was a statement of general applicability and future effect, the trial court concluded the addendum was a rule and enjoined the state from enforcing its provisions unless and until it is adopted as a rule after notice and a hearing pursuant to MAPA." (Citation omitted.) *Sa-Ag, Inc.* v. *Minnesota Dept. of Transportation*, supra, 447 N.W.2d 1–2. On appeal, the Court of Appeals of Minnesota explained that "[t]here is no dispute the addendum is in fact a statement of an agency of general applicability and future effect. . . . The parties agree that, if anything, the addendum would be an interpretive rule, which is one promulgated to make specific the law enforced or

administered by the agency." (Citations omitted; internal quotation marks omitted.) Id., 4. After considering the text of the relevant statute, the court concluded that it was "certainly subject to more than one interpretation and the Department of Transportation thus engaged in rulemaking by issuing the addendum which interprets [that statute]. Consequently, the trial court properly enjoined enforcement of the terms of the addendum unless and until the appropriate state agency adopts a rule pursuant to [MAPA]." Id., 5.

Again, just as with *Walker* v. *Commissioner*, *Dept. of Income Maintenance*, supra, 187 Conn. 458, the critical distinction between both *Academy* and *Sa-Ag* and the present case is that, unlike the clearly expressed legislative directives to the department and PURA in § 16-244z for the department to develop "program requirements" for PURA's approval for the shared clean energy facility procurement process, the agencies in *Academy* and *Sa-Ag* adopted policies interpreting statutes in the absence of a clear legislative directive to act in a particular manner. In addition, neither of those cases involved a statute designating the attendant procurement processes as uncontested proceedings under the respective administrative procedure acts, as § 16-35 (c) does in the present case. Thus, both cases are distinguishable from the present case.[10]

[10] We note that at least one court has held that an agency's bidding requirements are not regulations. In *Medical Management & Rehabilitation Services*, *Inc.* v. *Maryland Dept. of Health & Mental Hygiene*, 225 Md. App. 352, 355, 124 A.3d 1137 (2015), the plaintiffs challenged the defendant state agency's award of a contract to a competitor, and the trial court dismissed the action for failure to exhaust administrative remedies. On appeal, the plaintiffs claimed, among other things, that they were entitled to petition for a declaratory judgment challenging the contract award because the request for proposals was "effectively a regulation that was not adopted in accordance with [the Maryland Administrative Procedure Act]." Id., 364. The Court of Special Appeals of Maryland rejected that claim, holding that the agency's request for proposals "and the related contract award do not constitute a regulation under Maryland law." Id., 369. The court reasoned that the request for proposals did not constitute "a substantially new generally

In sum, mindful of the legislature's role, we reject the plaintiff's proffered interpretation of the program requirements in the present case, which plainly contradicts the legislature's clearly expressed policy decision. Cf. *Kleen Energy Systems, LLC* v. *Commissioner of Energy & Environmental Protection*, supra, 319 Conn. 388 (rejecting any interpretation of § 4-176 that suggests "that the department has broad authority to issue declaratory rulings pursuant to § 4-176 whenever it is asked to interpret a contract that it was involved in drafting, even if the contract was not approved in a contested case and the dispute did not require the department to apply a statute to the specific circumstances of the contractual dispute"). Therefore, because the program requirements are not regulations under the UAPA, the court properly dismissed the plaintiff's action seeking a declaratory judgment under § 4-175, as the plaintiff's requested ruling did not ask the court to decide whether a regulation is valid or to determine the application of a regulation, statute, or final decision. See *Pinchbeck* v. *Dept. of Public Health*, 65 Conn. App. 201, 206, 782 A.2d 242 (holding that § 4-175 did not authorize plaintiff to bring declaratory judgment action because "[s]he did not ask the [trial] court to decide whether a regulation is valid or whether a regulation, statute or decision applied to the facts of [her] case"), cert. denied, 258 Conn. 928, 783 A.2d 1029 (2001).

The judgment is affirmed.

In this opinion the other judges concurred.

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applicable policy" because it was "limited to case management services for a finite segment of the greater Medicaid population for a single contract period of July 1, 2013 through June 30, 2016, and applies only to the case management agencies responding to the [request for proposals]." (Internal quotation marks omitted.) Id., 368.

JEFFERSON SOLAR, LLC *v.* FUELCELL ENERGY, INC., ET AL.
(AC 45620)

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

Syllabus

The plaintiff, a renewable energy developer, brought a third action seeking to invalidate the winning bid by a competing energy developer, the defendant F Co. and its subsidiary, for a long-term clean energy contract with a utility company, the defendant I Co. The plaintiff and F Co. submitted bids in response to a request by I Co. for proposals to construct a shared clean energy facility that would sell energy to the public. Bidders were required to show that they had either control of the generation site, an unconditional right to acquire control or an unconditional option agreement to purchase or lease the site. F Co.'s bid, which contained an option to lease agreement, was selected by I Co. and ultimately approved by the Public Utilities Regulatory Authority. In a prior action the plaintiff brought against F Co., *Jefferson Solar, LLC* v. *FuelCell Energy, Inc.* (213 Conn. App. 288) (prior action), the trial court rendered judgment dismissing the action, which this court affirmed on appeal. The trial court determined that the plaintiff's claims were moot and that it lacked standing to seek a declaratory ruling as to the viability of the option agreement. The court further determined that the plaintiff lacked standing as to its claims for tortious interference with prospective contractual relations and unfair trade practices. In the present action, the plaintiff claimed that F Co.'s bid did not meet the site control requirement and sought declaratory and injunctive relief to void F Co.'s bid and the contract it was awarded as well as damages based on various legal theories, including unfair trade practices. The defendants filed a motion to dismiss, contending that the plaintiff lacked standing to pursue its claims. The trial court granted the motion, concluding that the plaintiff lacked standing to pursue its claims against F Co. for declaratory and injunctive relief because the plaintiff was a disappointed bidder for a public contract that failed to demonstrate fraud, corruption or favoritism that undermined the integrity of the bidding process. The court further determined that the plaintiff lacked standing because the damages it sought, lost profits from the contract that was awarded to F Co., were indirect and too remote from the defendants' allegedly wrongful conduct in submitting and accepting F Co.'s bid. On the plaintiff's appeal to this court, *held*:

1. This court determined, consistent with its reasoning in the prior action, that the plaintiff lacked standing to assert its various causes of action for monetary damages because the injuries it alleged were indirect and too remote from F Co.'s alleged wrongdoing: the plaintiff's claimed

injuries and the defendants' allegedly wrongful conduct were the same in both actions, as the plaintiff's appellate counsel stated during oral argument before this court that there was no meaningful difference between the unfair trade practices claims in both actions, and the plaintiff's other counts that sought damages were based on the same allegation in the prior action that F Co.'s bid did not comply with the site control requirement because the option to lease was invalid; moreover, contrary to the plaintiff's assertion that the trial court in the prior action based its decision on a different complaint with different allegations and lacked the benefit of F Co.'s concession in the present action that its bid certification was no good, the trial court's findings and ultimate conclusion in the present action regarding the remoteness of the plaintiff's claimed injuries were consistent with this court's reasoning in the prior action, which applied with equal force in the present case; furthermore, the record supported the trial court's finding that the plaintiff's claimed injuries were too speculative because there were too many links in the chain of causation for F Co.'s conduct to be the direct cause of the plaintiff's injuries and the Public Utilities Regulatory Authority retained discretion in awarding contracts.

2. The trial court properly concluded that the plaintiff lacked standing to assert its claims for declaratory and injunctive relief because it was a disappointed bidder on a public contract that failed to demonstrate fraud, corruption or favoritism that undermined the bidding process: the plaintiff's claim that the contract was not a public contract because the state was not a counterparty was unavailing, as the contract was awarded pursuant to competitive bidding in a public procurement process that was developed by and subject to the oversight of two state agencies; moreover, the plaintiff's reliance on the program requirements to challenge the award was no different from a disappointed bidder's reliance on state or municipal bidding statutes when challenging the award of a government contract, the program requirements, like competitive bidding laws, having been established for the benefit of the public, not bidders, and the trial court's application of standing rules regarding disappointed bidders on public contracts represented a proper balance between fulfilling the purposes of competitive bidding rules and preventing frequent litigation that might result in extensive delays in the commencement and completion of government projects to the detriment of the public; furthermore, even if, as the plaintiff contended, the contract were a public contract and the trial court improperly failed to find that F Co. knew its bid certification was false and that I Co. undermined the integrity of the bidding process by ignoring the program requirements, nothing in the record showed that F Co.'s bid did not conform to the site control requirement or that I Co. applied that requirement differently to other bidders, as I Co., which was permitted to select bids with option leases, applied the program requirements in a consistent, nondiscriminatory fashion.

Argued October 19, 2023—officially released April 16, 2024

Procedural History

Action for, inter alia, a declaratory judgment invalidating the award of a contract to the named defendant et al. for a shared clean energy facility, and for other relief, brought to the Superior Court in the judicial district of New Britain and transferred to the judicial district of Stamford-Norwalk, Complex Litigation Docket, where the court, *Ozalis*, *J.*, granted the motion to dismiss filed by the named defendant et al. and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Thomas Melone, for the appellant (plaintiff).

Erick M. Sandler, with whom, on the brief, were *Johanna S. Lerner* and *Lauren G. Moscato*, for the appellees (named defendant et al.).

Jennifer L. Morgan, with whom, on the brief was *Julie A. Lavoie*, for the appellee (defendant United Illuminating Company).

Jill Lacedonia, assistant attorney general, and *William Tong*, attorney general, filed a brief for the appellee (defendant Department of Energy and Environmental Protection).

Opinion

BRIGHT, C. J. The plaintiff, Jefferson Solar, LLC, appeals from the judgment of the trial court dismissing the action as to the defendants FuelCell Energy, Inc., and SCEF1 Fuel Cell, LLC (collectively, FuelCell),[1] and the United Illuminating Company (United Illuminating).[2] On appeal, the plaintiff claims that the court

[1] SCEF1 Fuel Cell, LLC, is a subsidiary of FuelCell Energy, Inc., that was created to be the entity that would submit a bid in response to the request for proposals at issue in the present case. For simplicity, we refer to both entities as FuelCell in this opinion.

[2] The plaintiff also named the Department of Energy and Environmental Protection (department) as a defendant in the underlying action. The trial court dismissed the action as to the department in a separate decision, and the plaintiff does not challenge the judgment as to the department on appeal.

improperly concluded that the plaintiff lacked standing to assert its claims. We disagree and, accordingly, affirm the judgment of the trial court.[3]

The following facts, either as found by the trial court after an evidentiary hearing on the defendants' motion to dismiss or as undisputed in the record, and procedural history are relevant to the plaintiff's claims on appeal. The present case arises from a 2020 request for proposals (request) jointly issued by the state's two electric distribution companies (electric companies), United Illuminating and Eversource Energy (Eversource), " 'for the purchase of any energy products and renewable energy certificates' produced by any eligible Class I Shared Clean Energy Facility"[4] under "Year 1" of the shared clean energy facility program (program). See General Statutes § 16-244z (a) (1) (C).[5] The program requires the electric distribution companies to conduct a procurement process for shared clean energy facilities

We note that the department nevertheless filed a brief in support of affirming the court's judgment and that it is an appellee in a separate appeal brought by the plaintiff challenging the dismissal of its action against the department. See *Jefferson Solar, LLC* v. *Dept. of Energy & Environmental Protection*, 224 Conn. App. 668, A.3d (2024).

All references to the defendants in this opinion are to Fuel Cell and United Illuminating only.

[3] The trial court also dismissed the plaintiff's claims on the ground that they were moot, and the plaintiff has challenged that alternative basis for the court's judgment on appeal. Because we agree with the court's conclusion that the plaintiff lacks standing to assert its claims, we do not address the mootness issue. See, e.g., *Healey* v. *Mantell*, 216 Conn. App. 514, 527, 528 n.10, 285 A.3d 823 (2022) (noting that, although courts are not required to address jurisdictional claims in specific order, courts should "address first the issue that disposes of the case").

[4] A shared clean energy facility is an electric generation facility that uses renewable resources, including but not limited to, solar and wind power, fuel cells or geothermal sources. See General Statutes § 16-244x (a) (1); see also General Statutes § 16-1 (a) (20).

[5] We note that the legislature amended § 16-244z subsequent to the events at issue. See, e.g., Public Acts 2023, No. 23-102, § 25. Because those amendments are not relevant to this appeal, we refer in this opinion to the current revision of § 16-244z.

on an annual basis for six years. General Statutes § 16-244z (c) (1) (B). The program allows customers of the electric companies who are unable to generate their own clean energy to purchase clean energy from shared clean energy facilities.

In accordance with § 16-244z, the Public Utilities Regulatory Authority (PURA) initiated a proceeding to establish the procurement plan for each electric company "consistent with . . . the requirements to reduce greenhouse gas emissions in accordance with [General Statutes §] 22a-200a." General Statutes § 16-244z (a) (1) (A). In accordance with the program directives, the Department of Energy and Environmental Protection (department) developed program requirements and tariff proposals for the procurement plan, which were subject to PURA's final approval. General Statutes § 16-244z (a) (1) (C). On December 18, 2019, PURA issued a final decision approving the program requirements and tariff proposals, as modified. See Final Decision, Public Utility Regulatory Authority, "Review of Statewide Shared Clean Energy Facility Program Requirements," Docket No. 19-07-01 (December 18, 2019) (program requirements).

The program requirements provided that the electric companies would select bids with the lowest price proposals first and that the department "shall review and approve the [electric companies'] final selections before the [electric companies] submit them to PURA to ensure consistency with the [p]rogram." Accordingly, the program involves a tiered review process for bids[6] for shared clean energy facilities, pursuant to which the electric companies select the winning bids, the department reviews those selected bids for compliance with

[6] Although the electric companies issued a joint request for proposals, as opposed to an invitation for bids, the program requirements provide that " 'Bid' means a responsive submission by a Bidder to the procurement under this [p]rogram" and that 'Bidder' means an entity that submits a [b]id . . . ."

the program requirements, and PURA issues final approval of the selected bids.

The request was issued on April 30, 2020, consistent with the program requirements. Section 2.4.1 of the request provides in relevant part: "The Bidder must demonstrate that it has control of the generation site, or an unconditional right, granted by the property owner, to acquire such control. . . . In order to be considered to have site control for generation, the Bidder must provide copies of executed documents between the Bidder and property owner showing . . . that the Bidder owns the site or has a lease or easement with respect to the site . . . or . . . that the Bidder has an unconditional option agreement to purchase or lease the site for [a term as long as the term of the standard agreement]." Section 4.4 of the request further specifies that "[s]ubmission of the completed Bid Certification Form, including the affidavit from the owner of the project site and the applicable documentation demonstrating that the Bidder has control of the generation site, or an unconditional right, granted by the property owner, to acquire such control, represents site control." (Footnote omitted.)

The request expressly provided that "[a]ny agreement entered into for the purchase of energy and [renewable energy credits] pursuant to this solicitation is contingent upon obtaining Regulatory Approval by PURA as set forth in the Standard Agreement. Pursuant to applicable Connecticut General Statutes and PURA requirements, each [electric company] will submit required information to PURA following the completion of each annual procurement process. If any of the Bids and/or Standard Agreements do not meet the objectives of PURA, PURA may reject the Bid(s) and Standard Agreement(s). . . . The [electric companies] . . . make no commitment to any Bidder that [they] will accept any Bid(s). The [c]ompanies reserve the right to discontinue

the [request] process at any time for any reason whatsoever. This is a Request for Proposals and not a binding offer to contract.'' The request was for a total of five megawatts in United Illuminating's service territory.

In its April 8, 2022 memorandum of decision granting the defendants' September 7, 2021 motion to dismiss, the trial court found that, in July, 2020, ''FuelCell and the plaintiff submitted bids in response to the [request] for year one of the [program] . . . . On its bid certification form, FuelCell submitted an affidavit from Richard Dziekan, the Mayor of [the city of] Derby [(city)], attesting that [the city], as the owner of the property . . . that was the subject of the energy bid [(property)], understood the site control requirements of the [request] and that FuelCell was authorized to submit a bid for a [clean energy] facility to be located on [the property]. . . . Attached to [Dziekan's] affidavit was the option to lease agreement between the city . . . and FuelCell, dated July 1, 2020. The option to lease provided FuelCell with the 'sole and exclusive right, privilege and option to lease [the property] from . . . [the city] . . . for good and valuable consideration and upon terms and conditions to be negotiated upon exercise of [the] Option.' . . . Section 4 of exhibit B to the option to lease, entitled 'Lease Terms,' provides in relevant part: 'within ninety (90) days after the date of Notice, the [c]ity and [FuelCell] shall enter into a lease agreement upon the terms and conditions set forth in [e]xhibit B attached hereto and made a part hereof, and such other terms and conditions as the [c]ity and [FuelCell] shall negotiate in good faith (the ''Lease'').' . . . Derek Phelps, Director of Government Relations and Business Development for FuelCell, testified at the April 1, 2022 hearing on [the defendants'] motion to dismiss that he believed when FuelCell submitted its bid certification to [United Illuminating], that the option to lease agreement for the property that it had attached

to its bid was valid and that such option to lease gave it site control of the property where it planned to construct the proposed . . . facility. . . .

"The plaintiff submitted a bid for a 4.0 megawatt solar energy project located in North Branford. . . . FuelCell submitted a bid for a 2.8 megawatt natural gas-powered fuel cell located on the property. . . . [United Illuminating] reviewed FuelCell's bid, its option to lease the property agreement, lease terms and the affidavit of the [city's] Mayor as the owner of the property regarding site control. . . . [United Illuminating] found [that] FuelCell's bid satisfied the site control [requirement] and [that] the option to lease demonstrated site control. . . . On September 28, 2020, [United Illuminating] selected [FuelCell's] bid as the winning bid for a 2.8 megawatt natural gas-powered fuel cell. . . . [United Illuminating] selected two other bids for its territory. [It] selected a 1.5 megawatt solar project in Milford and . . . the plaintiff's bid but limited the [plaintiff's project] to a 700 kilowatt facility. . . .

"[In October, 2020], the plaintiff made numerous filings at PURA in an effort to invalidate FuelCell's winning bid and notified [United Illuminating] and [the department] that FuelCell's bid did not meet the site control requirement based on public records. . . . The plaintiff claimed that [United Illuminating] and [the department] were required to reject FuelCell's bid and that they knowingly accepted FuelCell's bid even though it did not meet the program requirements. The plaintiff alleged that it would have received the contract awarded to FuelCell for the energy capacity awarded to FuelCell if [United Illuminating] rejected FuelCell's bid for lack of site control. On January 22, 2021, PURA approved [United Illuminating's] selections . . . .

"Pursuant to General Statutes § 7-163[e], a public hearing was duly noticed and held on May 13, 2021,

with the city of Derby [Board of Aldermen/Alderwomen] relating to the final lease of the property. . . . On May 13, 2021, the [Board of Aldermen/Alderwomen] voted in favor of granting FuelCell the final lease in connection with the 2.8 megawatt [shared clean energy facility]. . . . On August 31, 2021, the final lease was executed between the city . . . and FuelCell." (Citations omitted.)

The present case is the third action initiated by the plaintiff in which it has sought to invalidate FuelCell's winning bid. See *Jefferson Solar, LLC* v. *FuelCell Energy, Inc.*, 213 Conn. App. 288, 288 A.3d 1032 (2022) (*Jefferson Solar I*), cert. denied, 346 Conn. 917, 290 A.3d 799 (2023); see also *Jefferson Solar, LLC* v. *Dept. of Energy & Environmental Protection*, 224 Conn. App. 688, A.3d (2024) (*Jefferson Solar II*).

In October, 2020, the plaintiff initiated *Jefferson Solar I* against FuelCell in three counts. "In count one, the plaintiff sought a declaratory ruling that the option agreement 'does not provide [FuelCell] with any legally enforceable rights' due to the city's alleged failure to comply with the requirements of the city charter and . . . § 7-163e. In count two, the plaintiff alleged that [FuelCell] had submitted 'a false bid certification' in violation of [the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq.] as a result of the city's alleged failure to comply with the requirements of the city charter and § 7-163e 'prior to executing' the option agreement. In count three, the plaintiff alleged that the submission of a false bid certification by the defendants constituted tortious interference with prospective contractual relations.

"On December 10, 2020, the defendants filed a motion to dismiss [*Jefferson Solar I*], alleging, inter alia, that the plaintiff lacked standing. . . . By memorandum of decision dated April 30, 2021, the [trial] court granted

the motion to dismiss. The court first concluded that the plaintiff's request for a declaratory ruling was not ripe for adjudication, as PURA [had] not yet approved [FuelCell's] bid . . . . For the same reason, the court concluded that the plaintiff's tortious interference with prospective contractual relations claim was 'premature' and 'unripe.' The court then concluded that the plaintiff lacked standing to bring its CUTPA claim [because] its alleged injuries 'are remote and indirect.' " (Footnote omitted.) *Jefferson Solar, LLC* v. *FuelCell Energy, Inc.*, supra, 213 Conn. App. 291–93. On appeal to this court in *Jefferson Solar I*, the plaintiff claimed that the court improperly dismissed its CUTPA claim for lack of standing.[7] Id., 293. On June 14, 2022, this court affirmed the judgment of dismissal, reasoning that, "[b]ecause the utility companies, by the plain terms of the request, retained discretion in awarding shared clean energy facility contracts and reserved the right to reject any or all offers, the plaintiff's purported injuries are purely speculative. . . . We, therefore, agree with the trial court's determination that the plaintiff lacked standing to maintain its CUTPA action against the defendants." (Citations omitted.) Id., 297–98.

On May 18, 2021, the plaintiff filed *Jefferson Solar II* in the Superior Court, challenging the department's decision declining the plaintiff's request for a declaratory ruling that FuelCell's option to lease was illegal and did not satisfy the site control requirement under the program. *Jefferson Solar, LLC* v. *Dept. of Energy & Environmental Protection*, supra, 224 Conn. App. 688. The Superior Court dismissed that action for lack of subject matter jurisdiction on April 27, 2022, and the plaintiff appealed. See footnote 2 of this opinion. This

[7] The plaintiff did not challenge the trial court's conclusion that its request for a declaratory ruling and its tortious interference claim were not ripe. See *Jefferson Solar, LLC* v. *FuelCell Energy, Inc.*, supra, 213 Conn. App. 293 n.5.

court affirmed the judgment. See *Jefferson Solar, LLC* v. *Dept. of Energy & Environmental Protection*, supra, 709.

In June, 2021, while *Jefferson Solar I* was pending in this court, the plaintiff filed the underlying action against FuelCell, United Illuminating, and the department. In the operative first amended complaint the plaintiff sought (1) a declaratory ruling that FuelCell's bid did not satisfy the request's site control requirement (first count), (2) injunctive relief voiding the selection of FuelCell's bid and contract and awarding the plaintiff a contract for 3.5 megawatts instead of the 700 kilowatts it was awarded (second count), and (3) monetary damages against (i) FuelCell for its alleged violation of CUTPA (third count) and tortious interference with prospective contractual relations (fourth count) and (ii) United Illuminating and the department for violations of the filed rate doctrine (fifth count), the shared clean energy facility tariff (sixth count),[8] and the plaintiff's due process rights (seventh count) based on the selection of FuelCell's allegedly noncompliant bid.

On September 7, 2021, FuelCell and United Illuminating jointly filed a motion to dismiss for lack of subject matter jurisdiction. In their memorandum of law in support of that motion, the defendants claimed, inter alia, that the plaintiff lacked standing because it is an unsuccessful bidder on a public contract and because the

[8] In its operative amended complaint, the plaintiff alleged, as to counts five and six, that "[t]he tariff and filed rate doctrine prohibit [United Illuminating and the department] from allowing [FuelCell] to receive service and a contract that deviates from the tariff." The trial court subsequently explained that count five of the operative amended complaint asserted "that [the department], the Commissioner [of Energy and Environmental Protection (commissioner)], and [United Illuminating] violated the filed rate doctrine when they allowed FuelCell to receive a contract that deviates from the tariff" and that count six alleged that "[the department], the commissioner, and [United Illuminating] violated the tariff when they selected FuelCell's bid, even though FuelCell did not have site control."

plaintiff's alleged injuries were too remote and indirect to confer it with standing.[9] The plaintiff filed an objection to the motion to dismiss on October 6, 2021, and the defendants filed a reply on October 19, 2021. On November 19, 2021, the court, *Ozalis*, *J.*, heard oral argument on the defendants' motion. On January 27, 2022, the court issued an order scheduling the matter for an evidentiary hearing "to determine the facts surrounding United Illuminating's selection of [FuelCell's] bid and [FuelCell's] understanding of its option to lease when it submitted it with its . . . bid."

At the start of the evidentiary hearing on April 1, 2022, the court explained that the hearing would be limited to two questions. First, "if [FuelCell's] bid had not been accepted for any reason, would the plaintiff have 100 percent been awarded the [clean energy] capacity it desired. That's . . . from the first amended complaint, paragraph 77. And [second], was the option to lease submitted by [FuelCell] in its bid a sufficient basis to demonstrate site control required under the [request]." At the hearing, the court heard testimony from Christie Prescott, the Director of Wholesale Power Contracts for United Illuminating; Attorney Vincent Marino, the city's attorney; and Phelps.

On April 8, 2022, two months before this court issued its decision in *Jefferson Solar I*, the trial court issued its decision dismissing the underlying action as to the defendants on the grounds that the plaintiff's claims were moot and that the plaintiff lacked standing. The court first concluded that, as a disappointed bidder for a public contract, the plaintiff lacked standing to challenge the award of a public contract because it failed to demonstrate fraud, corruption, or favoritism

[9] The defendants also claimed that the plaintiff's claims were moot because FuelCell and the city had executed a final lease for the property and that the plaintiff's claims were precluded by operation of the doctrine of collateral estoppel based on the trial court's decision in *Jefferson Solar I*.

that undermined the bidding process. The court further concluded that the plaintiff lacked standing to assert its claims because its claimed damages, i.e., the lost profits from the contract that was awarded to FuelCell, were indirect and too remote from the defendants' allegedly wrongful conduct in submitting and accepting FuelCell's allegedly noncompliant bid. This appeal followed.

On appeal, the plaintiff claims that the court improperly concluded that it lacked standing to assert all the counts in its complaint against FuelCell. The seven counts of the plaintiff's complaint fall into two categories. In the first two counts, the plaintiff sought declaratory and injunctive relief and, in counts three through seven, the plaintiff sought monetary damages based on various theories. We conclude that this court's decision in *Jefferson Solar, LLC* v. *FuelCell Energy, Inc.*, supra, 213 Conn. App. 297–98, is dispositive of the plaintiff's claims for monetary damages in the present case and that the trial court properly dismissed the plaintiff's claims for declaratory and injunctive relief because the plaintiff lacked standing as a disappointed bidder on a public contract.[10]

As an initial matter, we set forth the applicable standard of review. "A trial court's determination of whether a plaintiff lacks standing is a conclusion of law that is subject to plenary review on appeal." (Internal quotation marks omitted.) *R.S. Silver Enterprises, Inc.* v. *Pascarella*, 163 Conn. App. 1, 7, 134 A.3d 662, cert. denied, 320 Conn. 929, 133 A.3d 460 (2016). "[T]rial courts addressing motions to dismiss for lack of subject matter jurisdiction . . . may encounter different situations, depending on the status of the record in the case. . . . [W]here a jurisdictional determination is dependent on the resolution of a critical factual dispute, it

[10] For ease of discussion, we address the plaintiff's claims in a different order than they are set forth in its principal appellate brief.

cannot be decided on a motion to dismiss in the absence of an evidentiary hearing to establish jurisdictional facts." (Internal quotation marks omitted.) *Good Earth Tree Care*, *Inc.* v. *Fairfield*, 151 Conn. App. 680, 685, 97 A.3d 28 (2014).

When the trial court resolves disputed factual issues after an evidentiary hearing,[11] "[w]e conduct that plenary review . . . in light of the trial court's findings of fact, which we will not overturn unless they are clearly erroneous. . . . This involves a two part function: where the legal conclusions of the court are challenged, we must determine whether they are legally and logically correct and whether they find support in the facts set out in the memorandum of decision; where the factual basis of the court's decision is challenged we must determine whether the facts set out in the memorandum of decision are supported by the evidence or whether, in light of the evidence and the pleadings in the whole record, those facts are clearly erroneous." (Internal quotation marks omitted.) *R.S. Silver Enterprises*, *Inc.* v. *Pascarella*, supra, 163 Conn. App. 7–8.

[11] The plaintiff claims that "the trial court's holding violates [the] plaintiff's due process rights and right to a jury trial because the plaintiff is not required to establish its case by a preponderance of the evidence at this stage, not having had the benefit of discovery. Nor can the court make merits findings of fact that are disputed and [are] properly within the province of the jury." Notably, not only did the plaintiff not object to the evidentiary hearing, it requested the hearing. Moreover, the trial court conducted the evidentiary hearing to determine disputed jurisdictional facts regarding the alleged misconduct in the bidding process, a procedure that our Supreme Court has endorsed. See, e.g., *Unisys Corp.* v. *Dept. of Labor*, 220 Conn. 689, 695–96, 600 A.2d 1019 (1991) ("With respect to this issue of standing—that is bidder injury—questions of fact were raised and the trial court should have allowed an evidentiary hearing. When issues of fact are necessary to the determination of a court's jurisdiction, *due process requires that* a trial-like hearing be held, in which an opportunity is provided to present evidence and to cross-examine adverse witnesses." (Emphasis added; internal quotation marks omitted.)). Accordingly, the trial court did not violate the plaintiff's due process rights or its right to a jury trial by holding a limited evidentiary hearing regarding disputed jurisdictional facts in accordance with the plaintiff's own request.

I

The plaintiff claims that the trial court improperly held that its alleged injuries are too remote and indirect to provide it with standing to assert its various causes of action for monetary damages. As we previously stated, our decision in *Jefferson Solar, LLC* v. *FuelCell Energy, Inc.*, supra, 213 Conn. App. 297–98, is dispositive of the plaintiff's standing to assert those claims.

On appeal in *Jefferson Solar I*, the plaintiff claimed that "the court improperly concluded that it lacked standing to maintain the CUTPA action . . . ." Id., 293. In rejecting that claim, this court first set forth the relevant legal principles regarding standing and, more specifically, the requirement that a plaintiff make a colorable claim of direct injury. Id., 293–95. The court then explained: "It is undisputed that [FuelCell], as part of its bid, submitted both the affidavit of Mayor Dziekan, in which he attested that [FuelCell] had control of the generation site, or an unconditional right . . . to acquire such control, and a copy of the option agreement between the city and FuelCell, which option was assigned to the company. Those materials demonstrate that the company's bid comported with the requirement . . . that a bidder submit proof that it has control of the generation site, or an unconditional right, granted by the property owner, to acquire such control. . . .

"In its complaint, the plaintiff alleged that the city's failure to comply with the bid process requirements of § 22 of the city charter and § 7-163e rendered the option agreement unlawful, without legal effect, and void and illusory. The plaintiff further alleged that, as a result of the city's failure to comply with those requirements, the [option agreement] does not provide the defendants with the unconditional right required by the [request] requirements. For that reason, the plaintiff alleged that the defendants had submitted a false bid certification

in violation of CUTPA, which allegedly caused the plaintiff to suffer an ascertainable loss of money because [it] will lose the revenue from the [program] that it would have received but for [the] defendants' submission of a false bid certification." (Internal quotation marks omitted.) Id., 295.

The trial court in *Jefferson Solar I* reasoned that "[t]he direct recipient of any injury resulting from false certification would be [United Illuminating], the beneficiary of the project. [United Illuminating] would presumably have at least one cause of action against the defendants. Additionally, the real party with purported unclean hands is [the city], which is claimed to have ignored its own city charter in order to furnish the option to lease to [FuelCell]. The plaintiff has not brought an action against [the city], nor does it appear that the plaintiff has standing to maintain such an action. The plaintiff's claims are remote and indirect. If there is a potential victim of [FuelCell's] alleged duplicity, it is [United Illuminating], not the plaintiff. The plaintiff lacks standing to bring the CUTPA claim." (Internal quotation marks omitted.) Id., 296.

This court agreed with that reasoning and also explained that, "[i]f [FuelCell] knowingly submitted a false bid, as the plaintiff alleges, the utility company that was a party to the contract for the shared clean energy facility would be a directly injured party and would be best suited to seek a remedy for the harm. Moreover, although the plaintiff claims that it was 100 percent certai[n] to receive the shared clean energy facility contract in question if [FuelCell] lacked the necessary site control, that contention is undermined by the plain language of the request. . . . Because the [electric] companies, by the plain terms of the request, retained discretion in awarding shared clean energy facility contracts and reserved the right to reject any or all offers, the plaintiff's purported injuries are purely

speculative." (Citations omitted; internal quotation marks omitted.) Id., 296–97. Accordingly, this court held that the plaintiff's alleged injuries—that is, the lost "revenue from the [program] that it would have received but for [FuelCell's] submission of a false bid certification"—were purely speculative. Id., 295; see also id., 297.

In the present case, the trial court likewise concluded "that the plaintiff's injuries are too remote and indirect from FuelCell's conduct to confer [on] the plaintiff standing. . . . Under the first policy factor articulated in *Ganim* v. *Smith & Wesson Corp.*, [258 Conn. 313, 347–48, 780 A.2d 98 (2002)], it would be difficult to determine the damages attributable to FuelCell's wrongdoing as opposed to other independent factors because, in all counts of the [operative] complaint, there are too many links in the chain of causation for FuelCell's conduct to be the direct cause of the plaintiff['s] not receiving its desired contract. . . .

"Under the second policy consideration, [United Illuminating] is the party directly injured by FuelCell's alleged misrepresentations because [United Illuminating] is the party [that the] plaintiff claims FuelCell allegedly made the misrepresentations to and the party [that] relied on them. Thus, [United Illuminating], as the party to a contract as to which an alleged misrepresentation was made, would suffer the direct injury resulting from FuelCell['s] not having site control. Additionally, the city . . . would be the more appropriate defendant under the facts of this case because it is the city . . . that the plaintiff claims did not comply with § 22 of its [c]harter, § 7-163e, and the statute of frauds. . . . Finally, under the third policy consideration . . . the directly injured party, [United Illuminating], can remedy the harm without these attendant problems such as indirectness of injury and apportionment of damages." (Citations omitted; footnote omitted.)

The plaintiff concedes that there is no meaningful difference between its CUTPA claim in *Jefferson Solar I* and its CUTPA claim in the present case.[12] In *Jefferson Solar I*, the plaintiff claimed "damages in an amount equal to the sum of all amounts that [the] plaintiff would have received over the twenty year term of the [shared clean energy facility] tariff contract term for the [shared clean energy facility] capacity that is obtained by [FuelCell] through the use of the false bid certification that would have gone to the plaintiff plus other damages and costs to be proved at trial . . . ." In the present case, the plaintiff's claimed damages under each count for which it sought monetary damages are the same: "damages in an amount equal to the sum of all amounts that [the] plaintiff would have received over the twenty year term of the [shared clean energy facility] tariff contract term for the [shared clean energy facility] capacity that would have gone to the plaintiff but for [the defendants' wrongful conduct] . . . ." Moreover, the plaintiff's other counts seeking monetary damages are based on the same allegation that FuelCell's bid did

[12] Although the plaintiff asserted in its reply brief that "the trial court in [*Jefferson Solar I*] did not hold any factual hearing on the CUTPA claim, did not have the benefit of [FuelCell's] concessions that [it] knew its bid certification was no good, and based its decision on a different complaint with different allegations," during oral argument before this court, counsel for the plaintiff conceded that the allegations in the plaintiff's CUTPA count are the same as the allegations that were made in *Jefferson Solar I*. The respective records confirm the plaintiff's concession.

In *Jefferson Solar I*, the plaintiff alleged in its amended complaint that it "has suffered an ascertainable loss of money because the plaintiff will lose the revenue from its [shared clean energy facility] that it would have received but for [FuelCell's] submission of a false bid certification because the plaintiff would receive a contract for 700 [kilowatts] and not 3.5 [megawatts], or a smaller facility contract than it otherwise would receive." In the present case, the plaintiff likewise alleged that it "has suffered an ascertainable loss of money because the plaintiff will lose the revenue from its [shared clean energy facility] that it would have received but for [FuelCell's] submission of a false bid certification. The plaintiff has received a contract for 700 [kilowatts], and not 3.5 [megawatts], due to [FuelCell's] fraudulent and unfair and deceptive practice."

not comply with the site control requirement under the request because the option to lease was invalid. Thus, whether styled as a CUTPA claim, a tortious interference with prospective contractual relations claim, or violations of the filed rate doctrine, the tariff, or the plaintiff's due process rights, the defendants' alleged wrongful conduct and the plaintiff's claimed injuries are the same as they were in *Jefferson Solar I*—too remote and indirect to confer standing on the plaintiff.[13]

Because this court held in *Jefferson Solar, LLC* v. *FuelCell Energy, Inc.*, supra, 213 Conn. App. 296–97, that the plaintiff's claimed damages were indirect and remote from the alleged wrongful conduct, that decision controls our decision in the present case in which the plaintiff concedes that it suffered the same injuries on account of the same allegedly wrongful conduct. See footnote 12 of this opinion. Although the plaintiff moved for reconsideration en banc of our decision in *Jefferson Solar I*, this court denied that motion. In effect, the plaintiff now requests that we reverse that ruling and reach a different conclusion in this appeal on the basis of the same allegations and claimed damages. We decline to do so. See *Staurovsky* v. *Milford Police Dept.*, 164 Conn. App. 182, 202–203, 134 A.3d 1263 (2016) ("[T]his court's policy dictates that one panel should not, on its own, reverse the ruling of a previous panel. The reversal may be accomplished only if the appeal is heard en banc. . . . Prudence, then, dictates that this panel decline to revisit such requests."

[13] We recognize that neither this court nor the trial court in *Jefferson Solar I* addressed the plaintiff's standing to bring its tortious interference with contractual relations claim because the trial court concluded that that claim was not ripe, and the plaintiff did not challenge that conclusion on appeal in *Jefferson Solar I*. Nevertheless, because the plaintiff's tortious interference claim was based on the same alleged wrongful conduct and injuries as were alleged in the plaintiff's CUTPA claim in *Jefferson Solar I*, this court's holding that the plaintiff lacked standing to assert its CUTPA claim applies equally to the tortious interference claim.

(Citation omitted; internal quotation marks omitted.)), appeal dismissed, 324 Conn. 693, 154 A.3d 525 (2017). Accordingly, the same reasoning employed by this court in *Jefferson Solar, LLC* v. *FuelCell Energy, Inc.*, supra, 296–97, applies with equal force in the present case.

The plaintiff nevertheless contends that our decision in *Jefferson Solar I* is distinguishable because "the trial court in the first action did not hold any factual hearing on the CUTPA claim, did not have the benefit of [FuelCell's] concessions that [it] knew its bid certification was no good, and based its decision on a different complaint with different allegations from the complaint here." We are not persuaded.

First, as noted in footnote 12 of this opinion, during oral argument before this court, counsel for the plaintiff conceded that the allegations in the plaintiff's CUTPA count in the present case are the same as the allegations that were made in its CUTPA count in *Jefferson Solar I*. Second, although the plaintiff suggests that the facts developed at the evidentiary hearing in the present case undermine this court's reasoning in *Jefferson Solar I*, the trial court's findings and ultimate conclusion regarding the remoteness of the plaintiff's claimed injuries in the present case are consistent with that reasoning. Specifically, the trial court in the present case concluded that "in all counts of the plaintiff's [complaint] there are too many links in the chain of causation for FuelCell's conduct to be the direct cause of the plaintiff['s] not receiving its desired contract." The court found that, although Prescott testified that, if FuelCell had been disqualified, the plaintiff likely would have been selected for the 2.8 megawatts of power awarded to FuelCell, it also explained that there was no "guarantee that [the plaintiff] would have made it through the final approval process with PURA for any portion of the 2.8 [megawatts] of power." In other words, because PURA retained discretion in awarding the contracts,

the plaintiff's claimed injuries are speculative. The evidence in the record supports the court's finding, as Phelps testified that, although Eversource had selected FuelCell's bids for three additional projects in Year 1 of the shared clean energy program, "[t]hose selections [had] to be affirmed, I'm going to say certified or finally approved by . . . PURA in the end, and that did not occur with those three projects." Similarly, in *Jefferson Solar I*, this court reasoned that, "[b]ecause the [electric] companies, by the plain terms of the request, retained discretion in awarding shared clean energy facility contracts and reserved the right to reject any or all offers, the plaintiff's purported injuries are purely speculative." *Jefferson Solar, LLC* v. *FuelCell Energy, Inc.*, supra, 213 Conn. App. 297. Accordingly, the facts developed in the present case do not alter this court's previous analysis.

Consequently, consistent with that decision, we conclude that the plaintiff lacked standing to assert its claims for monetary damages in the present case because the plaintiff's alleged injuries are indirect and remote. See id., 296–97.

II

The plaintiff also claims that the trial court improperly concluded that it lacked standing to assert its claims for declaratory and injunctive relief because it is a disappointed bidder on a public contract that failed to establish fraud, favoritism, or corruption that undermined the bidding process. We disagree.

The following legal principles regarding an unsuccessful bidder on a public contract inform our review. "In the context of competitive bidding, it is well established that an unsuccessful bidder on a state or municipal contract has no contractual right under the common law that would afford standing to challenge the award of a contract. . . . [A] bid, even the lowest responsible

one, submitted in response to an invitation for bids is only an offer which, until accepted by the municipality, does not give rise to a contract between the parties. . . . An unsuccessful bidder, therefore, has no legal or equitable right in the contract. Not unlike any other person whose offer has been rejected, the disappointed bidder has no right to judicial intervention. . . .

"Moreover, no statute grants unsuccessful bidders standing to challenge the award of a state contract. . . . In particular, state and local competitive bidding laws have not been enacted in order to protect bidders. These laws serve to guard against abuses in the award of contracts such as favoritism, fraud or corruption and are enacted solely for the benefit of the public and in no sense create any rights in those who submit bids. . . .

"Despite these substantial constraints, [our Supreme Court has] recognized a limited exception to the rules of standing in order to provide a means of protecting *the public's interest in properly implemented competitive bidding processes*. . . . Under this exception, unsuccessful bidders have standing to challenge the award of a public contract where fraud, corruption or acts undermining the objective and integrity of the bidding process existed . . . . [S]uch a suit is brought by one who suffers injury as a result of the illegal activity, but the suit itself is brought in the public interest by one acting essentially as a private attorney general. . . .

"Our policy to limit standing so as to deny some claims brought by unsuccessful and precluded bidders is designed to protect twin goals that serve the public interest in various, sometimes conflicting, ways. The standing rules aim to strike the proper balance between fulfilling the purposes of the competitive bidding statutes and preventing frequent litigation that might result in extensive delay in the commencement and completion of government projects to the detriment of the

public." (Citations omitted; emphasis added; internal quotation marks omitted.) *Electrical Contractors, Inc.* v. *Dept. of Education*, 303 Conn. 402, 412–13, 35 A.3d 188 (2012).

In addition, "an unsuccessful bidder to a municipal contract has no standing to assert a cause of action for money damages for failure of the municipality to follow its competitive bidding laws, regardless of whether the plaintiff alleges fraud, corruption or favoritism." *Lawrence Brunoli, Inc.* v. *Branford*, 247 Conn. 407, 411, 722 A.2d 271 (1999).[14] Thus, in the absence of a colorable claim of fraud, corruption or other acts undermining the integrity of the bidding process, an unsuccessful bidder lacks standing to challenge the award of a public contract. Compare *Spiniello Construction Co.* v. *Manchester*, 189 Conn. 539, 545, 456 A.2d 1199 (1983) (unsuccessful bidder had standing to challenge award of contract because evidence showed that bidding officials favored winning bidder by allowing that bidder to deviate from invitation for bids), with *Ardmare Construction Co.* v. *Freedman*, 191 Conn. 497, 506, 467 A.2d 674 (1983) (unsuccessful bidder lacked standing because elements traditionally thought to undermine competitive bidding process were absent when official "did not apply its requirement inconsistently or in a discriminatory fashion").

In its objection to the defendants' motion to dismiss in the present case, the plaintiff claimed that it is not properly characterized as a disappointed bidder because the shared clean energy facility contracts are not contracts with the government and because it has not

[14] The trial court held that the plaintiff lacked standing as a disappointed bidder to assert its claims for monetary damages pursuant to *Lawrence Brunoli, Inc.* Because we conclude in part I of this opinion that the plaintiff lacks standing to assert those claims based on this court's decision in *Jefferson Solar I*, we focus our analysis in part II of this opinion on whether the plaintiff has standing as a disappointed bidder to assert its claims for declaratory and injunctive relief.

asserted a breach of contract claim against a governmental entity. In the alternative, the plaintiff claimed that, assuming that it is a disappointed bidder on a public contract, it still has standing to seek declaratory and injunctive relief because the integrity of the bidding process was undermined when United Illuminating and the department failed to adhere to the program requirements by awarding FuelCell the contract when FuelCell did not demonstrate site control.

The trial court rejected each of the plaintiff's arguments. First, the court held that the shared clean energy facility contract is a public contract because, "although the contract is ultimately entered into between the bidder and [United Illuminating], the whole process is pursuant to a state administered program." The court next concluded that the limited exception to the standing rule did not apply because "the plaintiff's conclusory allegations do not amount to fraud, favoritism, corruption or acts that undermine the integrity of the bidding system to confer it standing under [that] exception. Additionally, there is nothing in the record to support that the bid submitted by FuelCell did not conform with the [site control requirement], as the program requirements permitted [United Illuminating] to select bids with option leases. . . .

"Moreover, there is no allegation, besides a conclusory assertion, that FuelCell knew its [option to] lease violated [the city's charter] and submitted the bid certification anyway to constitute fraud or to undermine the bidding requirements. In fact, the evidence is to the contrary. . . . [I]t is clear that [United Illuminating] did not use [the city charter] as a basis to reject some bids while ignoring [it] to award other bids. . . . Prescott, the Director of Wholesale Power Contracts for [United Illuminating], who oversaw the bid selection process for [United Illuminating], confirmed that [United Illuminating] found the option to lease submitted by FuelCell

to be acceptable under § 2.4.1 of the [request] and that neither she [n]or anyone else at [United Illuminating] was advised by someone with the proper authority that FuelCell lacked site control and granted the bid anyway to undermine the integrity of the bidding process." (Citations omitted.)

Finally, the court concluded that, "as a disappointed bidder, the plaintiff cannot request declaratory relief as a way to circumvent the fact that it does not have standing to assert its claims because [the declaratory judgment statute] does not create jurisdiction where it would not otherwise exist." (Internal quotation marks omitted.) Accordingly, the court held that the plaintiff lacked standing as a disappointed bidder.

On appeal, the plaintiff contends that the court improperly concluded that the shared clean energy facility contracts are public contracts. It argues that, although the shared clean energy facility "contracts are a public benefit made available to renewable energy developers, the . . . bids are not bids for a contract with a municipality or with any governmental agency. . . . The [shared clean energy facility] contracts at issue are not public contracts under *Ardmare* [*Construction Co.* v. *Freedman*, supra, 191 Conn. 497] because the state is not a counterparty. See, e.g., *Connecticut Energy Marketers Assn.* v. *Dept. of Energy & Environmental Protection*, 324 Conn. 362, 374 [152 A.3d 509] (2016) (holding that 'activities that are proposed by state actors, but which are ultimately performed by private entities' are not state activities)." We are not persuaded.

The plaintiff's reliance on our Supreme Court's holding in *Connecticut Energy Marketers Assn.* is misplaced. In that case, the court addressed whether the department's "issuance of a comprehensive energy strategy . . . pursuant to a legislative directive, and

the subsequent approval of a plan to expand the use of natural gas in this state by the department and [PURA] constituted '"actions which may significantly affect the environment"' within the meaning of General Statutes § 22a-1c, thereby triggering the requirement for written evaluation of the expansion plan's environmental impact pursuant to General Statutes § 22a-1b (c)." (Footnote omitted.) Id., 364–65. The court held that "activities that are proposed by state actors, but which are ultimately performed by private entities, do not constitute 'actions which may significantly affect the environment' for purposes of § 22a-1b (c)." Id., 374. Because *Connecticut Energy Marketers Assn.* involved an entirely different statutory scheme that is not at issue in the present case, our Supreme Court's holding in that case does not resolve the issue presented in the present case—whether the shared clean energy facility contract constitutes a public contract for purposes of the disappointed bidder doctrine.

In that regard, we recognize that neither the state nor any municipality is a party to the contract that was awarded to FuelCell. At the same time, the crux of each count of the plaintiff's complaint is that FuelCell's bid failed to comply with the request or the program requirements that were developed by the department and approved by PURA in accordance with express legislative directives. See General Statutes § 16-244z (a) (1) (C) (department "shall . . . develop program requirements and tariff proposals for shared clean energy facilities" and PURA "shall approve or modify such program requirements and tariff proposals submitted by the department"); see also General Statutes § 16-244z (a) (6) (providing that department's program requirements "shall include" several specific provisions and requirements). Thus, although this is not the typical disappointed bidder case in which a state or local government is a party to the contract, the plaintiff seeks

to challenge the award of a contract pursuant to competitive bidding in a public procurement process, which was developed by and subject to the oversight of two different state agencies. Indeed, the plaintiff's claims depend on the lowest responsible bidder requirement to establish that it would have been awarded the contract, which is the hallmark of a public procurement process. See, e.g., *Powder Horn Constructors, Inc.* v. *Florence*, 754 P.2d 356, 376 (Colo. 1988) (noting that public procurement process is "designed to avoid the appearance . . . of favoritism . . . in public procurement by awarding the contract in all cases to the lowest responsible bidder," whereas "[p]rivate parties are not required to accept the lowest bid").

Specifically, in the operative complaint, the plaintiff alleged that the electric companies "have no discretion in terms of whether they enter into contracts with successful bidders. The contracts are required to be entered into under . . . § 16-244z and [the program requirements]. . . . Nor do the [electric companies] have any discretion as to the basis for selection, which is based upon price for qualified bids as provided for by the tariffs." The plaintiff further alleged that, notwithstanding "the usual boilerplate disclaimer language that purported to reserve to the [electric companies] 'the right to reject any or all offers or proposals' . . . and that the [electric companies] 'make no commitment to any [b]idder that it will accept any [b]id(s)' and that the [request] does not constitute 'a binding offer to contract' . . . the legal and practical reality is that neither [electric company] had the discretion to reject any and all offers unless those offers failed to satisfy the requirements of the tariff, which incorporates the . . . program requirements." (Citation omitted; emphasis omitted.)

Consequently, the plaintiff's reliance on the program requirements to challenge the award of the contract in

the present case is no different than a disappointed bidder's reliance on the state or municipal bidding statutes to challenge the award of a government contract. That is, the program requirements, much like competitive bidding laws, were established for the benefit of the public—not the bidders. See, e.g., General Statutes § 16-244z (e) ("The costs incurred by an electric distribution company pursuant to this section shall be recovered on a timely basis through a nonbypassable fully reconciling component of electric rates for all customers of the electric distribution company. Any net revenues from the sale of products purchased in accordance with any tariff offered pursuant to this section shall be credited to customers through the same fully reconciling rate component for all customers of such electric distribution company.").

Therefore, applying our well established standing rules regarding disappointed bidders on public contracts to the present case represents a "proper balance between fulfilling the purposes of the competitive bidding [rules] and preventing frequent litigation that might result in extensive delay in the commencement and completion of government projects to the detriment of the public." (Internal quotation marks omitted.) *Electrical Contractors, Inc.* v. *Dept. of Education*, supra, 303 Conn. 413. Accordingly, we agree with the trial court that the shared clean energy facility contract awarded pursuant to the request is a public contract.

The plaintiff contends that "even if the contract was a public contract . . . the trial court's conclusion . . . that FuelCell did not know or have reason to know that its lease option was unenforceable is disproven by the testimony at the hearing." According to the plaintiff, "at the time [FuelCell] submitted its . . . bid, [FuelCell] knew, or at the very least had reason to know, that the option to lease and bid certification was no good and did not provide [FuelCell] with control to

anything, much less unconditional control." The plaintiff further maintains that the integrity of the bidding process was undermined when United Illuminating "ignored the [program requirements] on which [the] plaintiff relied when it expended funds necessary to submit a compliant bid." The plaintiff's arguments are unavailing.

The court rejected the plaintiff's "conclusory allegations" that fraud, favoritism, corruption, or other acts undermined the integrity of the bidding process because "there is nothing in the record to support that the bid submitted by FuelCell did not conform with the [site control requirement], as the program requirements permitted [United Illuminating] to select bids with option leases." The court relied on testimony from Prescott, who evaluated the bids for United Illuminating, and found that FuelCell's bid complied with the site control requirements. The court specifically noted that there was no evidence that United Illuminating applied the site control requirement differently to other bidders and, therefore, it would not disturb the bidding official's good faith interpretation of the bidding requirements. Put differently, the court found that United Illuminating did not exhibit favoritism by interpreting and applying the program requirements in a consistent and nondiscriminatory fashion. See *Good Earth Tree Care, Inc.* v. *Fairfield*, supra, 151 Conn. App. 685 (bidding officials do "not exhibit favoritism by making good faith interpretations of bidding requirements and applying them in a consistent and nondiscriminatory fashion").

Accordingly, the plaintiff's assertion, based on its reading of the option to lease and the city charter, that FuelCell knew that its bid certification was false does not alter the court's conclusion that there was no fraud, favoritism, or corruption that undermined the integrity of the bidding process. At bottom, the plaintiff simply disagrees with United Illuminating's, PURA's, and the

department's application of the bidding requirements and seeks to obtain judicial intervention to set aside the award of a public contract on the basis of its own interpretation of the bidding requirements. The plaintiff's interpretation, however, has been rejected by those entities, and the plaintiff has failed to demonstrate that their good faith assessments of their own bidding requirements amount to fraud, favoritism or corruption that undermined the integrity of the bidding process. It is well settled that, "[a]lthough the assessment of the criteria for determining the lowest qualified bidder includes some subjective analysis, that subjective analysis . . . does not carry with it the imprint of favoritism, but rather is a wholly permissive exercise of the [bidding official's] discretion unless favoritism otherwise is illustrated." (Internal quotation marks omitted.) Id., 686. Thus, although the plaintiff asserts that it seeks to vindicate the "public interest in ensuring that government agencies adhere to the law," it has failed to allege facts to support its claim that fraud, corruption or favoritism undermined the bidding process. See *AAIS Corp.* v. *Dept. of Administrative Services*, 93 Conn. App. 327, 332–33, 888 A.2d 1127 (unsuccessful bidder lacked standing to seek injunctive relief because there was "no allegation that any ex parte communications with other bidders took place or that the department was favoring the use of one brand of product over another in the bidding process"), cert. denied, 277 Conn. 927, 895 A.2d 798 (2006). Consequently, we conclude that the plaintiff, as a disappointed bidder on a public contract, lacked standing to challenge the award of the contract because it failed to demonstrate fraud, corruption or favoritism that undermined the integrity of the bidding process. Therefore, the court properly dismissed the plaintiff's claims for declaratory and injunctive relief.

The judgment is affirmed.

In this opinion the other judges concurred.

GREEN TREE SERVICING, LLC *v.* JANE E. CLARK ET AL.
(AC 44582)

Bright, C. J., and Alvord and Palmer, Js.

Syllabus

Pursuant to statute (§ 8-265ee (a)), "a mortgagee who desires to foreclose upon a mortgage . . . shall give notice to each homeowner who is a mortgagor by registered, or certified mail, postage prepaid at the address of the property which is secured by the mortgage. No such mortgagee may commence a foreclosure of a mortgage prior to mailing such notice."

In 2014, the plaintiff G Co. sought to foreclose a mortgage on certain residential property owned by the defendant mortgagor. In 2015, G Co. filed its affidavit of compliance with the state's Emergency Mortgage Assistance Program (EMAP), pursuant to § 8-265ee (a). W Co. was thereafter substituted as the plaintiff. The court granted W Co.'s motion for summary judgment as to liability, and subsequently rendered a judgment of strict foreclosure. The defendant filed an appeal, which was dismissed after he failed to file an appellate brief. The defendant thereafter filed a postjudgment motion to dismiss on the basis that the court lacked subject matter jurisdiction because G Co. failed to send an EMAP notice before commencing the action. The trial court denied the motion to dismiss. The court found that, although G Co. had failed to provide the defendant with timely notice of EMAP before bringing the present action in violation of § 8-265ee (a), the public policy of finality outweighed providing the defendant with a second opportunity to avail himself of EMAP, especially after he undertook to mediate the dispute for nearly one year before fully litigating the matter to a judgment and an appeal. The court further concluded that to allow the defendant to sit on his rights, only to collaterally attack the existing judgment, would have permitted a strategic delay of the proceedings. On the defendant's appeal to this court, *held* that this court affirmed the trial court's judgment denying the defendant's postjudgment motion to dismiss on the dispositive alternative ground that the defendant waived his right to raise a claim concerning G Co.'s compliance with EMAP: although G Co. had failed to timely comply with the EMAP notice requirement and the defendant's motion to dismiss was not an impermissible collateral attack on the foreclosure judgment, as the trial court retained jurisdiction to open the judgment at the time of the filing of the motion to dismiss, this court concluded that the defendant had waived his right to raise a claim concerning G Co.'s EMAP notice compliance, as G Co. effectively alerted the defendant to an issue with compliance in its affidavit by averring that it had given the notice containing the information required by § 8-265ee to the defendant in 2015, more than one year after the

present action had been commenced, and, despite being made aware of this failure to comply with EMAP, at no point during the two years that passed between the filing of G Co.'s affidavit and the trial court's judgment of strict foreclosure did the defendant raise G Co.'s noncompliance with EMAP by way of a motion to strike, in his answer, or in opposing W Co.'s motion for summary judgment, the defendant did not file any opposition to W Co.'s motion for judgment of strict foreclosure, and, although the defendant filed an appeal, that appeal was dismissed after he failed to file an appellate brief; accordingly, although W Co. failed to satisfy a mandatory condition precedent, no motion was filed challenging the action on that basis prior to the court's rendering judgment of strict foreclosure or the defendant's first appeal from that judgment.

Argued December 6, 2023—officially released April 16, 2024

Procedural History

Action to foreclose a mortgage on certain real property owned by the named defendant et al., and for other relief, brought to the Superior Court in the judicial district of Hartford, where the named defendant et al. were defaulted; thereafter, the plaintiff filed an amended complaint; subsequently, Wilmington Savings Fund Society, FSB, doing business as Christiana Trust, not individually but as trustee for Pretium Mortgage Acquisition Trust, was substituted as the plaintiff; subsequently, the court, *Robaina*, *J.*, granted the substitute plaintiff's motion for summary judgment as to liability; thereafter, the court, *Dubay*, *J.*, granted the substitute plaintiff's motion for judgment of strict foreclosure and rendered judgment thereon, from which the defendant Charles I. Merlis appealed to this court, which dismissed the appeal; subsequently, the court, *M. Taylor*, *J.*, denied the motion to dismiss filed by the defendant Charles I. Merlis, and the defendant Charles I. Merlis appealed to this court. *Affirmed.*

Charles I. Merlis, self-represented, the appellant (defendant).

Jeffrey M. Knickerbocker, for the appellee (substitute plaintiff).

Opinion

ALVORD, J. The self-represented defendant Charles I. Merlis[1] appeals from the judgment of the trial court denying his motion to dismiss the foreclosure action following the judgment of strict foreclosure rendered in favor of the substitute plaintiff, Wilmington Savings Fund Society, FSB, doing business as Christiana Trust, not individually but as trustee for Pretium Mortgage Acquisition Trust (Wilmington).[2] On appeal, the defendant claims that the court improperly denied his postjudgment motion to dismiss the action because the original plaintiff, Green Tree Servicing, LLC (Green Tree), failed to give him proper notice of the state's Emergency Mortgage Assistance Program (EMAP), as required by General Statutes § 8-265ee (a).[3] We disagree because

[1] The complaint also named Jane E. Clark; St. Francis Hospital and Medical Center; Webster Bank, National Association; Tortora, Da Silva and Flaherty; and National Credit Adjusters, LLC, as additional defendants. Clark was defaulted for failure to plead, Webster Bank, National Association, was defaulted for failure to disclose a defense, and the remaining additional defendants were defaulted for failure to appear. None of the additional defendants have participated in this appeal. Accordingly, we refer to Charles I. Merlis as the defendant.

[2] Green Tree Servicing, LLC (Green Tree), commenced this foreclosure action in 2014. In November, 2015, the court granted the motion to substitute Ditech Financial, LLC, as the plaintiff. In September, 2016, the court granted the motion to substitute Wilmington as the plaintiff.

[3] General Statutes § 8-265ee (a) provides in relevant part that "a mortgagee who desires to foreclose upon a mortgage which satisfies the standards contained in subdivisions (1), (9), (10) and (11) of subsection (e) of section 8-265ff, shall give notice to each homeowner who is a mortgagor by registered, or certified mail, postage prepaid at the address of the property which is secured by the mortgage. No such mortgagee may commence a foreclosure of a mortgage prior to mailing such notice. Such notice shall advise the homeowner of his delinquency or other default under the mortgage and shall state that the homeowner has sixty days from the date of such notice in which to (1) have a face-to-face meeting, telephone or other conference acceptable to the authority with the mortgagee or a face-to-face meeting with a consumer credit counseling agency to attempt to resolve the delinquency or default by restructuring the loan payment schedule or otherwise, and (2) contact the authority, at an address and phone number contained in the notice, to obtain information and apply for emergency mortgage assistance payments if the homeowner and mortgagee are unable to resolve the delinquency or default."

we conclude that the defendant waived his claim. We therefore affirm the judgment of the court.

The following facts and procedural history are relevant to our resolution of this appeal. In March, 2014, Green Tree commenced this action against the defendant and Jane E. Clark to foreclose a mortgage on residential property in West Hartford. The parties participated in the foreclosure mediation program; see General Statutes § 49-31m; until mediation was terminated due to the defendant's failure to attend a scheduled mediation and to provide required financial information. Upon termination of mediation in February, 2015, the parties reengaged in discovery and motion practice.

On August 31, 2015, Green Tree filed an affidavit of compliance with EMAP. In the affidavit, a paralegal employed by Green Tree's counsel averred that, "[b]ased on . . . [the] business records [of Green Tree's counsel] and its regular business practices, [Green Tree] has complied with the [EMAP] by [Green Tree's counsel] giving on March 20, 2015 to all mortgagors a notice containing the information required by said statute."[4] A few days later, on September 4, 2015, the defendant, who was then represented by counsel,[5] filed a motion to strike the complaint on the basis that Green Tree had misstated his name as "Charles I. Clark," and requested that Green Tree file a new complaint correcting his name. In September, 2015, Green Tree responded to the motion to strike by filing the operative amended complaint. In November, 2015, the court granted Green Tree's motion to substitute Ditech Financial, LLC, as

Although § 8-265ee has been amended since the events underlying this appeal; see Public Acts 2021, No. 21-44, § 8; 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.

[4] The affidavit did not have any attachments.

[5] See footnote 11 of this opinion.

the plaintiff, and, in September, 2016, the court granted the motion to substitute Wilmington as the plaintiff.

On January 11, 2017, the defendant filed an answer and special defenses to the amended complaint. His special defenses alleged that Wilmington lacked standing, that Wilmington did not possess the original note, and payment. In June, 2017, Wilmington filed a motion for summary judgment as to liability. The defendant filed an objection to the motion for summary judgment and affidavit in support of his objection. Therein, he presented argument in support of his special defense of payment and also argued that Green Tree had failed to provide him with a valid notice of acceleration. The court, *Robaina*, *J.*, granted Wilmington's motion for summary judgment as to liability on September 11, 2017. Wilmington thereafter filed a motion for judgment of strict foreclosure, to which the defendant did not file a response, and the court, *Dubay*, *J.*, granted the motion on November 13, 2017. The court set law days to commence on January 29, 2018.

On December 1, 2017, the defendant filed an appeal with this court.[6] Following four extensions of time, the defendant failed to file his appellate brief, and the appeal was dismissed on August 23, 2019. Following the dismissal of the appeal, on December 2, 2019, the court granted Wilmington's motion to reenter the judgment of foreclosure and reset the law days to commence on March 23, 2020. Over the course of the litigation, the court reset the law days a total of eight times.

On October 6, 2020, the defendant filed, on a Judicial Branch form designated for motions to open a judgment, a motion in which he argued that the court lacked

[6] In October, 2018, the defendant filed a motion for articulation, in which he requested articulation as to his special defense of payment and his contention that Wilmington did not possess the original note. The motion for articulation was denied.

subject matter jurisdiction because Green Tree had failed to comply with the EMAP notice requirements, in light of this court's decision in *MTGLQ Investors, L.P.* v. *Hammons*, 196 Conn. App. 636, 638, 230 A.3d 882 (2020) (overruled by *KeyBank, N.A.* v. *Yazar*, 347 Conn. 381, 297 A.3d 968 (2023)), cert. denied, 335 Conn. 950, 238 A.3d 21 (2020). The defendant requested that the court extend the law days for sixty days to permit the parties to brief the subject matter jurisdiction issue. The court granted the motion to set a new law day and set law days to commence on December 8, 2020. The law days were subsequently extended two additional times, to March 30, 2021.

On December 7, 2020, the defendant filed a motion to dismiss the foreclosure action on the basis that the court lacked subject matter jurisdiction over the action because Green Tree had failed to send an EMAP notice before commencing the action. The defendant also filed a memorandum of law in support of his motion. On December 18, 2020, Wilmington filed a memorandum of law in opposition to the defendant's motion to dismiss, arguing that it had complied with the EMAP requirement by sending a letter on March 20, 2015,[7] and that the defendant's argument was barred by his failure to raise the issue in his prior appeal.

The defendant filed a reply on February 19, 2021, arguing that the mailing of the notice more than one year after commencing the foreclosure action did not constitute compliance with EMAP and that his claim was not waivable because it implicated the court's subject matter jurisdiction. On February 22, 2021, Wilmington filed a surreply, in which it argued that the defendant's challenge constituted an impermissible collateral

[7] Wilmington attached to its memorandum of law in opposition to the defendant's motion to dismiss a copy of the March 20, 2015 letter with a certified mail tracking number.

attack on the foreclosure judgment, citing *Bank of New York Mellon* v. *Tope*, 202 Conn. App. 540, 541, 246 A.3d 4 (2021), rev'd, 345 Conn. 662, 286 A.3d 891 (2022). Wilmington additionally argued that § 8-265ee does not require an EMAP notice to be sent to a borrower when a second borrower, in this case Clark, no longer lives at the property. A hearing was held on the motion on February 22, 2021.[8]

On March 4, 2021, the court, *M. Taylor*, *J.*, issued a memorandum of decision in which it denied the defendant's motion to dismiss. The court first found that Green Tree mailed an EMAP notice to both the defendant and Clark on March 20, 2015. No return receipt was provided, and the defendant claimed that he did not receive the notice and, thus, he did not avail himself of the program. On the basis of the untimely mailing, the court found that Green Tree "failed to provide the defendant with timely notice of the EMAP program before bringing this action to foreclose the mortgage on his home, in contravention of the requirements of § 8-265ee (a)."

The court framed its inquiry as "whether the statutory EMAP provision, requiring notice of mortgage assistance programs, ought to nullify a judgment of strict foreclosure after years of litigation, during which the defendant exercised his right to mediation as well as an appeal after judgment, albeit dismissed on procedural grounds." The court explained that "the procedural context of a challenge to subject matter jurisdiction is an important consideration, leading courts to disfavor collateral attacks on judgments." The court noted that the "underlying right to notice of EMAP has existed throughout these proceedings and was, therefore, an existing and knowable legal right."

[8] The transcript of the hearing on the motion to dismiss was not filed in this appeal.

The court considered the important public policy underlying EMAP, which it described as especially important in the present case, in which the defendant had challenged the underlying default of his monthly mortgage payment. The court explained: "Absent the opportunity to apply for mortgage relief and resolve his dispute with the plaintiff in a pre-litigation forum such as EMAP, the dispute has continued into this long-standing litigation. In mitigation of his rights under EMAP, though distinguishable, the defendant undertook the opportunity to mediate his dispute with the plaintiff for nearly a year before litigating the dispute to judgment and an appeal. Therefore, whatever procedural and substantive rights may have flowed upon proper notice of EMAP, the defendant was afforded the opportunity to resolve the matter through court-sponsored mediation, albeit subsequent to engaging the machinery of litigation. Although court-supervised mediation did not resolve the foreclosure, EMAP similarly does not guarantee the resolution of the dispute between the parties."[9]

The court determined that, "[a]t this stage of the proceedings . . . based upon the facts and procedural posture of this case, the public policy of finality outweighs providing the defendant with a second opportunity, to begin again and avail himself of EMAP, especially after taking the opportunity to mediate the dispute for nearly one year before fully litigating the matter to a judgment and an appeal, albeit dismissed on procedural grounds. To allow a defendant to sit on his or her knowable rights, only to arise and collaterally attack an existing judgment after seven years of litigation and an appeal, would permit a strategic delay of proceedings

[9] The court stated in a footnote that it had "no basis to conclude that the defendant intentionally delayed his motion to dismiss for strategic purposes," but it expressed a concern that, "[t]o hold otherwise, here, might allow for such abuse in other cases."

that would have otherwise come to a conclusion on the underlying merits of the case." This appeal followed.

After this appeal was briefed and argued, this court ordered consideration of the appeal deferred until the final disposition by our Supreme Court of two pending cases, *Bank of New York Mellon* v. *Tope*, 345 Conn. 662, 663, 286 A.3d 891 (2022), and *KeyBank, N.A.* v. *Yazar*, 347 Conn. 381, 384, 297 A.3d 968 (2023), which were released on December 20, 2022, and August 1, 2023, respectively. This court then ordered the parties to file supplemental briefs addressing the effect of those decisions on the present appeal and heard additional oral argument on December 6, 2023.

On appeal, the defendant claims that the court improperly denied his postjudgment motion to dismiss the action because Green Tree failed to comply with the EMAP notice requirement.

We first set forth our standard of review. "A motion to dismiss . . . properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court. . . . A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . [O]ur review of the court's ultimate legal conclusion and resulting [determination] of the motion to dismiss will be de novo." (Internal quotation marks omitted.) *Wells Fargo Bank, N.A.* v. *Melahn*, 222 Conn. App. 828, 838–39, 307 A.3d 911 (2023), cert. denied, 348 Conn. 951, 308 A.3d 1038 (2024). "[If] the trial court reaches a correct decision but on [improper] grounds, this court has repeatedly sustained the trial court's action if proper grounds exist to support it. . . . [W]e . . . may affirm the court's judgment on a dispositive [alternative] ground for which there is support in the trial court record." (Internal quotation marks omitted.) Id., 840–41.

We next set forth the EMAP notice requirement. "[Section] 8-265ee prohibits the initiation of a valid suit without providing the EMAP notice by affirmatively providing that [n]o such mortgagee may commence a foreclosure of a mortgage prior to mailing such notice. . . . [General Statutes §] 8-265dd, which establishes EMAP, also prevents the court from rendering any judgment of foreclosure until the EMAP notice has been sent, the sixty day response time has expired, and, if relevant, a determination has been made on the application for emergency mortgage assistance payments. . . . Specifically, the statute provides in relevant part: [N]o judgment of strict foreclosure nor any judgment ordering a foreclosure sale shall be entered in any action instituted by the mortgagee . . . for the foreclosure of an eligible mortgage unless . . . notice to the homeowner who is a mortgagor has been given by the mortgagee in accordance with section 8-265ee and the time for response has expired . . . .

"Moreover, the EMAP does not require a return receipt for the provision of the required notice to a mortgagor, and the lack of a return receipt in the record does not affect [a mortgagee's] compliance with the [EMAP]. . . . Consequently, [it is sufficient] to establish that a letter was actually placed in the mail. . . . Whether a letter actually was placed in the mail may be proved either by direct or circumstantial evidence. It may be proved by the testimony of the person who deposited it or by proof of facts from which it may be reasonably inferred that it was duly deposited." (Citation omitted; internal quotation marks omitted.) Id., 844–45.

Our Supreme Court has held that compliance with the EMAP notice requirement is a condition precedent to the commencement of a foreclosure action. Specifically, it stated: "To have a cause of action on which relief can be granted, the notice requirement must be

fulfilled. The legislature has made it clear that the burden rests with the mortgagee to demonstrate compliance with the EMAP notice requirement. Specifically, subsection (b) of § 8-265ee requires the mortgagee to file an affidavit with the court stating that the notice provisions of subsection (a) have been complied with and that the relevant time period has expired. Only after the mortgagee files such an affidavit may the foreclosure suit continue. See General Statutes § 8-265ee (b). If a mortgagee fails to comply with § 8-265ee (a), it has failed to satisfy a mandatory condition precedent and, therefore, has failed to allege a claim on which relief can be granted." *KeyBank, N.A.* v. *Yazar*, supra, 347 Conn. 393–94.

The court agreed with the plaintiff's contention that the EMAP notice requirement does not implicate a court's subject matter jurisdiction, overruling *MTGLQ Investors, L.P.* v. *Hammons*, supra, 196 Conn. App. 636. *KeyBank, N.A.* v. *Yazar*, supra, 347 Conn. 396–97. In rejecting the argument that a determination that the EMAP notice requirement is not jurisdictional would frustrate the legislative intent of the EMAP amendments, the court stated: "Our holding that the EMAP notice is a mandatory condition precedent does nothing to dilute or impair the legislative intent or public policy underlying the 2008 amendments. The mortgagee is still mandated to provide the homeowner with the EMAP notice. Therefore, the public policy underlying the notice requirement—informing homeowners of their rights and the resources available to them to assist in avoiding foreclosure—is fulfilled. A foreclosure action may not proceed unless the EMAP notice requirement is carried out. If the plaintiff does not satisfy that condition, it has failed to allege a claim on which relief can be granted." Id., 398.

In a footnote, the court in *Yazar* identified the procedural avenues available to a mortgagor seeking to raise

a challenge to the mortgagee's compliance with the EMAP notice requirement, explaining that "[t]he failure to state a claim on which relief can be granted is typically addressed through a motion to strike, and, if the motion is granted, the plaintiff is allowed an opportunity to replead the stricken claim. See Practice Book §§ 10-39 (a) (1) and 10-44. The failure to send an EMAP notice, however, cannot be cured, as the plaintiff must send the EMAP notice prior to initiating suit to have an actionable claim to relief. In these instances, we have stated that the use of a motion for summary judgment to challenge the legal sufficiency of a complaint is appropriate when the complaint fails to set forth a cause of action and the defendant can establish that the defect could not be cured by repleading. . . . As such, either a motion to strike or a motion for summary judgment is an available procedural avenue to challenge the failure to send an EMAP notice." (Citation omitted; internal quotation marks omitted.) Id., 394 n.9.

Most recently, in *Wells Fargo Bank, N.A.* v. *Melahn*, supra, 222 Conn. App. 830–31, 838, this court affirmed a judgment of strict foreclosure, finding no error in the trial court's denial of the defendant's motion to dismiss the action for lack of subject matter jurisdiction on the basis of allegations that the plaintiff had filed false affidavits regarding its compliance with the EMAP notice requirement. The court first considered the trial court's determination that the motion constituted an impermissible collateral attack. Id., 838. This court rejected that basis for the denial of the motion to dismiss, stating that, because there was no final judgment at the time the court decided the motion to dismiss, the motion was not an impermissible collateral attack. Id., 840. However, this court affirmed the judgment on the alternative ground that, because "the question of a plaintiff's compliance with the EMAP notice requirement no longer implicates the court's subject matter

jurisdiction over the foreclosure action . . . the court would have been entitled to deny the motion to dismiss because it failed to raise properly a claim that the court lacked subject matter jurisdiction over the action." (Citation omitted.) Id., 841. The court also stated that "the [trial] court addressed the merits of the defendant's EMAP claim when it adjudicated both the defendant's motion to dismiss and the plaintiff's motion for summary judgment. . . . [T]he court properly determined that the defendant failed to raise a genuine issue of material fact regarding the plaintiff's compliance with the EMAP notification requirement." Id.

In the present case, at the time the trial court denied the defendant's motion to dismiss, the court, to the extent that it concluded that the defendant's motion to dismiss constituted an impermissible collateral attack on the judgment, relied on this court's decision in *Bank of New York Mellon* v. *Tope*, supra, 202 Conn. App. 540. In *Bank of New York Mellon* v. *Tope*, supra, 345 Conn. 665, 671, however, our Supreme Court reversed this court's decision and concluded that the defendant's motion to open the judgment of foreclosure by sale did not constitute a collateral attack on an earlier judgment. It noted that "an attack on a judgment within the same action or proceeding in which it was obtained can be a collateral attack if the judgment has become final and the court that rendered the judgment no longer has jurisdiction to open it." Id., 672. The court explained, however, that "[i]n a foreclosure by sale, the court retains jurisdiction to modify the judgment until the foreclosure sale is approved." Id., 673. Because the sale had not been approved, the judgment was not final and, "[a]s a result, when the court rendered the July, 2017 judgment, a new, four month limitation period was triggered, under which the modified judgment could be opened. Therefore, at the time the defendant filed his motion to open the judgment on September 28, 2017,

the trial court had jurisdiction to open the judgment under [General Statutes] § 52-212a." Id., 676. Accordingly, the court determined that the motion to open was not an impermissible collateral attack. Id.

In the present case, the court retained jurisdiction to open the foreclosure judgment at the time of the filing of the motion to dismiss. See *Real Estate Mortgage Network, Inc.* v. *Squillante*, 184 Conn. App. 356, 360, 194 A.3d 1262 ("[w]hether the trial court has jurisdiction to open a judgment of strict foreclosure is generally dependent on whether title has vested in the encumbrancer"), cert. denied, 330 Conn. 950, 197 A.3d 390 (2018); see also General Statutes § 49-15 (providing that no judgment of strict foreclosure "shall be opened after the title has become absolute in any encumbrancer"). Accordingly, the motion did not constitute an impermissible collateral attack on the judgment. See, e.g., *Wells Fargo Bank, N.A.* v. *Melahn*, supra, 222 Conn. App. 840 (motion to dismiss was not impermissible collateral attack due to absence of final judgment).

As noted previously in this opinion, however, this court may affirm the court's judgment on a dispositive alternative ground for which there is support in the trial court record. Accordingly, we consider Wilmington's contention that the defendant has waived his right to raise a claim concerning EMAP compliance. We conclude that he has.[10]

It is axiomatic that "[t]he court's function is generally limited to adjudicating the issues raised by the parties on the proof they have presented and applying appropriate procedural sanctions on motion of a party. . . . The parties, may, under our rules of practice, challenge

[10] Because we conclude that the defendant has waived his claim regarding EMAP compliance, we need not reach Wilmington's proposed alternative ground for affirmance that no EMAP notice was required because Clark no longer lived at the property.

the legal sufficiency of a claim at two points prior to the commencement of trial. First, a party may challenge the legal sufficiency of an adverse party's claim by filing a motion to strike. Practice Book § 10-39. Second, a party may move for summary judgment and request the trial court to render judgment in its favor if there is no genuine issue of fact and the moving party is entitled to judgment as a matter of law. Practice Book §§ 17-44 and 17-49. In both instances, the rules of practice require a party to file a written motion to trigger the trial court's determination of a dispositive question of law. The rules of practice do not provide the trial court with authority to determine dispositive questions of law in the absence of such a motion. . . .

"A court may not grant summary judgment sua sponte. . . . The issue first must be raised by the motion of a party and supported by affidavits, documents or other forms of proof. . . . When a rule of practice requires a written motion, a memorandum of law and supporting documentation, it is because the issue to be decided is of considerable importance. In the case of summary judgment, which results in a swift, concise end to often complex litigation without benefit of a full trial, the parties and the court need to be as well informed as possible on the applicable law and facts." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Emeritus Senior Living* v. *Lepore*, 183 Conn. App. 23, 25–26 n.3, 191 A.3d 212 (2018).

Our Supreme Court in *Yazar* explained that motions to strike or for summary judgment are appropriate procedural avenues to challenge a plaintiff's compliance with EMAP because "a mortgagee [who] fails to comply with § 8-265ee (a) . . . has failed to satisfy a mandatory condition precedent and, therefore, has failed to allege a claim on which relief can be granted." *KeyBank*,

N.A. v. *Yazar*, supra, 347 Conn. 393–94 and n.9. In setting forth the procedural avenues available to a defendant seeking to raise EMAP noncompliance, our Supreme Court did not identify any postjudgment motions.

In the present case, Green Tree effectively alerted the defendant to an issue with its EMAP compliance in its affidavit, which was filed on August 31, 2015. "Subsection (b) of § 8-265ee requires the mortgagee to file an affidavit with the court stating that the notice provisions of subsection (a) have been complied with and that the relevant time period has expired. Only after the mortgagee files such an affidavit may the foreclosure suit continue." *KeyBank, N.A.* v. *Yazar*, supra, 347 Conn. 394. In the present case, it was averred that Green Tree had given, *on March 20, 2015*, a notice to the mortgagors containing the information required by § 8-265ee (a). Although the affidavit averred compliance with the provisions of the statute, the affidavit clearly stated the date on which it claimed it had given notice, which date, significantly, was after the filing of the present action.

Despite being made aware of Green Tree's failure to timely comply with EMAP, more than two years passed between the filing of the affidavit and the court's rendering of a judgment of strict foreclosure. At no point during those two years did the defendant raise Green Tree's noncompliance with EMAP. Although the defendant, who was then represented by counsel,[11] filed a

[11] The defendant was represented by Attorney John L. Giulietti from September 4, 2015, until after the rendering of judgment on November 13, 2017. On December 6, 2017, Giulietti filed a motion to withdraw his appearance, which the court granted on December 18, 2017. In addition to filing the motion to strike, answer, and opposition to Wilmington's motion for summary judgment, Giulietti also filed on the defendant's behalf a motion to dismiss for lack of subject matter jurisdiction predicated on a claim that Wilmington lacked standing. That motion was later withdrawn.

motion to strike the complaint shortly after the EMAP affidavit was filed, the only ground alleged in the motion to strike was that the complaint had misstated the defendant's last name. Following the filing of an amended complaint to correct the misstatement, the defendant did not thereafter attempt to challenge Green Tree's compliance with EMAP by filing a second motion to strike, assuming it would have been permissible to do so.[12] Moreover, once the defendant filed his answer to the amended complaint, he waived his right to challenge the legal sufficiency of the complaint in a motion to strike. See, e.g., *Rogan* v. *Rungee*, 165 Conn. App. 209, 216 n.3, 140 A.3d 979 (2016) (party waived right to raise issue properly raised in motion to strike by filing answer); see also Practice Book §§ 10-6 and 10-7. In his answer, the defendant did not raise noncompliance with EMAP as a defense. Additionally, the defendant did not at any time file a motion for summary judgment. In responding to Wilmington's motion for summary judgment, filed in June, 2017, the defendant again failed to raise EMAP noncompliance. Finally, the defendant did not file any opposition to Wilmington's motion for judgment of strict foreclosure. He subsequently filed an appeal from the judgment of foreclosure, but the appeal

[12] Although our appellate courts have yet to address the issue, decisions of our Superior Court have held that "the rules of practice preclude a party from filing successive motions to strike when the grounds raised in a later motion could have been raised in the initial motion . . . . [A] second motion to strike may be appropriate in limited circumstances. For example, when a plaintiff, pursuant to Practice Book § 10-44, files a subsequent pleading alleging new facts . . . . Additional motions to strike, however, are not allowed when the grounds asserted therein could have been raised in an earlier motion. . . . [Because] [t]he Practice Book provides for pleading multiple grounds in a single motion to strike and, further, provides that pleadings are to advance after the adjudication of each enumerated pleading, a defendant may not impede the progress of the suit by dividing his grounds and pleading them in consecutive motions to strike." (Citation omitted; internal quotation marks omitted.) *Red Law Firm, LLC* v. *Webster Bank*, Superior Court, judicial district of New Haven, Docket No. CV-12-6029913-S (February 7, 2014).

was dismissed in August, 2019, after the defendant had failed to file his appellate brief.

Thus, although Wilmington failed to satisfy a mandatory condition precedent, no motion was filed challenging the action on that basis prior to the court's rendering of a judgment of foreclosure or the defendant's first appeal from that judgment. Moreover, because "the question of a plaintiff's compliance with the EMAP notice requirement no longer implicates the court's subject matter jurisdiction over the foreclosure action . . . the court would have been entitled to deny the motion to dismiss because it failed to raise properly a claim that the court lacked subject matter jurisdiction over the action." *Wells Fargo Bank, N.A.* v. *Melahn*, supra, 222 Conn. App. 841; see also, e.g., *Bank of New York Mellon* v. *Croce*, Superior Court, judicial district of Fairfield, Docket No. CV-18-6072015-S (September 11, 2023) (denying motion to dismiss that claimed plaintiff failed to comply with EMAP on basis that failure to comply with EMAP is not subject matter defect and defendant had waived her right to file motion to dismiss on other grounds by filing her answer).

Accordingly, we conclude, under the specific procedural facts and circumstances of the present case, that the defendant waived his right to challenge Green Tree's compliance with EMAP and that the court's denial of the defendant's postjudgment motion to dismiss does not constitute reversible error.

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

In this opinion the other judges concurred.

JUSTINE LYONS *v.* BIRMINGHAM LAW OFFICE, LLC, ET AL.

(AC 45631)

(AC 45632)

Moll, Cradle and Westbrook, Js.

Syllabus

Pursuant to statute (§ 52-59b (a)), "a court may exercise personal jurisdiction over any nonresident individual [or] foreign partnership . . . who in person or through an agent: (1) Transacts any business within the state; (2) commits a tortious act within the state . . . [or] (3) commits a tortious act outside the state causing injury to person or property within the state . . . if such person or agent (A) regularly does or solicits business . . . or derives substantial revenue from goods used or consumed or services rendered, in the state, or (B) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce . . . ."

The plaintiff appealed from the judgment of the trial court dismissing the underlying action against several defendants for lack of personal jurisdiction. The plaintiff's complaint alleged, inter alia, negligence against the defendants arising from their involvement in the sale of Vermont real property owned by D. The plaintiff was the longtime girlfriend of D and lived with him for years prior to his death in December, 2020. The plaintiff and D were Connecticut residents at all relevant times. In 2020, D's attorneys, B and B Co., represented D in the sale of the Vermont property to a buyer from Massachusetts represented by the buyer's attorneys, S and S Co. The plaintiff had no ownership interest in the Vermont property and was not a party to the real estate transaction. Throughout his representation of D in the sale of the Vermont property, B communicated with D at various times while D was in Connecticut. B was the sole member of B Co., a Vermont law firm, practiced law exclusively in Vermont, and was not admitted to the Connecticut bar. S Co. was located in and conducted business in Vermont and, although S had previously practiced law in Connecticut, she moved her law practice to Vermont in 2013 and retired from the practice of law in Connecticut in 2019. S Co. had represented clients from across the Northeast, as evidenced by the testimonials on its website from out-of-state clients, none of which were from a Connecticut resident. S was also listed as lead counsel for a party to a federal action in the United States District Court for the District of Connecticut as late as 2019, but the party that she represented was no longer actively involved in the action at that time. The sale of the Vermont property closed on December 23, 2020, and D's attorneys were instructed by D to have the buyer's attorneys wire the sale proceeds to the plaintiff's bank account. D's

attorneys forwarded the provided bank account information to the buyer's attorneys. On December 24, 2020, the buyer's attorneys attempted to wire the money to the account, but they could not do so because the provided account information was incorrect. The buyer's attorneys subsequently emailed D's attorneys to notify them that the wire transfer could not be completed with the account information provided. On December 26, 2020, D died, and D's attorneys subsequently contacted the buyer's attorneys to notify them of D's death. D's attorneys instructed the buyer's attorneys to wire the money from the sale proceeds to their attorney trust account, which the buyer's attorneys did. Upon receiving the sale proceeds, D's attorneys held the money in the account until they spoke with W, the attorney for the fiduciaries of D's estate. D's attorneys then released the sale proceeds to W to hold in escrow until the Probate Court could determine ownership of the funds. D's attorneys and the buyer's attorneys filed separate motions to dismiss the plaintiff's complaint, arguing that the trial court lacked personal jurisdiction over them as nonresidents of Connecticut because the plaintiff failed to prove that the requirements of § 52-59b (a) were satisfied as to any of the defendants. To support her claim that the defendants were subject to personal jurisdiction in Connecticut, the plaintiff pointed to evidence including, inter alia, a portion of the website for D's attorneys that was titled "Attention: out of state sellers," B's deposition testimony that B Co. had clients from "all over the place," and language from the website for the buyer's attorneys indicating that they provided legal services in the Northeast. After an evidentiary hearing, the trial court granted the defendants' motions to dismiss, concluding that it did not have personal jurisdiction over the defendants pursuant to § 52-59b (a) and that the defendants had insufficient minimum contacts with Connecticut to satisfy constitutional due process requirements. *Held*:

1. The trial court properly determined that D's attorneys were not subject to personal jurisdiction pursuant to § 52-59b (a):

a. The plaintiff failed to meet her burden of establishing that D's attorneys transacted any business in Connecticut within the meaning of § 52-59b (a) (1): D's attorneys derived only minimal income from Connecticut residents, did not solicit business in Connecticut, and did not promote themselves as a national firm, and, with respect to the sale of the Vermont property, D's attorneys performed all legal services exclusively in Vermont and did not meet with D or the plaintiff in Connecticut; moreover, D's attorneys were retained to represent D in the sale of real property located in the state of Vermont and, although both D and the plaintiff were Connecticut residents at all relevant times and D's attorneys conversed with D several times while he was in Connecticut, those facts were insufficient to establish that D's attorneys transacted business in the state without additional evidence that D's attorneys had projected themselves into Connecticut in such a manner that they purposefully

availed themselves of the benefits and protections of its laws; furthermore, contrary to the plaintiff's claim, the transfer by D's attorneys of the sale proceeds to and their communication with W and W's firm, Connecticut residents, were insufficient to satisfy the requirements of § 52-59b (a) (1), as the plaintiff failed to provide any evidence that D's attorneys affirmatively and purposefully contacted W or W's firm or that a contract existed between D's attorneys and W or W's firm.

b. The plaintiff could not prevail on her claim that the trial court had personal jurisdiction over D's attorneys pursuant to § 52-59b (a) (2); the plaintiff failed to meet her burden of establishing that D's attorneys committed a tort in Connecticut, given that B clearly denied in his affidavit that he committed any tortious acts in Connecticut, the plaintiff failed to refute those claims, and the plaintiff failed to present evidence demonstrating that the act of wiring the money from the sale proceeds involved false representations made by D's attorneys regarding anyone or anything related to the subject real estate transaction or, specifically, regarding the plaintiff and/or her alleged property or assets.

c. The plaintiff could not prevail on her claim that the trial court had personal jurisdiction over D's attorneys pursuant to § 52-59b (a) (3): although the plaintiff argued that D's attorneys regularly solicited business in Connecticut by virtue of their website and pointed to B's deposition testimony that B Co. had clients from "all over the place," that evidence, at best, merely established that D's attorneys had previously had clients who were not Vermont residents and that they had information available for potential out-of-state sellers on their website, but the evidence was too attenuated to establish that D's attorneys had either done any business in the state of Connecticut or had specifically solicited business in the state; moreover, there was no evidence that D's attorneys received any revenue from Connecticut other than minimal income received from D in connection with the sale of the Vermont property, and the plaintiff failed to present any facts to support her claim that D's attorneys received substantial revenue from Connecticut; furthermore, although the evidence cited by the plaintiff may support a claim that D's attorneys derived some revenue from interstate commerce, the plaintiff did not provide specific evidence demonstrating the number of interstate clients or amount of interstate revenue derived by D's attorneys but, rather, provided vague evidence that was insufficient to support a conclusion that the amount of revenue D's attorneys received from interstate commerce was substantial.

2. The plaintiff could not prevail on her claim that the buyer's attorneys were subject to personal jurisdiction pursuant to § 52-59b (a) (3):

a. Even assuming, arguendo, that the buyer's attorneys committed tortious acts outside of Connecticut causing injury to the plaintiff within the state, the plaintiff provided insufficient evidence that the jurisdictional requirements in § 52-59b (a) (3) (A) were satisfied: the plaintiff's claim that the buyer's attorneys regularly solicited business in Connecticut

through their website was unavailing, as the language highlighted by the plaintiff was taken out of context and given that, read in its entirety, the website stated that the buyer's attorneys provided services "in this beautiful part of the Northeast," it appeared that the website advertised the legal work that S Co. did in Vermont specifically, rather than advertising to the Northeast as a whole, and it was not apparent from that portion of the website that the buyer's attorneys regularly conducted or solicited business in Connecticut; moreover, although the website noted that S was admitted to practice in Connecticut, the information provided was a resume only, intended to provide potential clients with further information about S, rather than a solicitation of Connecticut clients; furthermore, there was insufficient evidence that the buyer's attorneys derived substantial revenue from the state as, even assuming, arguendo, that S were still involved in the referenced District Court case, that did not support the assertion that the buyer's attorneys derived substantial revenue from Connecticut, and, on the contrary, S's affidavit supported her assertion that she had derived minimal, if any, revenue from the state since she retired from practicing law in Connecticut, and it was unlikely that, even if S were still involved in the District Court case, that the proceeds from that case alone would have demonstrated that the buyer's attorneys could fairly have been expected to be haled into court in Connecticut for an entirely unrelated case.

b. The plaintiff provided insufficient evidence from which to conclude that the buyer's attorneys derived substantial revenue from interstate or international commerce that would subject them to personal jurisdiction pursuant to § 52-59b (a) (3) (B): although the testimonials on the website for the buyer's attorneys may have supported a claim that the buyer's attorneys derived revenue from interstate commerce, the plaintiff failed to provide sufficient evidence about these transactions from which the court could determine whether the buyer's attorneys derived substantial revenue from interstate commerce and, rather, the plaintiff merely showed that the website contained testimonials from clients from states other than Vermont without further information about what percentage of the buyer's attorneys' revenues those non-Vermont clients made up, the amount of revenue derived from those clients, or any other relevant facts and, therefore, the plaintiff provided insufficient evidence to conclude that, even if the buyer's attorneys did derive some revenue from interstate commerce, that revenue was substantial enough to satisfy the requirements of § 52-59b (a) (3) (B).

3. Because the plaintiff failed to meet her burden in establishing that the trial court could exercise personal jurisdiction over the defendants pursuant to § 52-59b (a), this court was not required to decide whether the defendants had sufficient minimum contacts with Connecticut to meet the constitutional requirements of due process.

Argued January 11—officially released April 16, 2024

Procedural History

Action to recover damages for, inter alia, negligence, and for other relief, brought to the Superior Court in the judicial district of New Haven, where the court, *Wilson, J.*, granted the motions to dismiss filed by the named defendant et al. and rendered judgment thereon, from which the plaintiff filed separate appeals to this court. *Affirmed.*

Michael S. Taylor, with whom were *Brendon P. Levesque*, and, on the brief, *Steven Berglass* and *Rosie Miller*, for the appellant (plaintiff).

Colleen Vellturo, with whom, on the brief, was *Stephen P. Brown*, for the appellees (named defendant et al.).

Walter J. Klimczak III, for the appellees (defendant Marylou Scofield et al.).

Opinion

WESTBROOK, J. The plaintiff, Justine Lyons, appeals from the judgment of the trial court dismissing the underlying action against the defendants Birmingham Law Office, LLC, and Attorney Matthew Birmingham (Birmingham defendants); and Marylou Scofield, PC, and Attorney Marylou Scofield (Scofield defendants),[1] for lack of personal jurisdiction. The plaintiff claims that the court improperly concluded that (1) personal jurisdiction over the defendants was not conferred under our state's long arm statute, General Statutes § 52-59b, and (2) exercising jurisdiction over the defendants would violate the due process requirements of

[1] The plaintiff additionally named as defendants The Law Offices of David L. Weiss and Attorney David L. Weiss (Weiss defendants). The Weiss defendants, however, are not participating in this appeal. Accordingly, all references to the defendants in this opinion are only to the Birmingham defendants and the Scofield defendants, collectively.

the United States constitution because they have insufficient "minimum contacts" with the state.[2] We disagree and, accordingly, affirm the judgment of the trial court.

We consider the following facts as alleged in the complaint and those facts contained in the affidavits and exhibits submitted in support of the defendants' motions to dismiss and the plaintiff's opposition thereto. The plaintiff was the longtime girlfriend of Alfred Ducharme (decedent) and lived with him for years prior to his death in December, 2020. Both the plaintiff and the decedent were Connecticut residents at all relevant times. The decedent owned property at 137 Flatow Road in Ludlow, Vermont (Vermont property), in which the plaintiff had no ownership interest. In 2020, the Birmingham defendants represented the decedent in the sale of the Vermont property to a buyer from Massachusetts represented by the Scofield defendants. The plaintiff was not a party to this real estate transaction.

Birmingham Law Office, LLC, is located and conducts business in the state of Vermont. Attorney Birmingham is the sole member of this firm. He practices law exclusively in Vermont. He is not admitted to the Connecticut bar. Throughout his representation of the decedent in the sale of the Vermont property, Attorney Birmingham communicated with the decedent at various times while the decedent was in Connecticut.[3]

[2] The plaintiff additionally claimed that there was personal jurisdiction over the defendants pursuant to General Statutes § 33-929 (f), the state's long arm statute pertaining to foreign corporations. It is well settled, however, that our "general long arm jurisdiction provision, § 52-59b, rather than our corporation specific long arm provision, § 33-929, applies to foreign [limited liability companies]." *Matthews* v. *SBA, Inc.*, 149 Conn. App. 513, 546, 89 A.3d 938, cert. denied, 312 Conn. 917, 94 A.3d 642 (2014). The plaintiff's counsel conceded at oral argument before this court that § 33-929 (f) is inapplicable to the defendants.

[3] The exact nature and extent of these communications are not clearly alleged. It appears, however, that the Birmingham defendants and the decedent communicated several times via telephone and email in connection with the sale of the Vermont property while the decedent was in Connecticut.

Marylou Scofield, PC, is located and conducts business in the state of Vermont. Although Attorney Scofield previously practiced law in Connecticut, she moved her law practice to Vermont in 2013 and retired from the practice of law in Connecticut in 2019. Marylou Scofield, PC, has represented clients from across the Northeast, as evidenced by the testimonials on its website from out of state clients. None of the testimonials, however, is from a Connecticut resident. Attorney Scofield was additionally listed as the lead counsel for a party to a federal action in the United States District Court for the District of Connecticut[4] as late as 2019, but the party that she represented was no longer actively involved in the action at that time.[5]

A real estate closing occurred on December 23, 2020, and the Vermont property was sold. At the time of closing, the decedent instructed the Birmingham defendants to have the Scofield defendants wire the sale proceeds to the plaintiff's bank account.[6] The Birmingham defendants forwarded the provided bank account information to the Scofield defendants. On December 24, 2020, the Scofield defendants attempted to wire the money to the account but could not do so because the provided account information was incorrect. The Scofield defendants subsequently emailed the Birmingham defendants to notify them that the wire transfer could not be completed with the account information provided.

The complaint does not allege that Attorney Birmingham ever traveled to Connecticut to meet with the decedent.

[4] See *Wachovia Mortgage, FSB* v. *Toczek*, Docket No. 3:18-CV-1965 (VLB), 2019 WL 6837788 (D. Conn. December 16, 2019).

[5] Attorney Scofield represented Wachovia Mortgage, FSB, in the District Court action. On June 10, 2013, the Superior Court entered an order granting the motion of Wachovia Mortgage, FSB, to substitute Wells Fargo Bank, N.A., as the plaintiff.

[6] The bank account provided was held with a Florida bank, not a Connecticut bank.

On December 26, 2020, the decedent died. The Birmingham defendants contacted the Scofield defendants to notify them of the decedent's death. The Birmingham defendants instructed the Scofield defendants to instead wire the money from the sale proceeds to their IOLTA account,[7] which the Scofield defendants subsequently did. Upon receiving the sale proceeds, the Birmingham defendants held the money in their IOLTA account until they spoke with the defendant Attorney David L. Weiss of the defendant The Law Offices of David L. Weiss (Weiss defendants), the attorney for the fiduciaries of the decedent's estate. The Birmingham defendants subsequently released the sale proceeds to Attorney Weiss to hold in escrow until the Probate Court could determine ownership of the funds.[8]

The plaintiff commenced the present action by way of a three count complaint against the defendants on June 7, 2021. The complaint alleged negligence and violations of the Connecticut Unfair Trade Practices Act, General Statutes § 42-110a et seq., arising from the sale of the Vermont property.

The Birmingham defendants filed a motion to dismiss for lack of personal jurisdiction on August 3, 2021. They argued that the court "lacks personal jurisdiction over the [Birmingham] defendants as nonresidents of the state of Connecticut. More particularly, the requirements of the long arm statute . . . § 52-59b . . . have not been met because Attorney Birmingham practices exclusively in the state of Vermont and has not performed legal services in relation to any property or

[7] "IOLTA stands for interest on lawyers' trust accounts." (Internal quotation marks omitted.) *Office of Chief Disciplinary Counsel* v. *Miller*, 335 Conn. 474, 476 n.1, 239 A.3d 288 (2020).

[8] Attorney Birmingham, in an affidavit, averred that he "sent the sale proceeds to [Attorney Weiss] based on his agreement to hold the funds in escrow until the probate court determined who was entitled to receive the funds."

asset in this state. . . . The only connection with this matter is his former representation of a seller of real property located in Vermont. Moreover, personal jurisdiction would violate constitutional due process because there are insufficient 'minimum contacts' with this state, which is required under due process. He has no offices or employees in Connecticut and does not own, possess or use real property in this state. It is not foreseeable that Attorney Birmingham would be haled into court in the state of Connecticut, and, as such, personal jurisdiction would offend traditional notions of fair play and substantial justice."

The Scofield defendants also filed a motion to dismiss for lack of personal jurisdiction on August 4, 2021. The Scofield defendants argued that, "in this matter, the state of Connecticut does not have jurisdiction over the [Scofield] defendants because they did not transact any business within . . . the state of Connecticut, nor do the [Scofield] defendants meet the minimum contacts requirements . . . ."

The plaintiff filed objections to both motions to dismiss, to which the Birmingham defendants and the Scofield defendants each filed a reply. In her objections to the defendants' motions to dismiss, the plaintiff argued that "the requirements of Connecticut's long arm statute . . . are satisfied and due process is not violated by [the] court's exercise of personal jurisdiction over the defendants." Specifically, she argued that "[t]he Birmingham defendants engaged in Connecticut communications and transactions, including legal representation of a Connecticut resident as well as negotiation and agreement with a Connecticut attorney, thus transferring substantial monies to that Connecticut attorney. Attorney Birmingham is currently admitted in the Connecticut Superior Court, and the Birmingham defendants' Internet website solicits and advertises for out-of-state interstate clients. The instant action involves

Connecticut conduct and improper actions of the Birmingham defendants."

As to the Scofield defendants, the plaintiff argued that "[Attorney] Scofield currently maintains admission in the United States District Court for the District of Connecticut . . . the Scofield defendants solicit and advertise for Connecticut and interstate clients to provide services in the Northeast . . . [are] registered in Connecticut, and [have] over twenty years of experience serving clients in New York, Connecticut and Vermont. The instant action involves Connecticut residents and improper actions of the Scofield defendants."

The court thereafter directed the parties to review our Supreme Court's decision in *North Sails Group, LLC* v. *Boards & More GmbH*, 340 Conn. 266, 264 A.3d 1 (2021), and to submit supplemental briefing on the case's relevance to the issue of personal jurisdiction raised by the defendants' motions to dismiss. The parties complied with the order and submitted supplemental briefs. The court additionally ordered a *Standard Tallow* evidentiary hearing,[9] which occurred remotely on February 1, 2022.

Following the *Standard Tallow* evidentiary hearing, the trial court issued its memorandum of decision granting the defendants' motions to dismiss. In its memorandum of decision, the court concluded that it did not have personal jurisdiction over the defendants pursuant to § 52-59b (a) and that the defendants had insufficient minimum contacts with Connecticut to meet constitutional due process requirements.

Specifically, the court concluded that it did not have personal jurisdiction over the Birmingham defendants

[9] In *Standard Tallow Corp.* v. *Jowdy*, 190 Conn. 48, 459 A.2d 503 (1983), our Supreme Court concluded that, "[w]hen issues of fact are necessary to the determination of a court's jurisdiction, due process requires that a trial-like hearing be held, in which an opportunity is provided to present evidence and to cross-examine adverse witnesses." Id., 56.

pursuant to § 52-59b (a) (1), (2) or (3). Turning first to § 52-59b (a) (1),[10] the court stated that the plaintiff failed to meet her burden of showing that the Birmingham defendants transacted any business in Connecticut. The court explained that the "evidence shows that the decedent contacted [the Birmingham defendants] seeking representation, thereby initiating contact with the Birmingham defendants. It is not readily apparent, on the basis of the evidence submitted, that the Birmingham defendants' subsequent communications with the decedent regarding the Vermont real estate transaction, while he was in Connecticut, shows that they were actively participating in business transactions within Connecticut, nor do they demonstrate that the Birmingham defendants were purposefully availing themselves of the benefits and protections of Connecticut laws. . . . [T]he subject property was located in Vermont, the real estate transaction was completed in Vermont, and . . . neither [Attorney Birmingham] nor anyone acting on behalf of the Birmingham Law Office, LLC, performed legal services in Connecticut. . . . Considering these factors, neither the communications from the Birmingham defendants nor the wire transfer to the Weiss defendants amount to the transacting of business in the state. Accordingly, the plaintiff has not met her burden [of] showing that the Birmingham defendants transacted business in Connecticut, and the court does not have personal jurisdiction over the [Birmingham] defendants pursuant to § 52-59b (a) (1)." (Citation omitted.)

The court also concluded that it did not have personal jurisdiction over the Birmingham defendants pursuant

[10] General Statutes § 52-59b (a) (1) provides in relevant part: "As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any nonresident individual, foreign partnership or foreign voluntary association, or over the executor or administrator of such nonresident individual, foreign partnership or foreign voluntary association, who in person or through an agent . . . [t]ransacts any business within the state . . . ."

to § 52-59b (a) (2)[11] because the plaintiff failed to meet her burden of showing that the Birmingham defendants committed a tort within the state. According to the court, "[t]he act of wiring the money from the sale proceeds is not, in and of itself, a fraudulent misrepresentation. The plaintiff has failed to present evidence demonstrating that this wire transfer involved false representations made by the Birmingham defendants regarding anyone or anything related to the subject real estate transaction or, specifically, regarding the plaintiff and/or her alleged property or assets."

Additionally, the court concluded that it did not have personal jurisdiction over the Birmingham defendants pursuant to § 52-59b (a) (3)[12] because the plaintiff failed to meet her burden of showing that the Birmingham defendants derived substantial revenue from Connecticut or interstate commerce. The court reasoned that, even "[a]ssuming, arguendo, that the Birmingham defendants did commit a tort outside of Connecticut

[11] General Statutes § 52-59b (a) (2) provides in relevant part: "As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any nonresident individual, foreign partnership or foreign voluntary association, or over the executor or administrator of such nonresident individual, foreign partnership or foreign voluntary association, who in person or through an agent . . . commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act . . . ."

[12] General Statutes § 52-59b (a) (3) provides in relevant part: "As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any nonresident individual, foreign partnership or foreign voluntary association, or over the executor or administrator of such nonresident individual, foreign partnership or foreign voluntary association, who in person or through an agent . . . commits a tortious act outside the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if such person or agent (A) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or (B) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce . . . ."

that caused injury to a person within Connecticut . . . the plaintiff has failed to show that the defendants meet the additional requirements of either § 52-59b (a) (3) (A) or (B)." (Citation omitted.) The court noted: "In the present case, the plaintiff has not provided any evidence demonstrating that the Birmingham defendants have derived substantial revenue from Connecticut or interstate commerce, outside of the fact that, at minimum, they received revenue from their representation of the decedent in the subject real estate transaction." The court therefore concluded that "the Birmingham defendants do not now, and did not at the time of the alleged tort, regularly conduct or solicit business or derive substantial revenue from Connecticut, nor did they derive revenue from interstate commerce so as to be subjected to Connecticut jurisdiction under § 52-59b (a) (3)."

The court also determined that the Birmingham defendants had insufficient minimum contacts with the state to meet constitutional due process requirements. "Because the Birmingham defendants did not transact business in Connecticut, did not commit a tort in the state of Connecticut, do not regularly conduct or solicit business from Connecticut, and do not derive substantial revenue from Connecticut or from interstate or international commerce with a commercial impact in Connecticut, the Birmingham defendants could not have reasonably anticipated being haled into court here. Accordingly, it would not be reasonable under the facts of this case for the court to confer personal jurisdiction over the Birmingham defendants. . . . [F]or the foregoing reasons, the plaintiff has failed to meet her burden of demonstrating that the court has personal jurisdiction over the Birmingham defendants." (Citation omitted.)

As to the Scofield defendants, the court concluded that it did not have personal jurisdiction over them

pursuant to § 52-59b (a) (3) and that they had insufficient minimum contacts with Connecticut to meet constitutional due process requirements. The court reasoned that, even "[a]ssuming, arguendo, that the Scofield defendants committed a tort, the plaintiff has failed to demonstrate that the [Scofield] defendants meet the additional requirements of either § 52-59b (a) (3) (A) or (B). As to subparagraph (A), the plaintiff argues, by way of printouts from the Scofield defendants' public website and a [District Court] opinion that lists Attorney Scofield as lead attorney, that the Scofield defendants regularly conduct business in Connecticut and solicit and advertise for interstate clients throughout the Northeast, including in the state of Connecticut. . . . [T]he website printouts seem to support the conclusion that the website is a recitation of Attorney Scofield's resume and for information purposes only. . . . The printouts do not demonstrate, or even suggest, that the Scofield defendants regularly conduct business outside of Vermont. Rather, they appear to confirm that the Scofield defendants provide services solely within Vermont." (Citations omitted; footnote omitted; internal quotation marks omitted.)

According to the court, although Attorney Scofield previously represented clients and practiced law in Connecticut, her affidavit states that "she has not practiced law in Connecticut since 2013 and officially retired from practicing law in the state of Connecticut in early 2019. . . . The plaintiff has not provided any evidence to counter Attorney Scofield's affidavit regarding these attestations." (Citation omitted.) The court further explained that, "[a]s to subparagraph (B), even if the Scofield defendants were aware of the plaintiff's involvement in the transaction . . . they had no reason to expect that redirecting the money from the sale proceeds to the Birmingham defendants, rather than the plaintiff, would result in consequences in Connecticut.

None of the evidence produced by the plaintiff suggests that the Scofield defendants were aware that the plaintiff resided or was located in Connecticut. . . . Moreover . . . the plaintiff has not provided any evidence to demonstrate that the Scofield defendants have derived substantial revenue from services rendered in Connecticut." The court accordingly concluded that the plaintiff had failed to demonstrate that the court had personal jurisdiction over the Scofield defendants under § 52-59b (a) (3).

The court also found that the Scofield defendants had insufficient minimum contacts with the state to meet constitutional due process requirements. The court concluded that "the Scofield defendants had no contact with Connecticut related to or arising out of the real estate transaction in Vermont in which they represented a Massachusetts buyer, and there is no evidence that the Scofield defendants derived any revenue from Connecticut with respect to any alleged interstate commerce activities in connection with the subject real estate transaction. . . . The Vermont real estate transaction between the decedent and the Scofield defendants' client is the extent of the interaction among the parties upon which the plaintiff relies for the establishment of personal jurisdiction in Connecticut. . . . Rather, the evidence demonstrates that all acts, transactions, and occurrences regarding the real estate transaction occurred within the state of Vermont and without knowledge, on the part of the Scofield defendants, that they would have consequences in the state of Connecticut. . . . The evidence further demonstrates that the Scofield defendants have not actively practiced law in Connecticut since early 2019 and that a majority, if not all, of their business is done within Vermont. . . . The plaintiff has not provided evidence to counter these assertions or to show that the Scofield

defendants derive substantial revenue from services rendered in Connecticut, as is her burden.

"Because the Scofield defendants did not transact business in Connecticut, did not derive substantial revenue from Connecticut or from interstate commerce with a commercial impact in Connecticut, and could not have reasonably expected their alleged tortious conduct to have consequences within Connecticut, the Scofield defendants could not have reasonably anticipated being haled into court here. Accordingly, under the facts of the present case, it would not be reasonable for the court to confer jurisdiction over the Scofield defendants." (Citations omitted.)

In sum, the court concluded that the plaintiff had failed to meet her burden of showing that (1) the court may exercise jurisdiction over the defendants pursuant to Connecticut's long arm statute and (2) the defendants had the requisite minimum contacts to satisfy constitutional due process requirements. The court accordingly granted the defendants' motions to dismiss. This consolidated appeal followed. Additional facts will be set forth as necessary.

As a preliminary matter, we set forth our standard of review and other relevant legal principles. "A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . Because a jurisdictional challenge presents a question of law, our review is plenary. . . . When, as in the present case, the defendant challenging the court's personal jurisdiction is a foreign corporation or a nonresident individual, it is the plaintiff's burden to prove the court's jurisdiction. . . . In deciding a jurisdictional question raised by a motion to dismiss, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the

pleader. . . . In most instances, the motion must be decided on the complaint alone. However, when the complaint is supplemented by undisputed facts established by affidavits submitted in support of the motion to dismiss . . . the trial court, in determining the jurisdictional issue, may consider these supplementary undisputed facts and need not conclusively presume the validity of the allegations of the complaint. . . . Rather, those allegations are tempered by the light shed on them by the [supplementary undisputed facts]. . . . If affidavits and/or other evidence submitted in support of a defendant's motion to dismiss conclusively establish that jurisdiction is lacking, and the plaintiff fails to undermine this conclusion with counteraffidavits . . . or other evidence, the trial court may dismiss the action without further proceedings. . . . If, however, the defendant submits either no proof to rebut the plaintiff's jurisdictional allegations . . . or only evidence that fails to call those allegations into question . . . the plaintiff need not supply counteraffidavits or other evidence to support the complaint . . . but may rest on the jurisdictional allegations therein." (Citations omitted; internal quotation marks omitted.) *North Sails Group, LLC* v. *Boards & More GmbH*, supra, 340 Conn. 269–70.

"When a defendant challenges personal jurisdiction in a motion to dismiss, the court must undertake a two part inquiry to determine the propriety of its exercising such jurisdiction over the defendant. The trial court must first decide whether the applicable state [long arm] statute authorizes the assertion of jurisdiction over the [defendant]. If the statutory requirements [are] met, its second obligation [is] then to decide whether the exercise of jurisdiction over the [defendant] would violate constitutional principles of due process." (Internal quotation marks omitted.) Id., 273. "It is axiomatic that

courts do not engage in constitutional analysis if a nonconstitutional basis upon which to resolve an issue exists. . . . Therefore, we begin by examining the [defendants'] statutory claim to determine whether we may resolve the jurisdictional issue without addressing the constitutional issue." (Citation omitted; internal quotation marks omitted.) *Cogswell* v. *American Transit Ins. Co.*, 282 Conn. 505, 516–17, 923 A.2d 638 (2007).

"[O]ur general long arm jurisdiction provision, § 52-59b, rather than our corporation specific long arm provision, [General Statutes] § 33-929, applies to foreign [limited liability companies]." *Matthews* v. *SBA, Inc.*, 149 Conn. App. 513, 546, 89 A.3d 938, cert. denied, 312 Conn. 917, 94 A.3d 642 (2014). "Section 52-59b grants jurisdiction to the Superior Court over nonresident individuals." *Doyle Group* v. *Alaskans for Cuddy*, 146 Conn. App. 341, 347, 77 A.3d 880 (2013).

I

We begin our analysis by examining the plaintiff's claim that the court erred in concluding that § 52-59b (a) (1), (2) and/or (3) did not provide a statutory basis for personal jurisdiction over the Birmingham defendants. We disagree with the plaintiff and conclude that the trial court properly determined that the Birmingham defendants were not subject to personal jurisdiction pursuant to § 52-59b (a) (1), (2) or (3).

A

We first turn to § 52-59b (a) (1). The crux of the plaintiff's claim regarding this provision is that the Birmingham defendants' representation of and communication with the decedent, a Connecticut resident, along with the transfer of money to the Weiss defendants, also Connecticut residents, satisfy the requirements of

§ 52-59b (a) (1).[13] For the reasons that follow, we conclude that they do not.

"Our Supreme Court has explained that § 52-59b (a) (1) authorizes jurisdiction over nonresidents who transact any business within the state provided that the cause of action arises out of such transaction. . . . [A]lthough the term [t]ransacts any business is not defined by statute, [the Supreme Court has] construed the term to embrace a single purposeful business transaction. . . .

"[A] nonresident individual who has not entered this state physically nevertheless may be subject to jurisdiction in this state under § 52-59b (a) (1) if that individual has invoked the benefits and protection of Connecticut's laws by virtue of his or her purposeful Connecticut related activity . . . ." (Citations omitted; internal quotation marks omitted.) Id., 347–48. "In determining whether [the defendants'] contacts constitute the transaction of business within the state, we do not apply a rigid formula but balance considerations of public policy, common sense, and the chronology and geography of the relevant factors." *Gaudio* v. *Gaudio*, 23 Conn. App. 287, 298, 580 A.2d 1212, cert. denied, 217 Conn. 803, 584 A.2d 471 (1990). "There must be some definitive act taken by the defendant that evinces a purposeful availment of the privileges of conducting the subject activity within the forum state and that, subsequently, invokes the benefits and protections of its laws." *Walshon* v. *Ballon Stoll Bader & Nadler, P.C.*, 121 Conn. App. 366, 372, 996 A.2d 1195 (2010).

[13] The plaintiff also argued before the trial court "that because the Birmingham defendants maintain pro hac vice admission in Connecticut, they should have reasonably expected to be haled into court in this state." The plaintiff's counsel conceded at oral argument before this court that the Birmingham defendants' pro hac vice admission in an unrelated matter was irrelevant to the determination of personal jurisdiction in this case.

In the present case, the Birmingham defendants derived only minimal income from Connecticut residents, did not solicit business in Connecticut, and did not promote themselves as a national firm. With respect to the sale of the Vermont property, the Birmingham defendants performed all legal services exclusively in Vermont and did not meet with the decedent or the plaintiff in Connecticut. Moreover, the decedent retained the Birmingham defendants to represent him in the sale of real property located in the state of *Vermont*. Although it is true that both the decedent and the plaintiff were Connecticut residents at all relevant times and that the Birmingham defendants conversed with the decedent several times while he was in Connecticut, we agree with the trial court that those facts alone are insufficient to warrant a determination that the legal services rendered by the Birmingham defendants constituted the transacting of business in Connecticut within the meaning of § 52-59b (1) (a).

This case is analogous to *Rosenblit* v. *Danaher*, 206 Conn. 125, 537 A.2d 145 (1988), in which our Supreme Court concluded that the trial court could not exercise personal jurisdiction over the defendant pursuant to § 52-59b (a) (1) when "two Connecticut residents, [the plaintiffs], went to Massachusetts and there, with . . . a Massachusetts resident, hired an attorney, who resided and practiced law in Massachusetts, to bring an action that arose out of a series of contacts by the plaintiffs with Massachusetts residents in the main." Id., 140. The court also noted that "the proposed action concerned not only events that had occurred in large measure in Massachusetts and arose out of the plaintiffs' efforts to rehabilitate real property situated in Massachusetts, but also involved a number of potential witnesses from Massachusetts." Id. The court found that, although the Massachusetts lawyer attended a meeting in Connecticut and communicated with the

plaintiffs in connection with his representation of them; see id., 135–36; the plaintiffs had not met their burden in establishing that the defendant had transacted any business in the state. See id., 141–42; see also *Ryan* v. *Cerullo*, 282 Conn. 109, 119–23, 918 A.2d 867 (2007) (holding that court could not exercise personal jurisdiction over defendant New York accountant pursuant to § 52-59b (a) (1) when defendant performed accounting services for plaintiff Connecticut resident exclusively in New York, met with plaintiff exclusively in New York, and corresponded exclusively with New York tax officials).

In this case, the Birmingham defendants performed legal services for the decedent entirely in Vermont, never met with the plaintiff or the decedent in Connecticut, and have not otherwise engaged in any other relevant contact with Connecticut.[14] As such, the facts that the plaintiff alleges in support of the "transacts any business" requirement of § 52-59b (a) (1) amount to far less than those found insufficient to establish personal jurisdiction in *Rosenblit* v. *Danaher*, supra, 206 Conn. 125, and *Ryan* v. *Cerullo*, supra, 282 Conn. 119–23.

[14] Although the plaintiff argues that the Birmingham defendants solicited individuals in Connecticut and other states on their website, pointing to a portion of the website that says "Attention: out of state sellers," we are not persuaded. The United States District Court for the District of Connecticut has held that websites deemed "passive" cannot support personal jurisdiction. "Active websites are those where individuals can directly interact with a company over their Internet site, download, transmit or exchange information, and enter into contracts with the company via computer. . . . Active websites may support an exercise of personal jurisdiction. . . . [P]assive websites that require a potential customer to initiate contact with the foreign corporation by telephone, mail, or email, rather than allowing them to order directly over the Internet, cannot support personal jurisdiction." (Citation omitted; internal quotation marks omitted.) *Cousteau Society, Inc.* v. *Cousteau*, 498 F. Supp. 3d 287, 303 (D. Conn. 2020). We agree with the District Court's reasoning.

There is insufficient evidence that the Birmingham defendants' website is active. We accordingly conclude that the website is an insufficient basis on which to find that the Birmingham defendants solicited out of state clients.

Additionally, the Birmingham defendants' communications with the decedent while he was in Connecticut are insufficient to establish that the Birmingham defendants transacted business in the state, as "[t]elephone calls and written communications . . . generally are held not to provide a sufficient basis for personal jurisdiction under the long-arm statute . . . . [T]elephone and mail contacts are jurisdictionally insufficient unless the defendant projected himself by those means into [the forum state] in such a manner that he purposefully availed himself . . . of the benefits and protections of its laws." (Citation omitted; internal quotation marks omitted.) *Green* v. *Simmons*, 100 Conn. App. 600, 605, 919 A.2d 482 (2007).

We additionally conclude that the Birmingham defendants' transfer of sale proceeds to and communication with the Weiss defendants are insufficient to satisfy the requirements of § 52-59b (a) (1). The plaintiff claims that the Birmingham defendants entered into an oral agreement with the Weiss defendants to transfer the sale proceeds and that, because of this alleged contract, the Birmingham defendants therefore transacted business in the state of Connecticut. Through his affidavit, however, Attorney Birmingham established that neither he, nor anyone acting on behalf of Birmingham Law Offices, LLC, had entered into any contracts in the state of Connecticut. Although the evidence does show that the Birmingham defendants spoke with Attorney Weiss and subsequently transferred the sale proceeds to the Weiss defendants, the plaintiff has failed to provide sufficient evidence to establish that a contract existed between the Birmingham defendants and the Weiss defendants. In support of her claim, she points only to a portion of Attorney Birmingham's affidavit that reads: "After speaking with Attorney Weiss, [Attorney Birmingham] sent the sale proceeds to [Attorney Weiss] based on his agreement to hold the funds in escrow

until the probate court determined who was entitled to receive the funds." She additionally has failed to provide any evidence that the Birmingham defendants affirmatively and purposefully contacted the Weiss defendants. We conclude that the evidence presented is insufficient to establish that the Birmingham defendants contracted with the Weiss defendants. The plaintiff's claim, therefore, is premised exclusively on the Birmingham defendants' communication with Connecticut residents, which is insufficient to establish that the "transacts any business" requirement of § 52-59b (a) (1) has been met. See *Green* v. *Simmons*, supra, 100 Conn. App. 605.

In short, the plaintiff has failed to meet her burden of establishing that the Birmingham defendants transacted any business within the state. Accordingly, we conclude that the trial court may not exercise personal jurisdiction over the Birmingham defendants pursuant to § 52-59b (a) (1).

B

We next turn to § 52-59b (a) (2). The plaintiff claims that the Birmingham defendants committed a tort in the state by failing to deliver the sale proceeds to the plaintiff and, instead, transferring the money to the Weiss defendants to hold for the decedent's estate. The plaintiff, however, does not clearly allege what tort was committed. Rather, she vaguely argues that the Birmingham defendants' "communications involved misrepresentations and omissions" and that, in failing to deliver the sale proceeds as instructed by the decedent, the Birmingham defendants committed a tort that caused harm in Connecticut. For the following reasons, we disagree.

Section 52-59b (a) (2) provides in relevant part that "a court may exercise personal jurisdiction over any nonresident individual, foreign partnership or foreign

voluntary association, or over the executor or administrator of such nonresident individual, foreign partnership or foreign voluntary association, who in person or through an agent . . . commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act . . . .''

The plaintiff has failed to meet her burden of establishing that the Birmingham defendants committed a tort in Connecticut. ''When, as in the present case, the defendant challenging the court's personal jurisdiction is a foreign corporation or a nonresident individual, it is the plaintiff's burden to prove the court's jurisdiction.'' (Internal quotation marks omitted.) *North Sails Group, LLC* v. *Boards & More GmbH*, supra, 340 Conn. 269. Attorney Birmingham, in his affidavit, clearly denied committing any tortious acts in Connecticut.[15] The plaintiff has failed to refute those claims. Rather, she relies solely on conclusory allegations in her complaint that the Birmingham defendants committed a false misrepresentation communicated into Connecticut, that they improperly transferred the sale proceeds to the Weiss defendants within the state, and that they therefore had committed a tort in the state. ''If affidavits and/or other evidence submitted in support of a defendant's motion to dismiss conclusively establish that jurisdiction is lacking, and the plaintiff fails to undermine this conclusion with counteraffidavits . . . or other evidence, the trial court may dismiss the action . . . .'' (Emphasis omitted; internal quotation marks omitted.) *Matthews* v. *SBA, Inc.*, supra, 149 Conn. App. 552.

We conclude that Attorney Birmingham's affidavit supports his assertion that jurisdiction pursuant to § 52-59b (a) (2) is lacking and that the plaintiff has failed

[15] Specifically, Attorney Birmingham's affidavit states: ''I have not committed a tortious act in the state of Connecticut, nor committed a tortious act outside the state causing injury to a person or property in the state of Connecticut.''

to undermine this conclusion. "A plaintiff, in presenting facts sufficient to establish the court's jurisdiction, must present specific, and not simply conclusory, allegations." Id. We agree with the trial court that "[t]he act of wiring the money from the sale proceeds is not, in and of itself, a fraudulent misrepresentation. The plaintiff has failed to present evidence demonstrating that this wire transfer involved false representations made by the Birmingham defendants regarding anyone or anything related to the subject real estate transaction or, specifically, regarding the plaintiff and/or her alleged property or assets." We therefore conclude that the plaintiff has failed to meet her burden in proving the court's jurisdiction pursuant to § 52-59b (a) (2).

C

We last turn to § 52-59b (a) (3). The plaintiff contends that the trial court had personal jurisdiction over the Birmingham defendants because (1) the Birmingham defendants committed a tortious act outside of Connecticut,[16] (2) that act caused injury to the plaintiff within the state, (3) the plaintiff's cause of action arises from the Birmingham defendants' tortious act, and (4) the Birmingham defendants (a) regularly do or solicit business in the state, (b) derive substantial revenue from the state, or (c) expected or reasonably should have expected that the act would have consequences in the state and derived substantial revenue from interstate commerce. For the reasons that follow, we disagree.

[16] The plaintiff has not clearly stated exactly what the claimed tortious act is. The plaintiff, instead, has vaguely argued that "[t]he Birmingham defendants' communications involved misrepresentations and omissions." She argues that the Birmingham defendants' failure to wire her the sale proceeds and instead transferring the money to the Weiss defendants "violated [the decedent's] written instructions to the Birmingham defendants that the plaintiff receive the monies at the closing. The foregoing constitutes false statements, misrepresentations, omissions, and tortious conduct."

Section 52-59b (a) (3) provides in relevant part that "a court may exercise personal jurisdiction over any nonresident individual, foreign partnership or foreign voluntary association, or over the executor or administrator of such nonresident individual, foreign partnership or foreign voluntary association, who in person or through an agent . . . commits a tortious act outside the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if such person or agent (A) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or (B) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce . . . ."

"[T]he substantial revenue requirement is designed to narrow the long-arm reach to preclude the exercise of jurisdiction over nondomiciliaries who might cause direct, foreseeable injury within the [s]tate but whose business operations are of a local character . . . . Put differently, substantial revenue means enough revenue to indicate a commercial impact in the forum, such that a defendant fairly could have expected to be haled into court there. . . . Because of the indefinite nature of the substantial revenue requirement, the determination of whether that jurisdictional threshold has been met in any particular case necessarily will require a careful review of the relevant facts and frequently will entail an evaluation of both the total amount of revenue involved and the percentage of annual income that that revenue represents." (Citations omitted; internal quotation marks omitted.) *Ryan* v. *Cerullo*, supra, 282 Conn. 125.

The plaintiff has failed to meet any of the statutory requirements in § 52-59b (a) (3) (A) and (B), namely,

that the Birmingham defendants either do or solicit business in the state or derived substantial revenue from Connecticut or interstate commerce.[17] In order to find that the trial court could exercise jurisdiction over the Birmingham defendants pursuant to § 52-59b (a) (3), the plaintiff must demonstrate that the additional requirements of either § 52-59b (a) (3) (A) or (B) are met. We address each in turn.

i

In order to exercise jurisdiction over the Birmingham defendants pursuant to § 52-59b (a) (3) (A), the plaintiff must establish, in addition to the tortious conduct element, that the Birmingham defendants either (1) regularly do or solicit business in Connecticut, or (2) derive substantial revenue from services rendered in the state. See General Statutes § 52-59b (a) (3) (A). We conclude that the plaintiff has provided insufficient evidence as to each and therefore conclude that the court may not exercise jurisdiction over the Birmingham defendants pursuant to § 52-59b (a) (3) (A).

Although the plaintiff claims that the Birmingham defendants regularly solicit business in Connecticut, we are not persuaded. In support of her claim, the plaintiff argues that the Birmingham defendants regularly do or solicit business by virtue of their website. Specifically, she points to a portion of the Birmingham defendants' website that is titled: "Attention: out of state sellers." She argues that this, in light of Attorney Birmingham's deposition testimony in which he stated that his firm

[17] Although § 52-59b (a) (3) (A) would also be satisfied if the plaintiff established that the Birmingham defendants engaged "in any other persistent course of conduct" in the state, the plaintiff did not rely on this statutory language in arguing that the statutory requirements of § 52-59b (a) (3) (A) have been met. We, accordingly, consider only whether the other statutory requirements, namely, whether the Birmingham defendants have done or solicited business in Connecticut or derived substantial revenue from services rendered in the state, have been met.

"ha[s] clients from all over the place," establishes that the Birmingham defendants regularly solicit business in the state. This evidence, however, is insufficient to establish that the Birmingham defendants regularly solicit business in *Connecticut*. At best, this evidence establishes that the Birmingham defendants have previously had clients who were not Vermont residents and that they have information available for potential out-of-state sellers on their website. It is too attenuated, however, to establish that the Birmingham defendants have either done any business in the state of Connecticut or have specifically solicited business in the state.

We additionally conclude that the plaintiff has failed to establish that the Birmingham defendants derive substantial revenue from Connecticut. The Birmingham defendants acknowledge that they received minimal income from the state, namely, the payment received from the decedent in connection with the underlying representation of the decedent in the sale of his Vermont property. There is no evidence, however, that the Birmingham defendants received any further revenue from Connecticut or interstate commerce. The plaintiff has failed to present any facts to support her assertion that the Birmingham defendants have received *any* revenue from Connecticut, excepting that from the underlying representation of the decedent, let alone facts supporting her claim that the Birmingham defendants have received *substantial* revenue from Connecticut. We therefore conclude that the plaintiff failed to establish either of the statutory requirements of § 52-59b (a) (3) (A).

ii

In order to exercise jurisdiction over the Birmingham defendants pursuant to § 52-59b (a) (3) (B), the plaintiff must establish, in addition to the tortious conduct element, that the Birmingham defendants both (1) expect

or should reasonably expect for their actions to have consequences in the state, and (2) derive substantial revenue from interstate or international commerce. See General Statutes § 52-59b (a) (3) (B). We conclude that the plaintiff has provided insufficient evidence to find that the Birmingham defendants derived substantial revenue from interstate or international commerce and therefore conclude that the court may not exercise jurisdiction over the Birmingham defendants pursuant to § 52-59b (a) (3) (B).

The crux of the plaintiff's claim regarding § 52-59b (a) (3) (B) is substantially the same as her claim under § 52-59b (a) (3) (A). She again points to the Birmingham defendants' website, arguing that "the Birmingham defendants' Internet website advertises to clientele out of state, thus establishing interstate revenue . . . ." She additionally points to Attorney Birmingham's deposition, in which he stated that the firm has "clients from all over the place." She additionally argues that the Birmingham defendants derived revenue from interstate commerce because they "entered into a contract of representation of [the decedent], a Connecticut resident . . . ." We are not persuaded.

Although the evidence cited by the plaintiff may support her claim that the Birmingham defendants have derived *some* revenue from interstate commerce, we are not persuaded that this evidence establishes that the Birmingham defendants derive *substantial* revenue from interstate commerce, as required by § 52-59b (a) (3) (B). "[S]ubstantial revenue means enough revenue to indicate a commercial impact in the forum, such that a defendant fairly could have expected to be haled into court there. . . . Because of the indefinite nature of the substantial revenue requirement, the determination of whether that jurisdictional threshold has been met in any particular case necessarily will require a careful review of the relevant facts and frequently will entail

an evaluation of both the total amount of revenue involved and the percentage of annual income that that revenue represents." (Citation omitted; internal quotation marks omitted.) *Ryan* v. *Cerullo*, supra, 282 Conn. 125. The plaintiff has not provided specific evidence demonstrating the number of interstate clients or amount of interstate revenue the Birmingham defendants derive. The evidence provided is vague and insufficient to support a conclusion that the amount of revenue the Birmingham defendants received from interstate commerce was substantial.

We therefore conclude that the plaintiff has failed to meet her burden of establishing that the trial court may exercise personal jurisdiction over the Birmingham defendants pursuant to § 52-59b (a) (3) (A) or (B). Accordingly, we need not decide whether the Birmingham defendants have sufficient minimum contacts with Connecticut to satisfy constitutional due process requirements because it is only "[i]f the statutory [long arm] requirements [are] met, [that the court then] decide[s] whether the exercise of jurisdiction over the [defendant] would violate constitutional principles of due process." (Internal quotation marks omitted.) *North Sails Group, LLC* v. *Boards & More GmbH*, supra, 340 Conn. 273. We therefore conclude that the trial court properly determined that it could not exercise personal jurisdiction over the Birmingham defendants pursuant to § 52-59b (a) (1), (2) or (3).

II

The plaintiff claims that the trial court had personal jurisdiction over the Scofield defendants pursuant to § 52-59b (a) (3)[18] because (1) they committed a tortious

[18] The plaintiff additionally argued in her principal appellate brief that the court had personal jurisdiction over the Scofield defendants pursuant to § 52-59b (a) (1), an argument not made by the plaintiff before the trial court. The plaintiff's counsel abandoned this claim during oral argument before this court.

act outside of Connecticut, (2) that act caused injury to the plaintiff within the state, (3) the plaintiff's cause of action arises from the Scofield defendants' tortious act, and (4) the Scofield defendants (a) regularly do or solicit business in the state, (b) derive substantial revenue from the state, or (c) expected or reasonably should have expected that the act would have consequences in the state and derived substantial revenue from interstate commerce. We disagree.

Even if we assume, arguendo, that the Scofield defendants committed tortious acts outside of the state, causing injury to the plaintiff within the state, the plaintiff has still failed to meet the final statutory requirement, namely, that the Scofield defendants either do or solicit business in the state or derived substantial revenue from Connecticut or interstate commerce. In order to find that the trial court could exercise jurisdiction over the Scofield defendants pursuant to § 52-59b (a) (3), the plaintiff must demonstrate that the additional requirements of either § 52-59b (a) (3) (A) or (B) are met. We address each in turn.

A

We first turn to § 52-59b (a) (3) (A). In order to exercise jurisdiction over the Scofield defendants pursuant to § 52-59b (a) (3) (A), the plaintiff must establish, in addition to the tortious conduct element, that the Scofield defendants either (1) regularly do or solicit business in Connecticut, or (2) derive substantial revenue from services rendered in the state.[19] See General Statutes § 52-59b (a) (3) (A). We conclude that the plaintiff

[19] As with the Birmingham defendants, the plaintiff did not argue that the Scofield defendants engaged "in any other persistent course of conduct" in the state in arguing that the statutory requirements of § 52-59b (a) (3) (A) have been met, and we, accordingly, consider only whether the other statutory requirements, namely, whether the Scofield defendants have done or solicited business in Connecticut or derived substantial revenue from services rendered in the state, have been met. See footnote 17 of this opinion.

has provided insufficient evidence as to each and therefore conclude that the court may not exercise jurisdiction over the Scofield defendants pursuant to § 52-59b (a) (3) (A).

The plaintiff claims that the Scofield defendants regularly solicit business in the state through their website. Particularly, the plaintiff argues that the website says that the Scofield defendants provide services in the "Northeast" and highlights that Attorney Scofield is licensed to practice in Connecticut. We are not persuaded.

First, the portion of the Scofield defendants' website quoted by the plaintiff is taken out of context. Read in its entirety, the website states that "[t]he Firm's goal is to offer top level real estate services as well as general legal services and estate and probate work as needed to individuals and small business entities living and operating *in this beautiful part* of the Northeast." (Emphasis added.) It appears, in context, that the website advertises the legal work the firm does in *Vermont* specifically, rather than advertising to the Northeast as a whole. It is not apparent from this portion of the website that the Scofield defendants regularly conduct or solicit business in Connecticut.

Additionally, although the website does note that Attorney Scofield is admitted to practice in Connecticut, we are not convinced that this alone demonstrates that the Scofield defendants solicited business in the state. The website states that Attorney Scofield is "[a]dmitted to practice in Vermont, Connecticut, and New York" and that she has "[o]ver 20 years of legal experience serving both public and private sector clients in New York, Connecticut and Vermont." We agree with the trial court that the provided information is a resume only, intended to provide potential clients with

further information about Attorney Scofield, rather than a solicitation of Connecticut clients.

There is also insufficient evidence that the Scofield defendants derive substantial revenue from the state. The plaintiff points to Attorney Scofield's status as "lead attorney" in a case before the United States District Court in support of her contention that the Scofield defendants regularly conduct business in and derive substantial revenue from Connecticut. The Scofield defendants provided evidence showing that Attorney Scofield is no longer actively involved in the referenced case[20] and that she has not practiced law in the state since 2019. Additionally, even assuming, arguendo, that Attorney Scofield were still involved in that District Court case, this does not support the assertion that the Scofield defendants derived *substantial* revenue from the state of Connecticut. Our Supreme Court has clearly stated that "substantial revenue means enough revenue to indicate a commercial impact in the forum, such that a defendant fairly could have expected to be haled into court there." (Internal quotation marks omitted.) *Ryan* v. *Cerullo*, supra, 282 Conn. 125. Attorney Scofield does not dispute that she previously represented clients in and practiced law in Connecticut, but her affidavit supports her assertion that she officially retired from practicing law in the state in 2019 and that she has derived minimal, if any, revenue from the state since that time. It is additionally unlikely that, even if Attorney Scofield were still involved in the referenced District Court case at the time of the sale of the Vermont property, the proceeds from that case alone would demonstrate that the Scofield defendants could fairly have been expected

[20] Specifically, the Scofield defendants highlighted the fact that the case was closed in 2018, and that the later motion for reconsideration was filed by the defendant against the substitute plaintiff, not the party represented by Attorney Scofield. See *Wachovia Mortgage, FSB* v. *Toczek*, Docket No. 3:18-CV-1965 (VLB), 2019 WL 6837788 (D. Conn. December 16, 2019); see also footnote 5 of this opinion.

to be haled into court in Connecticut for an entirely unrelated case.

The plaintiff has provided no other evidence that the Scofield defendants derived any, let alone substantial, revenue from Connecticut. Therefore, we conclude that the plaintiff has failed to meet her burden in establishing that the court may exercise personal jurisdiction over the Scofield defendants pursuant to § 52-59b (a) (3) (A).

B

Finally, we turn to § 52-59b (a) (3) (B). In order to exercise jurisdiction over the Scofield defendants pursuant to § 52-59b (a) (3) (B), the plaintiff must establish, in addition to the tortious conduct element, that the Scofield defendants both (1) expect or should reasonably expect for their actions to have consequences in the state, and (2) derive substantial revenue from interstate or international commerce. See General Statutes § 52-59b (a) (3) (B). We conclude that the plaintiff has provided insufficient evidence to conclude that the Scofield defendants derived substantial revenue from interstate or international commerce and, therefore, conclude that the court may not exercise jurisdiction over the Scofield defendants pursuant to § 52-59b (a) (3) (B).

In support of her argument that the Scofield defendants derive substantial revenue from interstate commerce, the plaintiff points to a portion of the Scofield defendants' website that contains testimonials from prior out-of-state clients. Although these testimonials may support a claim that the Scofield defendants derive revenue from interstate commerce, the plaintiff has failed to provide sufficient evidence about these transactions from which the court could determine whether the Scofield defendants derive *substantial* revenue from interstate commerce and accordingly establish

jurisdiction pursuant to § 52-59b (a) (3) (B). The plaintiff has simply shown that the website contains testimonials from clients from states other than Vermont without further information about what percentage of the Scofield defendants' revenues these non-Vermont clients make up, the amount of revenue derived from these clients, or any other relevant facts. Because "the determination of whether [the substantial revenue] threshold has been met in any particular case necessarily will require a careful review of the relevant facts and frequently will entail an evaluation of both the total amount of revenue involved and the percentage of annual income that that revenue represents"; *Ryan* v. *Cerullo*, supra, 282 Conn. 125; we conclude that the plaintiff has provided insufficient evidence to conclude that, even if the Scofield defendants do derive some revenue from interstate commerce, that revenue is substantial enough to satisfy the requirements of § 52-59b (a) (3) (B).

Because we conclude that the plaintiff has failed to meet her burden in establishing that the court may exercise personal jurisdiction over the Scofield defendants pursuant to the relevant long arm statute provision alleged, we need not decide whether the Scofield defendants have sufficient minimum contacts with Connecticut to meet the constitutional requirements of due process, as it is only "[i]f the statutory [long arm] requirements [are] met, [that the court then] decide[s] whether the exercise of jurisdiction over the [defendant] would violate constitutional principles of due process." (Internal quotation marks omitted.) *North Sails Group, LLC* v. *Boards & More GmbH*, supra, 340 Conn. 273.

To summarize, we conclude that the trial court properly determined that it could not exercise personal jurisdiction over the defendants pursuant to § 52-59b (a).

Accordingly, we affirm the judgment of the trial court granting the defendants' motions to dismiss.

The judgment is affirmed.

In this opinion the other judges concurred.

Y. H. *v.* J. B.*
(AC 45857)

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

Syllabus

The defendant appealed to this court from the judgment of the trial court dissolving his marriage to the plaintiff and entering certain financial orders. Following a trial, the court granted the parties joint legal custody of their minor son, with the defendant having primary physical custody, and stated that "[n]either party has asked for alimony or child support, so the court will order none." The court also granted three motions for contempt filed by the plaintiff based on its conclusion that the defendant wilfully had disobeyed court orders regarding the finances of the parties' business. As a result of the contempt, the court ordered the defendant to pay the plaintiff $40,000 in attorney's fees. *Held*:

1. The trial court abused its discretion in the manner in which it addressed child support: although the trial court stated that it declined to award child support on the ground that it was not requested by either party, a review of the trial court file revealed that the defendant consistently had requested child support before, during, and after the dissolution trial as evidenced by his filing of completed child support guidelines worksheets, his compliance with trial management orders requesting child support and arrearage, and his motion for reconsideration after the court issued its memorandum of decision in which he pointed out that he had requested child support previously; moreover, even if child support had not been requested, the court improperly declined to award child support without considering the applicable statutes and child support guidelines, and did not discuss whether the parties' son was a "child . . . in need of maintenance" pursuant to the criteria set forth in the relevant statute (§ 46b-84 (d)), or make a finding on the record,

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* 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 party's identity may be ascertained.

as required by statute (§ 46b-215b), that the application of the guidelines would be inequitable or inappropriate as determined under the deviation criteria established by the Commission for Child Support Guidelines, and this court was left to speculate both as to the presumptive child support amount and as to whether application of the guidelines would be inequitable or inappropriate in this case; accordingly, the case was remanded for a new trial on all financial orders because it was uncertain whether the court's other financial orders would remain intact after reconsidering the child support order in a manner consistent with this opinion.

2. The defendant could not prevail on his claim that the trial court abused its discretion in finding him in contempt but, to the extent the award of attorney's fees was imposed as a sanction for the defendant's contempt, the award constituted an abuse of the trial court's discretion, which entitled the defendant to a new hearing as to the appropriate sanction for his wilful violation of the court's orders: on the basis of a review of the record, the trial court reasonably could have concluded that the defendant had not complied with its orders and that his noncompliance was wilful, and, because the underlying findings were not clearly erroneous, the court properly exercised its discretion in granting the plaintiff's motions for contempt; moreover, in awarding the attorney's fees to the plaintiff, the court did not cite any evidence in the record that the $40,000 in attorney's fees related to the three motions for contempt, instead making only general statements regarding the defendant's behavior and the amount of docket entries and the needlessly disorganized trial, and, although the plaintiff requested $40,000 in attorney's fees in her proposed orders, that amount was not tied to the plaintiff's request that the court find the defendant in contempt; furthermore, because the trial court's financial orders will be reconsidered in their entirety on remand, to the extent that the award of attorney's fees was made pursuant to the statute (§ 46b-62) that provides for an award of attorney's fees in a dissolution action, the court may consider whether to award attorney's fees pursuant to § 46b-62 as part of the new financial orders.

Argued December 5, 2023—officially released April 16, 2024

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the case was tried to the court, *Moukawsher, J.*; judgment dissolving the marriage and granting certain other relief, and granting the plaintiff's motions for contempt, from which the defendant

appealed to this court. *Reversed in part*; *further proceedings*.

J. B., self-represented, the appellant (defendant).

Opinion

BRIGHT, C. J. The self-represented defendant, J. B., appeals from the judgment of the trial court dissolving his marriage to the plaintiff, Y. H., and entering certain financial orders.[1] On appeal, the defendant claims that the court abused its discretion (1) in declining to award him alimony and child support, (2) in its orders regarding the division of marital property, specifically, the marital home and the parties' business, and (3) in granting the plaintiff's motions for contempt and ordering him to pay $40,000 in attorney's fees to the plaintiff.[2]

[1] The plaintiff did not file a brief in this appeal. Consequently, on September 18, 2023, we issued an order stating that "the appeal will be considered on the basis of the [defendant's] brief and the record, as defined by Practice Book § 60-4, only." Although the plaintiff's counsel appeared at oral argument before this court, consistent with our order, he was not permitted to argue.

[2] The issues as set forth in this opinion are based on this court's thorough review of the defendant's brief. To the extent that the defendant's brief could be interpreted as raising issues pertaining to (1) orders issued by the trial court, *Nastri*, *J.*, on May 27 and June 1, 2020, regarding pendente lite custody orders and (2) orders issued by the trial court, *Nguyen-O'Dowd*, *J.*, on September 7, 2021 and January 12, 2022, regarding the appraisal of the marital residence and the parties' handling of the business during the pendency of the dissolution proceedings, we note that such issues are moot as they were superseded by the judgment of dissolution. See *Netter* v. *Netter*, 220 Conn. App. 491, 494–95, 298 A.3d 653 (2023) ("Pendente lite orders are temporary orders of the court that are necessarily extinguished once a final judgment has been rendered. . . . Once a final judgment has been rendered, an issue with respect to a pendente lite order is moot because an appellate court can provide no practical relief. . . . As a result, an appellate court lacks subject matter jurisdiction over a pendente lite order after the trial court has rendered a final judgment." (Internal quotation marks omitted.)).

To the extent that the defendant has attempted to raise issues other than those set forth in this opinion, we decline to review those claims as they are inadequately briefed. The defendant's brief is confusing, repetitive and disorganized. "We repeatedly have stated that [w]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue

Because we conclude that the trial court abused its discretion in declining to award child support on the ground that it was not requested, and without considering and applying the child support guidelines, we reverse the judgment of the trial court with respect to all the financial orders and remand this case for a new trial on all financial issues. We further conclude that the court's award of attorney's fees, to the extent it was imposed as a sanction for the defendant's contempt, constituted an abuse of its discretion, which entitles the defendant to a new hearing as to the appropriate sanction for his wilful violation of the court's orders. Finally, to the extent that the award of attorney's fees was made pursuant to General Statutes § 46b-62 (a), this case must also be remanded for reconsideration in light of the new financial orders that will be issued on remand.[3]

The following facts, as found by the trial court, *Moukawsher, J.*,[4] and procedural history are relevant to our consideration of the issues raised on appeal. The plaintiff and the defendant were married on September 10, 2010. The parties' son was born in January, 2008. On January 13, 2020, the plaintiff commenced this action for dissolution of marriage, alleging that the parties' marriage had broken down irretrievably. On June

properly. . . . [When] a claim is asserted in the statement of issues but thereafter receives only cursory attention in the brief without substantive discussion or citation of authorities, it is deemed to be abandoned. . . . For a reviewing court to judiciously and efficiently . . . consider claims of error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs. . . . In addition, briefing is inadequate when it is not only short, but confusing, repetitive, and disorganized." (Internal quotation marks omitted.) *Gleason* v. *Durden*, 211 Conn. App. 416, 439, 272 A.3d 1129, cert. denied, 343 Conn. 921, 275 A.3d 211 (2022).

[3] Because we reverse the judgment of the trial court with respect to its financial orders and remand this case for a new trial on all financial issues, we need not address the defendant's claim that the court abused its discretion in its orders regarding alimony and the division of property.

[4] Unless otherwise indicated in this opinion, all references to the trial court are to Judge Moukawsher.

2, 2020, the defendant filed an amended answer and cross complaint. On September 8, 2022, following a trial, the court dissolved the parties' marriage. In its memorandum of decision, the court granted the parties joint legal custody of their son with the defendant having primary physical custody. The court stated, in part, that "[n]either party has asked for alimony or child support, so the court will order none." In dividing the parties' marital property, the court awarded the parties' business, a small religious gift shop that it valued at $100,000, to the plaintiff. The court awarded the parties' residence to the defendant; it found that the value of the residence was $435,000 and that the equity therein was $259,000. The court further ordered the residence to be sold after the parties' minor son graduated from high school or turned nineteen years old. To prevent the defendant from encumbering the residence, the court ordered that the residence remain in both parties' names and that the defendant bear all expenses related to it. The court determined that the plaintiff was entitled to 100 percent of the business' value and that the defendant was entitled to 65 percent of the residence's value; accordingly, it ordered that the defendant pay to the plaintiff $90,650 or 35 percent of the proceeds from the sale of the residence, whichever was greater.

The court also granted the plaintiff's three motions for contempt based on its conclusion that the defendant wilfully had disobeyed court orders regarding the finances of the business. As a result of the contempt, the court ordered the defendant to pay the plaintiff $40,000 in attorney's fees. The court, however, also stated that it was awarding such attorney's fees "under . . . § 46b-62." Finally, the court stated that "[t]he remaining pending motions in the case have been considered in the court's orders. They are denied as moot. Any remaining financial claims raised by the parties at

trial have been taken into account in the court's equitable deliberations over the property division." This appeal followed.[5]

We begin by setting forth the well settled standard of review in domestic relations cases. "[T]his court will not disturb trial court orders unless the trial court has abused its legal discretion or its findings have no reasonable basis in the facts. . . . As has often been explained, the foundation for this standard is that the trial court is in a clearly advantageous position to assess the personal factors significant to a domestic relations case . . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action. . . . Notwithstanding the great deference accorded the trial court in dissolution proceedings, a trial court's ruling . . . may be reversed if, in the exercise of its discretion, the trial court applies the wrong standard of law. . . . The question of whether, and to what extent, the child support guidelines apply, however, is a question of law over which this court should exercise plenary review."

[5] The defendant amended this appeal three times to challenge subsequent decisions of the trial court. Specifically, the defendant amended the appeal to challenge the trial court's November 22, 2022 denial of his motion to disqualify Judge Moukawsher, Judge Nguyen-O'Dowd and Judge Nastri from the trial court proceedings. Next, the defendant amended the appeal to challenge two orders by the trial court issued on February 15, 2023, denying his November 14, 2022 and January 26, 2023 motions to compel discovery as to certain of the business' expenses. Finally, the defendant amended this appeal to challenge the trial court's April 5, 2023 memorandum of decision addressing several of the parties' outstanding postjudgment motions. In its decision on these motions, the court indicated that the issues raised by the parties either had been addressed in the court's memorandum of decision in the dissolution proceeding or were stayed pending the resolution of this appeal. After noting that the parties' filings had wasted time and money, the trial court ordered that the parties were required to apply for and receive permission before filing any further trial court documents.

Although the defendant refers to some of these postjudgment orders in his brief, he does not raise distinct, fully briefed claims as to these orders.

(Internal quotation marks omitted.) *Renstrup* v. *Renstrup*, 217 Conn. App. 252, 259, 287 A.3d 1095, cert. denied, 346 Conn. 915, 290 A.3d 374 (2023).

I

The defendant first claims that the trial court improperly declined to award child support on the ground that it was not requested by either party. Because a review of the trial court file reveals that the defendant consistently had requested child support, we agree with the defendant. We further conclude that, even if not requested, the trial court improperly declined to award child support without considering the applicable statutes and child support guidelines.

The following additional facts are necessary for the resolution of this claim. On May 27, 2022, the trial court issued a trial management order indicating that trial would begin on August 2, 2022. This order required that, not later than five days before the trial date, the parties were to exchange with each other and file, inter alia, fully completed child support guidelines worksheets as required by Practice Book § 25-30 (e), if applicable, and written proposed orders in accordance with Practice Book § 25-30 (c) and (d). On August 1, 2022, both parties filed completed child support guidelines worksheets, in accordance with the trial management order. On his worksheet, the defendant calculated the plaintiff's presumptive current support obligation as $274 per week and the total arrearage owed to him as $26,121. Also on August 1, 2022, the plaintiff filed a corrected notice of compliance with the trial management order in which she requested that neither party pay child support to the other party[6] and the defendant filed his notice of compliance, which stated in part: "For minor teenager son support, the defendant is providing the

[6] The plaintiff had filed a previous notice of compliance on July 29, 2022, that did not reference child support.

child support guidelines worksheet as requested in the orders and to be considered for risk mitigations to the minor teenager son support."

The trial in this matter commenced on August 2, 2022.[7] On August 3, 2022, the court issued a trial management order indicating that the trial would resume on August 18, 2022. On August 12, 2022, the defendant filed another notice of compliance with the trial management orders with proposed orders "for the trial scheduled for August 18, 2022 . . . ." In this filing, the defendant provided the same statement regarding child support as in his previous filings but, in addition, he specifically requested that the court order "the plaintiff to pay the defendant for child support and arrearage." The trial resumed on August 18, 2022, with no mention of the defendant's August 12, 2022 filing.

The court issued its memorandum of decision on September 8, 2022, indicating that child support had not been requested. On September 16, 2022, the defendant filed a motion for reconsideration in which he, inter alia, pointed out that he had requested child support in his August 12, 2022 notice of compliance with the trial management orders. The court denied this motion on September 20, 2022, and the defendant filed this appeal on September 28, 2022. [8] Contrary to the

[7] On August 2, 2022, the defendant filed a revised notice of compliance with the trial management order; this filing contained the same language as his previous filing regarding child support.

[8] On December 14, 2022, the defendant filed a postjudgment motion for alimony and child support and, on February 14, 2023, the defendant filed a motion for emergency relief, ex parte, postjudgment, in which he requested, inter alia, that the court enter an award for child support and alimony. On April 5, 2023, the court issued a memorandum of decision on several of the parties' postjudgment motions, including the defendant's postjudgment motion for alimony and child support and the defendant's motion for emergency relief, ex parte, postjudgment. In its decision, the court stated: "[The defendant] wants alimony, child support, and discovery. He continues to claim that [the plaintiff] is making far more money from her business than she admits. After a trial, the court concluded he is wrong about this. The court denied him alimony and child support. The trial is over. Discovery

court's statement in its memorandum of decision, the record reveals that the defendant consistently requested child support before, during, and after the dissolution trial.

More importantly, even if not requested, the court improperly declined to award child support without first considering the applicable statutes and child support guidelines. In considering this issue, we begin with a review of the statutory scheme regarding child support and the guidelines. General Statutes § 46b-84 provides in relevant part: "(a) Upon or subsequent to the . . . dissolution of any marriage . . . the parents of a minor child of the marriage, shall maintain the child according to their respective abilities, if the child is in need of maintenance. Any post judgment procedure afforded by chapter 906 shall be available to secure the present and future financial interests of a party in connection with a final order for the periodic payment of child support. . . .

"(d) In determining whether a child is in need of maintenance and, if in need, the respective abilities of the parents to provide such maintenance and the amount thereof, the court shall consider the age, health, station, occupation, earning capacity, amount and sources of income, estate, vocational skills and employability of each of the parents, and the age, health, station, occupation, educational status and expectation, amount and sources of income, vocational skills, employability, estate and needs of the child. . . ."

General Statues § 46b-215a provides for a commission "to issue child support and arrearage guidelines

was over long ago. If [the defendant] persuades an appellate court that this court is wrong, he will get a chance to ask for these things. He is not entitled to them now." The defendant thereafter amended this appeal to include the trial court's April 5, 2023 decision. See footnote 5 of this opinion.

to ensure the appropriateness of criteria for the establishment of child support awards and to review and issue updated guidelines every four years." General Statutes § 46b-215b provides in relevant part that the "guidelines issued pursuant to section 46b-215a . . . and in effect on the date of the support determination shall be considered in all determinations of child support amounts . . . . In all such determinations, there shall be a rebuttable presumption that the amount of such awards which resulted from the application of such guidelines is the amount to be ordered. *A specific finding on the record at a hearing, or in a written judgment, order, or memorandum of decision of the court, that the application of the guidelines would be inequitable or inappropriate in a particular case*, as determined under the deviation criteria established by the Commission for Child Support Guidelines under section 46b-215a, *shall be required in order to rebut the presumption in such case*. . . ." (Emphasis added.) See also *Maturo* v. *Maturo*, 296 Conn. 80, 118, 995 A.2d 1 (2010) ("[t]he . . . guidelines shall be considered in *all* determinations of child support amounts within the state" (emphasis in original; internal quotation marks omitted)).

Section 46b-215a-5c (a) of the Regulations of Connecticut State Agencies provides in relevant part: "The current support . . . contribution amounts calculated under [the child support guidelines] . . . are presumed to be the correct amounts to be ordered. The presumption regarding each such amount may be rebutted by a specific finding on the record that such amount would be inequitable or inappropriate in a particular case. . . . Any such finding shall state the amount that would have been required under such sections and include a factual finding to justify the variance. Only the deviation criteria stated in . . . subdivisions (1) to (6), inclusive, of subsection (b) of this section . . . shall establish

sufficient bases for such findings." The deviation criteria set forth in § 46b-215a-5c (b) of the regulations are: "(1) Other financial resources available to a parent . . . (2) [e]xtraordinary expenses for care and maintenance of the child . . . (3) [e]xtraordinary parental expenses . . . (4) [n]eeds of a parent's other dependents . . . (5) [c]oordination of total family support . . . [and] (6) [s]pecial circumstances . . . ."

In the present case, the trial court found that the parties' fourteen year old son had been living with the defendant. It awarded the parties joint legal custody of their son with the defendant to have primary physical custody of the child. The court, however, did not discuss whether the parties' son was a "child . . . in need of maintenance" pursuant to the criteria set forth in § 46b-84 (d), nor did it make a finding on the record, as required by § 46b-215b, that the application of the guidelines would be inequitable or inappropriate as determined under the deviation criteria established by the Commission for Child Support Guidelines. Instead, the court simply stated that "[n]either party has asked for . . . child support, so the court will order none." Under these circumstances, we are left to speculate both as to the presumptive child support amount and as to whether application of the guidelines would be inequitable or inappropriate in this case. Considering the applicable statutory framework and child support guidelines previously set forth, we conclude that the trial court abused its discretion in declining to award child support based on its conclusion that it had not been requested. See *Maturo* v. *Maturo*, supra, 296 Conn. 94–95 ("the applicable statutes, as well as the guidelines, provide that *all* child support awards must be made in accordance with the principles established therein to ensure that such awards promote equity, uniformity, and consistency for children at *all income levels*" (emphasis in original; internal quotation marks omitted)); see also

Chowdhury v. *Masiat*, 161 Conn. App. 314, 322–23, 128 A.3d 545 (2015) (trial court, without reference to applicable statutes and child support guidelines, improperly declined to award child support for parties' oldest child); *O'Brien* v. *O'Brien*, 138 Conn. App. 544, 555, 53 A.3d 1039 (2012) (trial court abused its discretion in entering unallocated award of alimony and child support without considering and applying guidelines or principles espoused therein), cert. denied, 308 Conn. 937, 66 A.3d 500 (2013).

In light of our conclusion that the trial court abused its discretion in the manner in which it addressed child support, we remand the case for a new trial on all financial orders. "Individual financial orders in a dissolution action are part of the carefully crafted mosaic that comprises the entire asset reallocation plan. . . . Under the mosaic doctrine, financial orders should not be viewed as a collection of single disconnected occurrences, but rather as a seamless collection of interdependent elements. Consistent with that approach, our courts have utilized the mosaic doctrine as a remedial device that allows reviewing courts to remand cases for reconsideration of all financial orders even though the review process might reveal a flaw only in the alimony, property distribution or child support awards. . . .

"Every improper order, however, does not necessarily merit a reconsideration of all of the trial court's financial orders. A financial order is severable when it is not in any way interdependent with other orders and is not improperly based on a factor that is linked to other factors. . . . In other words, an order is severable if its impropriety does not place the correctness of the other orders in question." (Internal quotation marks omitted.) *Renstrup* v. *Renstrup*, supra, 217 Conn. App. 284.

In the present case, because it is uncertain whether the court's other financial orders will remain intact after reconsidering the child support order in a manner consistent with this opinion, we conclude that the entirety of the mosaic must be refashioned. See id., 285. Accordingly, on remand, the court must consider all the financial orders, including the alimony and property distribution orders.[9]

II

The defendant next claims that the trial court abused its discretion in finding him in contempt and ordering him to pay $40,000 in attorney's fees to the plaintiff. As to this claim, we conclude that the court's award of attorney's fees, to the extent it was imposed as a sanction for the defendant's contempt, constituted an abuse of its discretion, which entitles the defendant to a new hearing as to the appropriate sanction for his wilful violation of the court's orders. To the extent that the award of attorney's fees was made pursuant to § 46b-62 (a), this case must also be remanded for reconsideration in light of the new financial orders that will be issued on remand.

In its memorandum of decision, the court set forth the following findings relevant to its finding of contempt: "This has been a pointlessly complex case. Neither party has substantial assets or income. Yet they have battled for years and repeatedly changed attorneys. As the court can see from the filings on the docket, most of the fault for this lies with [the defendant]. He has used the lawsuit as a bludgeon. Worse yet, he has repeatedly ignored the court's orders. The record contains many motions for contempt for him bleeding assets away from the business. The evidence shows that [the defendant] repeatedly withdrew money from

[9] On remand, the parties shall submit new proposed orders pursuant to Practice Book § 25-30.

the business when he was ordered not to in the plainest possible language. The evidence is clear and convincing: [the defendant] wilfully disobeyed court orders about the business finances as alleged in [the plaintiff's] motions for contempt. These motions are granted."

Our review of this claim is guided by the following principles. "Contempt is a disobedience to the rules and orders of a court which has power to punish for such an offense. . . . [C]ivil contempt is committed when a person violates an order of court which requires that person in specific and definite language to do or refrain from doing an act or series of acts. . . . In part because the contempt remedy is particularly harsh . . . such punishment should not rest upon implication or conjecture, [and] the language [of the court order] declaring . . . rights should be clear, or imposing burdens [should be] specific and unequivocal, so that the parties may not be misled thereby. . . . To constitute contempt, it is not enough that a party has merely violated a court order; the violation must be wilful. . . . It is the burden of the party seeking an order of contempt to prove, by clear and convincing evidence, both a clear and unambiguous directive to the alleged contemnor and the alleged contemnor's wilful noncompliance with that directive. . . . The question of whether the underlying order is clear and unambiguous is a legal inquiry subject to de novo review. . . . If we answer that question affirmatively, we then review the trial court's determination that the violation was wilful under the abuse of discretion standard." (Internal quotation marks omitted.) *Mitchell* v. *Bogonos*, 218 Conn. App. 59, 68–69, 290 A.3d 825 (2023).

We first consider whether the directives to the defendant that form the basis for the court's finding of contempt were clear and unambiguous. A review of the file reveals that on February 19, 2020, the trial court, *Connors*, *J.*, approved an agreement of the parties that

provided in relevant part: "Defendant will account for all cash taken from the business since the filing of the divorce, as well as monies taken in [November and December] of 2019. . . . Plaintiff and defendant will work together at the marital business. All cash will be deposited daily by both parties together at Webster Bank." In docket entries ##109.00 and 112.00, the plaintiff alleged that the defendant had failed to account for the cash taken from the business since the filing of the divorce, as well as monies taken in November and December, 2019. In docket entry #112.00, the plaintiff also alleged that the defendant had not deposited the monies into the Webster Bank account and, instead, had deposited the monies with a different financial institution.

On January 12, 2022, the trial court, *Nguyen-O'Dowd*, *J.*, entered an order that provided, in part, that the plaintiff was to operate the parties' business, and the defendant was to transfer the Comcast account for the business to the plaintiff and provide the plaintiff with the username and password to access the business banking accounts online.[10] In docket entry #262.00, the plaintiff alleged that, although the defendant had vacated the business, he had changed the password on the business computer so the plaintiff could not access or use the computer. In its decision, the court found that the defendant wilfully had disobeyed court orders regarding the finances of the parties' business as alleged in the plaintiff's motions for contempt, docket entries ##109.00, 112.00 and 262.00. On the basis of our review of the foregoing, we agree with the trial court that the orders forming the basis for the contempt finding were clear and unambiguous.

[10] The court determined that it was necessary to give the plaintiff exclusive control over the business pending the final dissolution judgment due to problems with the defendant's management of the business during the weeks that he ran the business, including his tendency to "draw" more from the business than he reported as generated during those weeks.

We next consider whether the trial court's finding that the defendant had not complied with these orders was clearly erroneous. "The clearly erroneous standard is the well settled standard for reviewing a trial court's factual findings. A factual finding is clearly erroneous when it is not supported by any evidence in the record or when there is evidence to support it, but the reviewing court is left with the definite and firm conviction that a mistake has been made." (Internal quotation marks omitted.) *Auerbach* v. *Auerbach*, 113 Conn. App. 318, 326–27, 966 A.2d 292, cert. denied, 292 Conn. 902, 971 A.2d 40 (2009).

If the court's determination that the defendant had not complied with the court's orders was not clearly erroneous, we next consider whether the defendant's noncompliance was wilful. "Whether a party's violation was wilful depends on the circumstances of the particular case and, ultimately, is a factual question committed to the sound discretion of the trial court. . . . Without a finding of wilfulness, a trial court cannot find contempt and, it follows, cannot impose contempt penalties." (Internal quotation marks omitted.) *Mitchell* v. *Bogonos*, supra, 218 Conn. App. 69. "To the extent that [this] claim requires us to examine findings that were based on witness testimony, we note that [t]he credibility of witnesses, the findings of fact and the drawing of inferences are all within the province of the trier of fact. . . . We review the findings to determine whether they could legally and reasonably be found, thereby establishing that the trial court could reasonably have concluded as it did." (Internal quotation marks omitted.) *Netter* v. *Netter*, 220 Conn. App. 491, 501, 298 A.3d 653 (2023).

On the basis of our review of the record, the trial court reasonably could have concluded that the defendant had not complied with the court's orders and that his noncompliance was wilful. The plaintiff testified at

trial that, beginning in July, 2020, she and the defendant agreed that they would each operate the business on alternating weeks. The defendant, however, did not deposit all the money that he received during the weeks when he operated the business. On the basis of a summary admitted into evidence, the plaintiff testified that from June through December, 2021, the defendant deposited no cash from the business into either the Webster Bank business account or the defendant's Bank of America account to which she had access. The defendant provided no evidence to contradict this testimony. The plaintiff testified that she learned from a customer that the defendant was accepting payments on Cash App,[11] even though the business did not accept Cash App as a method of payment.[12] The plaintiff also testified that the defendant did not provide the log in credentials for the business computer to the plaintiff, which resulted in her being locked out of the account and having to hire someone to assist her in regaining access to it. In light of this testimony, we cannot conclude that the court's finding that the defendant was not in compliance with the court's orders was clearly erroneous.[13] Because the underlying findings were not clearly

[11] "Cash App is a peer-to-peer money transfer service that allows users to deposit and store money on the app." *H&R Block, Inc.* v. *Block, Inc.*, 58 F.4th 939, 945 (8th Cir. 2023).

[12] On September 7, 2021, the trial court, *Nguyen-O'Dowd, J.*, entered an order that provided, in part, that "the parties shall only accept credit/debit card payments or checks made out to the business for all purchases. The parties shall not accept any payment by cash or through a cash app, Venmo, PayPal, Zelle, or the like, until further order of the court." In its order of January 12, 2022, the trial court stated that its September 7, 2021, order remained in effect.

[13] We note that, on March 2, 2022, the defendant filed a document, which contained numerous exhibits, captioned "Compliance Marital Business Cash Report from November, 2019, through February, 2020." In this document, the defendant outlined purported remuneration and payments to the business during this period and indicated that, by agreement of the parties, he was permitted to deposit cash into a Bank of America account. At trial, the plaintiff disagreed that this was the accounting that the defendant was required to provide and maintained that the defendant had not accounted

erroneous, we conclude that the court properly exercised its discretion in granting the plaintiff's motions for contempt.

As to the award of attorney's fees, the court stated: "The behavior at issue was a running theme through the pretrial period and into the trial. Because of this misconduct, the court awards [the plaintiff] attorney's fees under General Statutes § 46b-87. Because the home equity is the best source of income to pay fees, the court also awards them to [the plaintiff] under . . . § 46b-62. Following the 213 docket entries and the needlessly disorganized trial, [the plaintiff] requests $40,000 in fees in her proposed orders. The court knows she has spent more. The court finds this $40,000 number under the circumstances reasonable. They will be paid from the proceeds of the home sale." A review of the court's decision, therefore, reveals that the court awarded attorney's fees pursuant to §§ 46b-87[14] and 46b-62.[15]

for all the cash that he took from the business from November, 2019, to February, 2020. It was for the court to determine what weight to give this competing evidence. Further, this document neither addresses the defendant's failure to deposit cash from the business into the Webster Bank account, as ordered by the court, nor the defendant's failure to comply with the court's order that he provide to the plaintiff the log in credentials for the business accounts.

[14] General Statutes § 46b-87 provides in relevant part: "When any person is found in contempt of an order of the Superior Court entered under section 46b-60 to 46b-62, inclusive, 46b-81 to 46b-83, inclusive, or 46b-86, the court may award to the petitioner a reasonable attorney's fee and the fees of the officer serving the contempt citation, such sums to be paid by the person found in contempt . . . ."

[15] General Statutes § 46b-62 (a) provides in relevant part: "In any proceeding seeking relief under the provisions of this chapter and sections 17b-743, 17b-744, 45a-257b, 46b-1, 46b-6, 46b-301 to 46b-425, inclusive, 47-14g, 51-348a and 52-362, the court may order either spouse or, if such proceeding concerns the custody, care, education, visitation or support of a minor child, any parent to pay the reasonable attorney's fees of the other in accordance with their respective financial abilities and the criteria set forth in section 46b-82. . . ."

Section 46b-87 grants the court the discretion to award attorney's fees to the prevailing party in a contempt proceeding. "The award of attorney's fees in contempt proceedings is within the discretion of the court. . . . An abuse of discretion in granting the counsel fees will be found only if this court determines that the trial court could not reasonably have concluded as it did. . . . Importantly, *where contempt is established, the concomitant award of attorney's fees properly is awarded pursuant to § 46b-87 and is restricted to efforts related to the contempt action*." (Citation omitted; emphasis added; internal quotation marks omitted.) *Malpeso* v. *Malpeso*, 165 Conn. App. 151, 184, 138 A.3d 1069 (2016).

Additionally, "[i]n dissolution and other family court proceedings, pursuant to § 46b-62 (a), the court may order either [spouse] to pay the reasonable attorney's fees of the other in accordance with their respective financial abilities and the equitable criteria set forth in [General Statutes] § 46b-82, the alimony statute." (Internal quotation marks omitted.) *Zakko* v. *Kasir*, 209 Conn. App. 619, 625, 269 A.3d 220 (2022). That statute provides in relevant part that that the court "shall consider the length of the marriage, the causes for the . . . dissolution of the marriage . . . the age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, employability, estate and needs of each of the parties and the award, if any, which the court may make pursuant to section 46b-81 . . . ." General Statutes § 46b-82 (a). "[A]n award of attorney's fees in a marital dissolution case is warranted only when at least one of two circumstances is present: (1) one party does not have ample liquid assets to pay for attorney's fees; or (2) the failure to award attorney's fees will undermine the court's other financial orders." (Internal quotation marks omitted.) *Zakko* v. *Kasir*, supra, 626.

In the present case, the trial court awarded $40,000 in attorney's fees to the plaintiff but did not cite any evidence in the record that the $40,000 in attorney's fees related to the three motions for contempt. Instead, the court made general statements regarding the defendant's behavior and the "213 docket entries and the needlessly disorganized trial . . . ."[16] While it is true that the plaintiff requested $40,000 in attorney's fees in her proposed orders, this amount was not tied to the plaintiff's request that the court find the defendant in contempt. On this record, insofar as the court awarded the plaintiff $40,000 in attorney's fees as a sanction related to the defendant's contempt, it does not appear that the award "is restricted to efforts related to the contempt action." (Internal quotation marks omitted.) *Malpeso* v. *Malpeso*, supra, 165 Conn. App. 184. Consequently, to the extent that the court awarded the $40,000 in legal fees as a sanction for the defendant's contemptuous conduct, it abused its discretion in doing so. The defendant is thus entitled to a new hearing as to the appropriate sanction for his wilful violation of the court's orders.

The court further stated, however, that "[b]ecause the home equity is the best source of income to pay fees, the court also awards [attorney's fees] to [the plaintiff] under . . . § 46b-62." An award of attorney's fees pursuant to this statute "is a function of the parties' financial circumstances" which "depend directly upon the final financial orders issued by the court in its dissolution judgment." *O'Brien* v. *O'Brien*, supra, 138 Conn. App. 556–57. Accordingly, because the court's financial orders will be reconsidered in their entirety on remand, the trial court may consider whether to award attorney's fees pursuant to § 46b-62 as part of the new financial orders.

[16] We note that the trial court's memorandum of decision, dated September 8, 2022, is docket entry #314.10 in the trial court file.

The judgment is reversed only as to the financial orders and the award of attorney's fees, and the case is remanded for a new trial on all financial issues and for a new determination of the appropriate contempt sanctions; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

PAULA M. CARDOZA *v.* CITY OF WATERBURY
(AC 46460)

Alvord, Seeley and Westbrook, Js.

Syllabus

The plaintiff motorist sought to recover damages from the defendant city for personal injuries she sustained and for damage to her vehicle allegedly resulting from a defective condition in a roadway that was owned and maintained by the defendant city. Pursuant to the applicable statute (§ 13a-149), the plaintiff sent a notice of claim to the defendant that stated the date, time and location of the incident, described her injuries and the losses she incurred, and provided that the cause of such injuries and losses was a "defect in the roadway . . . ." The defendant filed a motion to dismiss the plaintiff's complaint, arguing that the trial court lacked subject matter jurisdiction because the plaintiff failed to comply with the notice requirements of § 13a-149, as her notice did not identify the alleged defect in the road that caused her injuries and damages. The trial court granted the motion, concluding that it lacked subject matter jurisdiction over the action, and rendered judgment dismissing the complaint. On the plaintiff's appeal to this court, *held* that the trial court properly granted the defendant's motion to dismiss for lack of subject matter jurisdiction: the language of the plaintiff's notice did not provide the level of specificity necessary to meet the requirements of § 13a-149 because it failed to describe the cause of the injury in any way beyond the assertion that there was a "defect in the roadway," and, contrary to the plaintiff's argument, the use of the word "defect" did not provide any information as to the cause of the plaintiff's injuries nor did the fact that the notice provided that the defect was "in" the road rule out a long list of potential defects; moreover, the plaintiff's argument that the notice was sufficient in light of the complaints she had filed with the city's police department and public works department following the incident, which provided additional information, was unavailing because § 13a-149 provides that the notice must be given to a selectman or the clerk of a city and does not allow the court to

consider additional notices filed with departments within the city; furthermore, the savings clause of § 13a-149, even if construed liberally, was inapplicable because it applied only in cases in which information in the notice concerning one of the statute's required elements was inaccurate or vague, not where the information was entirely absent, and, in the present case, the cause of the plaintiff's injury was completely, totally and unmistakenly omitted from the plaintiff's notice.

Argued January 30—officially released April 16, 2024

Procedural History

Action to recover damages for, inter alia, personal injuries sustained by the plaintiff as a result of an allegedly defective municipal highway, and for other relief, brought to the Superior Court in the judicial district of Waterbury, where the court, *Massicotte, J.*, granted the defendant's motion to dismiss and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Prerna Rao, for the appellant (plaintiff).

Daniel J. Foster, corporation counsel, for the appellee (defendant).

Opinion

SEELEY, J. The plaintiff, Paula M. Cardoza, appeals from the judgment of the trial court granting the motion to dismiss filed by the defendant, the city of Waterbury, for lack of subject matter jurisdiction over the plaintiff's complaint on the basis that she failed to comply with the requirements of the notice provision of the municipal defective highway statute, General Statutes § 13a-149.[1]

[1] General Statutes § 13a-149 provides in relevant part: "Any person injured in person or property by means of a defective road or bridge may recover damages from the party bound to keep it in repair. No action for any such injury sustained on or after October 1, 1982, shall be brought except within two years from the date of such injury. No action for any such injury shall be maintained against any town, city, corporation or borough, unless written notice of such injury and a general description of the same, and of the cause thereof and of the time and place of its occurrence, shall, within ninety days thereafter be given to a selectman or the clerk of such town, or to the clerk of such city or borough, or to the secretary or treasurer of such corporation. . . . No notice given under the provisions of this section shall be held invalid or insufficient by reason of an inaccuracy in describing the

On appeal, the plaintiff claims that the court erred in granting the defendant's motion to dismiss because the written notice that she submitted to the defendant contained sufficient information in compliance with the notice requirements of § 13a-149, or, in the alternative, the savings clause of § 13a-149 grants her relief under the statute. We disagree and, accordingly, affirm the judgment of the court.

The following facts, as alleged in the plaintiff's complaint, and procedural history are relevant to our resolution of this appeal. On May 14, 2019, the plaintiff sent to the defendant via certified mail a written "Notice of Claim" (notice) pursuant to § 13a-149. The notice, which was received by the defendant on May 16, 2019, stated the plaintiff's name; the date and time of the incident as April 12, 2019, approximately between the hours of 4 and 10 p.m.; and the location of the incident as "Gordon Street, between Cooke Street and Oakland Avenue." The notice described the plaintiff's injuries and losses as "pain and injury to her cervical and lumbar spine, and other injuries which are yet unknown. Property damages include loss and replacement of two tires and other damage to the vehicle." With respect to the cause of the injuries and losses, the notice stated that "[t]he above injuries and losses were caused by the defect in the roadway described above."

On April 5, 2021, the plaintiff commenced the present action by filing a one count complaint against the defendant alleging liability pursuant to § 13a-149. Specifically, the complaint alleges that, on or about April 12, 2019, the plaintiff was operating her motor vehicle in an eastward direction on Gordon Street, which is owned and maintained by the defendant, near the intersection with

injury or in stating the time, place or cause of its occurrence, if it appears that there was no intention to mislead or that such town, city, corporation or borough was not in fact misled thereby."

Cooke Street, in Waterbury. When the plaintiff reached a portion of Gordon Street that "was heavily eroded and unsafe for public travel," the defective condition of the roadway "caused [her] vehicle to suddenly experience two flat tires," which, in turn, caused "the plaintiff to suffer personal injuries[2] and losses[3] . . . ." (Footnotes added.)

On December 14, 2022, the defendant, pursuant to Practice Book § 10-30, filed a motion to dismiss the plaintiff's complaint, arguing that the court lacked subject matter jurisdiction due to the plaintiff's failure to comply with the notice requirements of § 13a-149. Specifically, in its memorandum of law in support of its motion to dismiss, the defendant argued that the notice provided by the plaintiff was inadequate, as it "entirely failed to identify the alleged defect in the road that caused the plaintiff's injuries and damages." On January 23, 2023, the plaintiff filed a memorandum in opposition to the defendant's motion to dismiss, with an attached affidavit and exhibits. The defendant filed a reply on January 30, 2023.

On April 10, 2023, the court, *Massicotte*, *J.*, held a hearing regarding the defendant's motion to dismiss and, that same day, issued an order granting the defendant's motion on the grounds that "the cause of the injury is completely missing [from the notice] and the savings clause does not apply." The court noted the

[2] Specifically, the plaintiff alleged that, as a result of the defendant's carelessness and negligence in failing to maintain Gordon Street, she "suffered neck spasms, stiffness, and pain and tingling in her left arm . . . [and] pain [in] her low back . . . some or all of which require future treatment and possibly future medical procedures . . . ." She also alleged that she requires injections for pain and now has limited range of movement and that her "injuries will be permanent in nature and/or permanently disabling."

[3] The plaintiff further alleged that, in addition to the expenses incurred "for medical care and attention," she sustained "substantial damages and losses to [her] personal property, including . . . [the loss of use of her] vehicle," and that her "ability to enjoy life's activities has been impaired."

plaintiff's argument that the language in the notice—"the defect in the roadway described above"—constituted a description of the defect but found, to the contrary, that the plaintiff had "failed to describe [the defect]" and, therefore, "completely and unmistakably omitted the cause" of her injuries. Accordingly, the court concluded that it lacked subject matter jurisdiction over the plaintiff's action and rendered judgment dismissing the complaint. This appeal followed.

We begin by setting forth the relevant legal principles concerning actions pursuant to § 13a-149. "Under the common law, municipalities enjoyed immunity for injuries caused by defective highways. . . . This immunity has been legislatively abrogated by § 13a-149, which allows a person to recover damages against a municipality for injuries caused by a defective highway. . . . Section 13a-149 provides the exclusive remedy for a person seeking redress against a municipality for such injuries. . . . Under § 13a-149, the plaintiff must provide statutory notice within ninety days of the accident in order for an action to lie for damages caused by a defective highway that the town must maintain. [T]he notice which the statute prescribes comprehends five essential elements: (a) written notice of the injury; (b) a general description of that injury; (c) the cause; (d) the time [and date], and (e) the place thereof. . . . The purpose of the notice requirement is not to set a trap for the unwary or to place an impediment in the way of an injured party who has an otherwise meritorious claim. Rather, the purpose of notice is to allow the municipality to make a proper investigation into the circumstances surrounding the claim in order to protect its financial interests. . . . More specifically . . . the statutory notice assists a town in settling claims promptly in order to avoid the expenses of litigation and encourages prompt investigation of conditions that may endanger public safety, as well as giving the town

an early start in assembling evidence for its defense against meritless claims. . . . A notice that *patently* fails to meet this test in describing the place or cause of the injury is defective as a matter of law." (Citation omitted; emphasis in original; internal quotation marks omitted.) *Murphy* v. *Clinton*, 217 Conn. App. 182, 186–87, 287 A.3d 1150 (2023).

"The failure to comply with [the requirements of § 13a-149] deprives the Superior Court of jurisdiction over a plaintiff's action. . . . It is well established that a determination regarding a trial court's subject matter jurisdiction is a question of law over which our review is plenary. . . . Subject matter jurisdiction involves the authority of the court to adjudicate the type of controversy presented by the action before it. . . . [A] court lacks discretion to consider the merits of a case over which it is without jurisdiction . . . . Under our rules of practice, a motion to dismiss for lack of subject matter jurisdiction may be raised at any time." (Internal quotation marks omitted.) Id., 187–88. In the present case, the defendant's pretrial motion to dismiss was premised on the plaintiff's failure to comply with the notice requirements of § 13a-149. Therefore, the question before us is whether the trial court properly determined, as a matter of law, that the description in the notice of the defect in the roadway that caused the plaintiff's injuries was insufficient to satisfy § 13a-149. See *Dobie* v. *New Haven*, 204 Conn. App. 583, 595, 254 A.3d 321 (2021), aff'd, 346 Conn. 487, 291 A.3d 1014 (2023).

On appeal, the plaintiff claims that (1) the notice given to the defendant is sufficient to meet the requirements of § 13a-149, and (2) even if it is not sufficient, the savings clause in the statute cures any deficiencies in the notice.[4] We conclude, as a matter of law, that

[4] We note that the plaintiff did not brief her claims separately, nor did she include any subheadings for her arguments, leaving us to attempt to differentiate her arguments in support of each of the two claims. See Practice

the language of the notice is insufficient under the requirements of § 13a-149, and, furthermore, because it fails to describe the cause of the plaintiff's injuries in any way, the savings clause is inapplicable.

The notice provided by the plaintiff listed the cause of the plaintiff's injuries as "the defect in the roadway described above," which refers to the description of the location of the incident, namely, "Gordon Street, between Cooke Street and Oakland Avenue." In context, therefore, the description of the cause is limited to "the defect in" the area of Gordon Street that is located between Cooke Street and Oakland Avenue. The entirety of the description of the cause of her injuries is that there is a "defect in" some portion of the roadway. Notably, the notice in the present case does not contain the more detailed description of the cause of the injury that appears in the plaintiff's complaint, which alleges that the road was "heavily eroded and unsafe for public travel . . . caus[ing] the plaintiff's vehicle to suddenly experience two flat tires and causing the plaintiff to suffer personal injuries and losses . . . ."

Our appellate courts previously have addressed the level of specificity required to meet the five statutory elements under § 13a-149. In *Marino* v. *East Haven*, 120 Conn. 577, 182 A. 225 (1935), for example, our Supreme Court addressed the sufficiency of the description of the injury in the plaintiff's notice and held that the notice stating that the plaintiff " 'fell and was injured' " was insufficient as a matter of law, as it failed to provide a description of the injury itself. Id., 578,

Book § 67-4 ("[t]he appellant's brief shall contain the following . . . (e) The argument, divided under appropriate headings into as many parts as there are points to be presented, with appropriate references to the statement of facts or to the page or pages of the transcript or to the relevant document"). For ease of discussion, we address the plaintiff's claims in an order different from the order presented in her brief.

580. Similarly, in *Martin* v. *Plainville*, 240 Conn. 105, 689 A.2d 1125 (1997), our Supreme Court held that the notice given to the town under § 13a-149, which merely stated that the plaintiff " 'was injured after she tripped,' " was insufficient as a description of the injuries suffered. Id., 107, 109. In *Martin*, the plaintiff challenged the validity of *Marino*, arguing that it was "an outdated precedent that produces harsh results." Id., 110. Our Supreme Court upheld *Marino*, noting that the "legislative history manifests an intent to require more rather than less notice to the town. The legislative history of the statute does not support the plaintiff's argument that a mere statement of injury, without any description of such injury, should suffice under § 13a-149." (Emphasis omitted.) Id., 111.[5]

Our courts also specifically have addressed what constitutes sufficient notice as to the cause of the injury. In *Ross* v. *New London*, 3 Conn. Cir. 644, 222 A.2d 816, cert. denied, 154 Conn. 717, 221 A.2d 272 (1966), the notice provided by the plaintiff stated in relevant part: "The claim is that the fall was caused by the neglect of the city in the maintenance and repair of the sidewalk at said site." (Internal quotation marks omitted.) Id., 645. The court held that it was "immediately apparent that [the notice] fails to specify the defect in the highway

[5] We note that *Martin* was decided before the enactment of General Statutes § 1-2z, which provides that "[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." Our Supreme Court has "addressed the issue of whether the passage of § 1-2z require[s] us to abandon prior interpretations of statutes in order to comply with § 1-2z" and "determined that we do not abandon prior interpretations of statutory language. Rather, even after the passage of § 1-2z, it is customary for us to begin with this court's prior interpretations of statutes in previous cases." *Peek* v. *Manchester Memorial Hospital*, 342 Conn. 103, 124, 269 A.3d 24 (2022).

which resulted in injury to the plaintiff. The cause of the injury required to be stated must be interpreted to mean the defect or defective condition of the highway which brought about the injury. . . . What exactly was the neglect of the city in the maintenance and repair of the sidewalk in front of the premises . . . which brought about the injuries claimed by the plaintiff? Was it a large, small or medium hole, a ditch, a gully, a rut, a depression, or the elevation of a portion of the sidewalk, or perhaps the failure of the city effectively to remove snow or ice accumulated thereon? . . . Certainly, the use of the words neglect, maintenance and repair gives no clue whatsoever as to the direct cause of the fall in question, nor do the words give any indication of that which occasioned or produced the fall. . . . It is sufficient and customary in defective highway cases to state that the cause was a specified defective condition, without further statement that it in turn was due to negligence in failing to keep the highway in repair or otherwise." (Citations omitted; internal quotation marks omitted.) Id., 646–47.[6]

[6] Although "[w]e are not bound by the precedent of the statutory Appellate Division of the Circuit Court . . . we may find it persuasive." (Citation omitted; internal quotation marks omitted.) *State* v. *Hackett*, 72 Conn. App. 127, 135, 804 A.2d 225, cert. denied, 262 Conn. 904, 810 A.2d 270 (2002). We find the court's reasoning in *Ross* to be persuasive to our analysis in the present case. See also *Beisiegel* v. *Seymour*, 58 Conn. 43, 52, 19 A. 372 (1889) (statement that highway was "defective, and out of repair is clearly insufficient" as to cause of plaintiff's injuries (internal quotation marks omitted)). We also note that many Superior Court decisions similarly have determined that a bare bones assertion of a defect is insufficient under § 13a-149. See, e.g., *Troisi* v. *Watertown*, Superior Court, judicial district of Waterbury, Docket No. CV-23-6071453-S (November 20, 2023) ("description in the notice of claim [that plaintiff] . . . 'was caused to fall due to a defect in the sidewalk' " was insufficient because it "fails to describe the exact nature of the defect"); *Castillo-Blain* v. *Wethersfield*, Superior Court, judicial district of Hartford, Docket No. CV-19-6110067-S (November 5, 2019) (69 Conn. L. Rptr. 417, 417–18) (notice stating cause as " 'relating to a defective sidewalk' " and that plaintiff was injured " '[d]ue to a defect in the roadway in the crosswalk' " and " '[a]s a result of the defect,' " was insufficient because it "provide[d] the defendant with nothing more from which to identify the exact nature of the defect"); *Sherard* v. *New Haven*, Superior

In *Murphy* v. *Clinton*, supra, 217 Conn. App. 184, this court determined that the description of the cause of injury in the notice provided was sufficient under § 13a-149. In *Murphy*, the notice "stated that while 'walking across the intersection of Grove Street and West Grove Street . . . [the plaintiff] stepped into a defective water main hole cover causing serious personal injuries to her right leg.' The plaintiff included three color photographs with the notice, in which the water main hole cover is visible from three different distances within the intersection. Additionally, in the notice, the plaintiff referenced the three photographs; the notice indicate[d] that the water main hole cover '[was] more fully shown [i]n the photos attached hereto' . . . ." Id., 185. In reviewing the notice, this court observed that "[t]he notice states that the plaintiff '*stepped into* a defective water main hole cover' . . . . The plaintiff also included three color photographs with the notice, in support of the assertion that the water main hole cover located at the intersection . . . was the cause of her injury. Each photograph makes unmistakable that the cover is depressed, that is, markedly lower than the grade of the surrounding pavement. The language of the notice and the appended photographs go well beyond merely asserting a 'defect'; rather, they paint a picture that gave notice to the defendant that the plaintiff's injury was caused by a water main hole cover, in a

Court, judicial district of New Haven, Docket No. CV-16-6060857-S (January 7, 2019) (67 Conn. L. Rptr. 607, 610–11) (description of cause of injury as " 'a defect in the sidewalk due to its state of disrepair' " was insufficient under § 13a-149); *Bencivengo* v. *Madison*, Superior Court, judicial district of New Haven, Docket No. CV-12-6030857-S (May 1, 2013) (notice describing cause of injuries as " 'a defective condition upon a walkway and/or bridge' " was defective in that it omitted required description of cause of injuries); *Platt* v. *Naugatuck*, Superior Court, judicial district of Waterbury, Docket No. CV-10-6002897-S (January 17, 2012) (notice stating plaintiff fell due to "negligent maintenance of pedestrian sidewalks" was insufficient because it completely omitted cause of injury (emphasis omitted; internal quotation marks omitted)).

particular location, that was not sufficiently flush with the surrounding pavement." (Emphasis in original.) Id., 189. In sum, this court concluded that the description was specific and detailed enough to give the town adequate notice as to what brought about the injuries suffered by the plaintiff. See id.

In contrast, in the present case, the notice given fails to describe the cause of the injury beyond the assertion that it was a "defect in the roadway . . . ." Despite the plaintiff's argument that such a description "excludes many different claims, including those involving (1) materials or other substances merely on the roadway, such as a pile of wet leaves . . . (2) sidewalks . . . (3) bridges . . . (4) malfunctioning traffic lights . . . [5] ice, snow or other weather conditions . . . or [6] parking lots"; (citations omitted; emphasis omitted); we conclude that it fails to meet the requirements of the statute. Construing the notice requirements of § 13a-149 liberally, as we are required to do; see *Murphy* v. *Clinton*, supra, 217 Conn. App. 187; the use of the word "defect" fails to provide any information as to the cause of the plaintiff's injuries. Nor does the fact that the notice provided that the "defect" was "in" the road, as the plaintiff argues, rule out a long list of potential defects. Unlike in *Murphy*, in which the plaintiff's notice stated that the plaintiff stepped " '*into*' " the water main hole cover; (emphasis added) *Murphy* v. *Clinton*, supra, 185; the description in the plaintiff's notice in the present case does not indicate whether the alleged defect was protruding from the surface, or underneath it, which would be important to the defendant's efforts to identify the cause of the plaintiff's injury. Moreover, as *Martino*, *Marino*, and *Ross* make clear, the notice requirement is intended to provide the municipality with sufficiently specific information so that it can remedy the defect. We conclude that the language of the plaintiff's notice fails to sufficiently describe the cause

of her injury, and, therefore, it *patently* does not meet the requirements of § 13a-149 as a matter of law.

The plaintiff argues that the defendant was already familiar with the defect from complaints that she had filed with the defendant's police department and public works department in the aftermath of the incident, which provided additional information, and that, therefore, the notice was sufficient. This argument is unavailing. We note first that § 13a-149 provides that the notice must "be given to a selectman or . . . the clerk of such city or borough . . . ." The statute does not allow the court to consider the filing of additional notices with departments within the municipality. See General Statutes § 13a-149. Furthermore, the only support offered by the plaintiff in furtherance of this argument is that our Supreme Court stated that, "[i]n testing the sufficiency of a notice, it should be remembered also that a general description of the location of a large, or well known or long continued obstruction, or one with which the defendants are already familiar, may be quite sufficient to meet the test, where it would not be if these were not the facts." *Sizer* v. *Waterbury*, 113 Conn. 145, 158, 154 A. 639 (1931). The plaintiff's reliance on *Sizer* is misplaced, however, because the notice given in *Sizer* to the city described " 'personal injuries sustained by reason of falling in a hole on Huntington Avenue' "; id., 154; and, therefore, the description of the cause of the injuries—a hole—was provided as part of the notice, unlike in the present case in which a description of the cause of the plaintiff's injuries was entirely absent from the notice.[7]

[7] The plaintiff's final argument in support of this claim is that the trial court "relied heavily" on this court's decision in *Frandy* v. *Commissioner of Transportation*, 132 Conn. App. 750, 34 A.3d 418 (2011), cert. denied, 303 Conn. 937, 36 A.3d 696 (2012), and that "[t]his reliance was erroneous, as unlike the state, municipalities are not sovereign and do not enjoy sovereign immunity." The plaintiff is correct that there are important distinctions between *Frandy* and the present case: the claim in *Frandy* was brought under General Statutes § 13a-144, which permits a civil action to recover

We next turn to the plaintiff's claim that the savings clause of § 13a-149[8] applies in the present case and cures any deficiencies in the notice. We begin with the relevant legal principles. "Section 13a-149 . . . contains a saving[s] clause that provides that notice given under the statute will not be invalidated because of inaccuracies in its content as long as there was no intent to mislead the municipality or the municipality is not in fact misled. . . . While the saving[s] clause will excuse inaccuracies in the content of the notice, however, it will not excuse a complete absence of notice." (Citation omitted; internal quotation marks omitted.) *Bassin* v. *Stamford*, 26 Conn. App. 534, 538, 602 A.2d 1044 (1992). "When a notice fails to provide information respecting each of the required elements, it is deficient as a matter of law." *Pajor* v. *Wallingford*, 47 Conn. App. 365, 378, 704 A.2d 247 (1997), cert. denied, 244 Conn. 917, 714 A.2d 7 (1998); see also *Martin* v. *Plainville*, supra, 240 Conn. 113 ("[t]he savings clause applies only where the information provided in the notice is inaccurate, not where information is entirely absent" (emphasis omitted)).

The plaintiff correctly points out in her brief that the inclusion of a savings clause means that § 13a-149 is to

damages for injuries sustained on state highways or sidewalks, as opposed to roads owned by a municipality. See *Frandy* v. *Commissioner of Transportation*, supra, 751. Nevertheless, the plaintiff overstates the trial court's reliance on *Frandy*. The trial court cited *Frandy* once in its decision, and the portion that it cited was a quotation within that decision from *Ross* v. *New London*, supra, 3 Conn. Cir. 646, in which the court discussed what constituted a sufficient description of the cause of injuries sustained by a plaintiff under § 13a-149. See *Frandy* v. *Commissioner of Transportation*, supra, 754–55. There is thus no merit to the plaintiff's argument that the court's use of *Frandy* in its decision was erroneous.

[8] The savings clause of General Statutes § 13a-149 provides: "No notice given under the provisions of this section shall be held invalid or insufficient by reason of an inaccuracy in describing the injury or in stating the time, place or cause of its occurrence, if it appears that there was no intention to mislead or that such town, city, corporation or borough was not in fact misled thereby."

be construed liberally. See *Murphy* v. *Clinton*, supra, 217 Conn. App. 187. Nevertheless, as we previously stated in this opinion, the savings clause applies only in cases in which information in the notice concerning one of the required elements is inaccurate or vague, "not where information is *entirely absent*." (Emphasis in original; internal quotation marks omitted.) *Salemme* v. *Seymour*, 262 Conn. 787, 794, 817 A.2d 636 (2003); see also *Bassin* v. *Stamford*, supra, 26 Conn. App. 538. Our Supreme Court has "emphasize[d] that 'entirely absent' means exactly that; one of the 'five essential elements' articulated in *Martin* v. *Plainville*, supra, [240 Conn. 109], must be completely, totally and unmistakably omitted from the plaintiff's notice." *Salemme* v. *Seymour*, supra, 794.

In the present case, the notice given by the plaintiff to the defendant failed to include any description of the cause of the plaintiff's injury; therefore, it did not fulfill one of the requirements for notice under § 13a-149. See id. (discussing *Martin* v. *Plainville*, supra, 240 Conn. 113, and noting that court in *Martin* "declined to afford the plaintiff the 'relief of the savings clause because the notice she provided *failed to give any description of the injury whatsoever* and, thus, did not comport with one of the five fundamental requirements for perfected notice' " (emphasis in original)); see also *Nicholaus* v. *Bridgeport*, 117 Conn. 398, 401, 167 A. 826 (1933) ("[t]he provision that no notice shall be held invalid or insufficient because of an 'inaccuracy' in stating the cause of the injury, if the conditions stated in the statute appear, cannot avail to make valid a notice which fails *entirely* to state that cause" (emphasis added)); *Ross* v. *New London*, supra, 3 Conn. Cir. 645, 647 (savings clause could not be applied when only description given in notice of cause of injury was " 'neglect of the city' "). Accordingly, the savings clause

cannot be applied to the notice given by the plaintiff to the defendant in the present case.

In summary, we conclude, as a matter of law, that the plaintiff's notice fails to meet one of the statutory requirements of § 13a-149. Moreover, because the cause of injury was "completely, totally and unmistakenly omitted from the plaintiff's notice"; *Salemme* v. *Seymour*, supra, 262 Conn. 794; the savings clause does not apply. Accordingly, given the plaintiff's failure to comply with a condition precedent to maintaining an action under § 13a-149, the court properly granted the defendant's motion to dismiss for lack of subject matter jurisdiction.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* EDWIN EDDIE BERRIOS
(AC 46463)

Clark, Seeley and Prescott, Js.

Syllabus

The defendant, who had been convicted, on a plea of guilty, of the crime of burglary in the first degree as a persistent felony offender, appealed to this court from the judgment of the trial court denying his motions to withdraw his guilty plea, which were filed nearly three months after he had begun serving his sentence. The defendant previously had been charged with several crimes in addition to burglary, including assault in the third degree and criminal mischief in the third degree. A jury found the defendant guilty on the assault count and not guilty on the criminal mischief count but was unable to reach a unanimous verdict on the remaining charges. The trial court declared a mistrial as to those charges, and the state, in a new docket, subsequently charged the defendant with those crimes, including the burglary count, and with being a persistent felony offender. *Held* that the defendant could not prevail on his claim that the trial court improperly denied his motions to withdraw his guilty plea in which he challenged his conviction on double jeopardy grounds, namely, that his prior conviction of assault and acquittal of

criminal mischief precluded the state from retrying him on the charge of burglary in the first degree: because the defendant already had begun serving his sentence at the time he filed his motions, the trial court no longer had jurisdiction to decide the motions, which could not be construed as challenging the defendant's sentence, and the defendant did not claim, nor could this court conclude after reviewing the motions, that any legislative or constitutional grant of continuing jurisdiction applied that would have allowed the trial court to retain jurisdiction over the motions; accordingly, although the trial court properly rejected the defendant's postsentencing motions, the form of the court's judgment was improper, as the court should have dismissed, rather than denied, the motions, and the case was remanded to the trial court with direction to render judgment dismissing the motions.

Argued January 29—officially released April 16, 2024

Procedural History

Two part information charging the defendant, in the first part, with the crimes of burglary in the first degree, burglary in the second degree and robbery in the third degree, and, in the second part, with being a persistent felony offender, brought to the Superior Court in the judicial district of Danbury, where the defendant was presented to the court, *Pavia*, *J.*, on pleas of guilty to burglary in the first degree and being a persistent felony offender; thereafter, the state entered a nolle prosequi as to the charges of burglary in the second degree and robbery in the third degree; judgment in accordance with the pleas; subsequently, the court, *Stango*, *J.*, denied the defendant's motions to vacate and to dismiss, and the defendant appealed to this court. *Improper form of judgment*; *reversed*; *judgment directed*.

Edwin Eddie Berrios, self-represented, the appellant (defendant).

Timothy F. Costello, supervisory assistant state's attorney, with whom, on the brief, were *David R. Applegate*, state's attorney, and *Matthew Knopf*, assistant state's attorney, for the appellee (state).

Opinion

SEELEY, J. The self-represented defendant, Edwin Eddie Berrios, who had been convicted following his guilty plea to a charge of burglary in the first degree, appeals from the judgment of the trial court denying certain motions he filed after he was sentenced (postsentencing motions), in which he challenged his conviction on double jeopardy grounds. The defendant initially had been tried on the charge of burglary in the first degree, but after the jury was unable to reach a unanimous verdict on that charge, among others, the court declared a mistrial. The state subsequently charged him under a new criminal docket number with various crimes, including burglary in the first degree, after which he entered his guilty plea to that charge. On appeal, the defendant challenges the trial court's judgment denying his postsentencing motions and raises a number of arguments in support of his claim that the state was precluded from seeking to prosecute him again for burglary in the first degree following the mistrial on that count.[1] In response, the state argues, inter alia, that the court lacked jurisdiction to decide the defendant's motions because they were filed after the court had sentenced the defendant.[2] We agree with the state that the court lacked jurisdiction over the defendant's postsentencing motions,[3] and that, therefore, the form of the judgment is improper, as the court should

[1] See footnotes 8 and 10 of this opinion.

[2] The state also argues, in the alternative, that the defendant waived his double jeopardy claims regarding the charge of burglary in the first degree when he unconditionally pleaded guilty to that charge and that the defendant's claims fail on the merits because there was no double jeopardy violation. Because we conclude that the trial court lacked jurisdiction, we do not reach these alternative arguments.

[3] The state acknowledges in its appellate brief that it failed to raise the issue of jurisdiction before the trial court. The issue of subject matter jurisdiction, however, may be raised by a party at any time, including on appeal. See, e.g., *State* v. *Evans*, 329 Conn. 770, 777 n.11, 189 A.3d 1184 (2018), cert. denied, U.S. , 139 S. Ct. 1304, 203 L. Ed. 2d 425 (2019).

have dismissed rather than denied the motions. We, thus, reverse the judgment denying the defendant's postsentencing motions and remand the case with direction to render judgment dismissing those motions.

The following facts and procedural history are relevant to this appeal. The defendant was arrested in May, 2019, following an incident in which he entered an unlocked apartment in Danbury and attempted to take a small safe. During the incident, the resident[4] of the apartment returned home, confronted and fought the defendant, and eventually overpowered him. At that point, the resident was able to call the police, who arrested the defendant at the scene. He subsequently was charged, under Docket No. 19-0159665-S, with one count each of burglary in the first degree in violation of General Statutes § 53a-101 (a) (2), robbery in the third degree in violation of General Statutes § 53a-136 (a), assault in the third degree in violation of General Statutes § 53a-61 (a) (1), attempt to commit larceny in the sixth degree in violation of General Statutes §§ 53a-49 and 53a-125b, and criminal mischief in the third degree in violation of General Statutes § 53a-117 (a) (1).

The jury found the defendant guilty of assault in the third degree and not guilty of criminal mischief in the third degree. The jury was unable to reach a unanimous verdict with respect to the remaining charges, and the court declared a mistrial as to those counts. The state subsequently filed a long form information under a new criminal docket number, Docket No. 19-0159665-A, charging the defendant with burglary in the first degree, burglary in the second degree, and robbery in the third

[4] 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.

degree. The state also filed a part B information charging the defendant with being a persistent felony offender.

On July 13, 2022, the defendant entered into an agreement with the state and pleaded guilty to the charge of burglary in the first degree as a persistent felony offender. The court canvassed the defendant and found that his plea was "entered knowingly and voluntarily with the assistance of competent counsel." The court accepted the defendant's plea and sentenced him in accordance with the plea agreement. On the charge of burglary in the first degree as a persistent felony offender, the court imposed a sentence of twenty-five years of incarceration, execution suspended after five years, followed by five years of probation.[5] The state entered a nolle prosequi[6] on each of the remaining charges.

Nearly three months after his sentencing, the defendant filed the first of several postsentencing motions that are at issue in this appeal. Specifically, those motions included a motion to vacate for lack of subject matter jurisdiction filed on October 7, 2022; a motion to vacate for lack of subject matter jurisdiction filed on October 17, 2022; an amended motion to vacate for lack of subject matter jurisdiction filed on October 17, 2022; and a motion to reverse and dismiss for lack of subject matter jurisdiction filed on December 16, 2022.[7]

[5] In the prior case, under Docket No. 19-0159665-S, the court imposed a consecutive sentence of 364 days of incarceration for the defendant's conviction of assault in the third degree.

[6] "A nolle prosequi is a declaration of the prosecuting officer that he will not prosecute the suit further at that time. . . . As our Supreme Court has explained, [t]he effect of a nolle is to terminate the particular prosecution of the defendant without an acquittal and without placing him in jeopardy." (Citations omitted; internal quotation marks omitted.) *State* v. *Richard P.*, 179 Conn. App. 676, 682, 181 A.3d 107, cert. denied, 328 Conn. 924, 181 A.3d 567 (2018).

[7] On appeal, the defendant and the state both reference a motion to dismiss for lack of subject matter jurisdiction dated September 28, 2022, as one of the postsentencing motions the court denied that is the subject of this

In those motions, the defendant argued that the state was precluded from prosecuting him again on the burglary in the first degree charge for a number of reasons, mainly, on double jeopardy grounds.[8]

On March 23, 2023, the court, *Stango*, *J.*, heard arguments on all four of the defendant's motions. After the court addressed two unrelated motions, it turned to the motions to dismiss and/or vacate at issue in this appeal and asked the defendant if he wanted to vacate his guilty plea, to which the defendant initially replied that he did not and, instead, wanted to have the information reversed or dismissed as defective. The court then explained that "the first step in that would be having the guilty pleas vacated. You have [pleaded] guilty and were fully canvassed. So, you're a convicted person on this case now, and you're sentenced, and you're here

appeal. The trial court file does not show that any such motion was filed with or decided by the court. The transcript of the March 23, 2023 hearing indicates that, at the outset of the hearing, the court referenced five motions that were the subject of that hearing: (1) a motion for guilty plea and sentencing transcripts; (2) a motion to compel the defendant's attorney to produce the defendant's file; (3) a motion to vacate for lack of subject matter jurisdiction filed October 7, 2022; (4) an amended motion to vacate for lack of subject matter jurisdiction filed October 17, 2022; and (5) a motion to reverse and dismiss for lack of subject matter jurisdiction filed December 16, 2022. Even though the March 23, 2023 transcript shows three motions to vacate or dismiss for lack of subject matter jurisdiction that were denied by the court, the defendant's motion to vacate for lack of subject matter jurisdiction filed on October 17, 2022, includes a notation by the trial court indicating that it was part of the remote hearing and that the motion was denied. Accordingly, our decision in this appeal is limited to the four relevant motions to vacate or dismiss that were addressed and denied by the court. We note, nonetheless, that, even if our decision also concerned the September 28, 2022 motion, that would in no way impact or change our decision in this appeal.

[8] In his motions, the defendant made two primary arguments, namely, that (1) burglary in the first degree is a greater offense of assault in the third degree, and robbery in the third degree and assault in the third degree are greater and lesser included offenses, and (2) double jeopardy bars successive prosecutions for greater and lesser included offenses. In his motions, the defendant sought to reverse, dismiss, and/or vacate his conviction of burglary in the first degree and the sentence imposed on July 13, 2022.

in front of me as a sentenced prisoner. . . . [S]o, you have decided to do some research on your own that the state was without subject matter jurisdiction to prosecute you, and, therefore, you should not have [pleaded] guilty?" The defendant replied that he "should not have [pleaded] guilty."

Thereafter, the defendant reiterated the arguments contained in his motions. After hearing those arguments, the court denied the defendant's postsentencing motions, stating: "You chose to have a trial. At that trial, you were acquitted of some counts, convicted of some counts, and [on] other [counts] the jury [was] unable to reach a verdict. At that point, any of those matters where the jury was unable to reach a verdict could be retried by the prosecutor. You can't be retried on something you were convicted of. You can't be retried on something that you were acquitted of. But the ones where the jury [was] unable to [reach] a verdict, the prosecutor brought another case against you. [On] [t]hose charges, you wound up pleading guilty and [were] thoroughly canvassed . . . ." This appeal followed.[9]

On appeal, the defendant argues that (1) his conviction of assault in the third degree precluded a subsequent prosecution for burglary in the first degree and (2) his acquittal on the charge of criminal mischief in the third degree precluded a subsequent prosecution for burglary in the first degree.[10] The state counters

[9] The defendant has not appealed from his conviction under Docket No. 19-0159665-S of assault in the third degree. See footnote 5 of this opinion.

[10] On appeal, the defendant also argues that the state could not prosecute him again for robbery in the third degree because that charge shares a common element with assault in the third degree, for which he previously was convicted. This claim also was raised in his motion to reverse and dismiss for lack of subject matter jurisdiction filed on December 16, 2022. Although, for the reasons stated in this opinion, we do not reach the merits of the defendant's claims, we do note that this claim concerns a crime of which the defendant was never convicted. See *State* v. *Just*, 185 Conn. 339, 356, 441 A.2d 98 (1981) (defendant could not make argument that court erroneously instructed jury concerning unlawful restraint in first degree as

that, because the defendant's postsentencing motions were filed after the court already had sentenced the defendant, the court did not have jurisdiction to decide the defendant's motions. We agree with the state.

We first set forth the legal principles that are relevant to our resolution of this appeal. "It is axiomatic that jurisdiction involves the power in a court to hear and determine the cause of action presented to it and its source is the constitutional and statutory provisions by which it is created. . . . Article fifth, § 1 of the Connecticut constitution proclaims that [t]he powers and jurisdiction of the courts shall be defined by law, and General Statutes § 51-164s provides that [t]he superior court shall be the sole court of original jurisdiction for all causes of action, except such actions over which the courts of probate have original jurisdiction, as provided by statute. . . . The Superior Court is a constitutional court of general jurisdiction. . . . In the absence of statutory or constitutional provisions, the limits of its jurisdiction are delineated by the common law. . . . It is well established that under the common law a trial court has the discretionary power to modify or vacate a criminal judgment *before* the sentence has been executed." (Citations omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Reid*, 277 Conn. 764, 774, 894 A.2d 963 (2006); see also *State* v. *McCoy*, 331 Conn. 561, 585, 206 A.3d 725 (2019) ("a trial court loses jurisdiction upon the execution of the defendant's sentence, unless it is expressly authorized to act").

Our Supreme Court consistently has held that, in criminal cases, "the imposition of sentence is the judgment of the court. . . . When the sentence is put into

lesser offense of kidnapping in first degree because he was not convicted of unlawful restraint in first degree); *State* v. *David O.*, 104 Conn. App. 722, 732, 937 A.2d 56 (2007) (defendant could not have been prejudiced by prosecutor's remarks regarding crimes of which defendant was not convicted), cert. denied, 285 Conn. 915, 943 A.2d 473 (2008).

effect and the prisoner is taken in execution, custody is transferred from the court to the custodian of the penal institution. At this point jurisdiction of the court over the prisoner terminates." (Internal quotation marks omitted.) *State* v. *Reid*, supra, 277 Conn. 775; see also *State* v. *Butler*, 348 Conn. 51, 69, 300 A.3d 1145 (2023) (recognizing existing common-law rule that "a trial court has the discretionary power to modify or vacate a criminal judgment before the sentence has been executed" (internal quotation marks omitted)); *State* v. *Evans*, 329 Conn. 770, 778, 189 A.3d 1184 (2018) ("[A] trial court has the discretionary power to modify or vacate a criminal judgment *before* the sentence has been executed. . . . This is so because the court loses jurisdiction over the case when the defendant is committed to the custody of the [C]ommissioner of [C]orrection and begins serving the sentence." (Emphasis added; internal quotation marks omitted.)), cert. denied, U.S. , 139 S. Ct. 1304, 203 L. Ed. 2d 425 (2019); *State* v. *Parker*, 295 Conn. 825, 834, 992 A.2d 1103 (2010) ("[a] generally accepted rule of the common law is that a sentence cannot be modified by the trial court . . . if the sentence was valid and execution of it has commenced" (internal quotation marks omitted)); *State* v. *Das*, 291 Conn. 356, 370, 968 A.2d 367 (2009) (trial court lacked jurisdiction to consider postsentencing motion to withdraw plea); *State* v. *Lawrence*, 281 Conn. 147, 154, 913 A.2d 428 (2007) ("[w]ithout a legislative or constitutional grant of continuing jurisdiction . . . the trial court lacks jurisdiction to modify its judgment" (internal quotation marks omitted)).

Accordingly, because the defendant already had been sentenced, the trial court no longer had jurisdiction to decide his postsentencing motions, unless there exists a legislative or constitutional grant of continuing jurisdiction that applies in this case. See *State* v. *Luzietti*, 230 Conn. 427, 431, 646 A.2d 85 (1994) ("once judgment

has been rendered and the defendant has begun serving the sentence imposed, the trial court lacks jurisdiction to modify its judgment *in the absence of* a legislative or constitutional grant of continuing jurisdiction" (emphasis added)). In that vein, our Supreme Court has "note[d] that there are a limited number of circumstances in which the legislature expressly has conferred on the trial courts 'continuing jurisdiction to act on their judgments after the commencement of sentence . . . . See, e.g., General Statutes §§ 53a-29 through 53a-34 (permitting the trial court to modify terms of probation after sentence is imposed); General Statutes § 52-270 (granting jurisdiction to trial court to hear a petition for a new trial after execution of original sentence has commenced) . . . .' " *State* v. *Reid*, supra, 277 Conn. 775 n.13; see also *State* v. *Das*, supra, 291 Conn. 362 (court may correct illegal sentence or sentence imposed in illegal manner pursuant to Practice Book § 43-22).

In the present case, the defendant has not claimed that any such exception applies that would have allowed the trial court to retain jurisdiction over his postsentencing motions, and his motions cannot be construed as challenging his sentence. Furthermore, our review of the substance of the motions leads us to conclude that they do not fall within any of these categories as to which the legislature has conferred continuing jurisdiction on the trial court to act on a judgment following the imposition of sentence. We, thus, need not examine the applicability of these exceptions to the defendant's postsentencing motions.

In its appellate brief, the state argues that, despite the various titles of the defendant's motions, they all were, in substance, motions to withdraw his plea of guilty to the burglary charge. In light of the colloquy at the March 23, 2023 hearing and the arguments raised in the motions, we agree with the state and treat the motions as such. See *Torres* v. *Carrese*, 149 Conn. App.

596, 613, 90 A.3d 256 ("[c]ourts analyze pleadings for what they are, rather than for what their titles state they are"), cert. denied, 312 Conn. 912, 93 A.3d 595 (2014). Pursuant to Practice Book § 39-26, "[a] defendant may withdraw his or her plea of guilty or nolo contendere as a matter of right until the plea has been accepted. . . . *A defendant may not withdraw his or her plea after the conclusion of the proceeding at which the sentence was imposed.*" (Emphasis added.) In *State* v. *Das*, supra, 291 Conn. 356, the defendant appealed from the trial court's dismissal of his motion to vacate the judgment of conviction against him and to withdraw his plea of nolo contendere. Id., 358. Our Supreme Court affirmed the trial court's dismissal of his motion on the ground that, because the defendant's sentence already had begun, the trial court no longer had jurisdiction to consider a postsentencing request to withdraw a plea.[11] See id., 361–62. It therefore follows that, because the defendant in the present case already had begun serving his sentence, the trial court did not have jurisdiction to consider his postsentencing motions seeking, in effect, a withdrawal of his guilty plea. It is also significant that the previously mentioned limited circumstances in which the legislature expressly has conferred continuing jurisdiction on the trial courts are not "relevant . . . to a trial court's jurisdiction to consider a defendant's postsentencing request to withdraw his plea." Id., 363; see id., 362 ("[a]lthough there are several exceptions to th[e] rule [that a defendant may not withdraw his plea after the conclusion of the proceeding at which the sentence was imposed] that afford the trial court jurisdiction over a defendant's challenge to his *sentence*, we find it instructive that none of these exceptions extends the trial court's jurisdiction to consider

[11] Furthermore, our Supreme Court stated that there is no "constitutional violation exception to the trial court's lack of jurisdiction over a defendant's motion to withdraw his plea after the sentence has been executed . . . ." *State* v. *Das*, supra, 291 Conn. 368.

a postsentencing attack on the plea itself" (emphasis in original)).

In sum, in the present case, the defendant pleaded guilty, and the court sentenced him on July 13, 2022. The defendant did not file his first postsentencing motion until nearly three months after the sentence had been imposed, at which point he already had started serving his sentence. Therefore, on March 23, 2023, when the court heard argument on and denied the postsentencing motions, the court no longer had jurisdiction to rule on the motions. See, e.g., *State* v. *Luzietti*, supra, 230 Conn. 432 ("court loses jurisdiction over the case" once defendant has begun serving his sentence). For that reason, the court should have dismissed, rather than denied, the defendant's postsentencing motions.[12]

The form of the judgment is improper, the judgment is reversed and the case is remanded with direction to render judgment dismissing the defendant's postsentencing motions.

In this opinion the other judges concurred.

CHRISTOPHER S. TRAVINSKI ET AL. *v.* GENERAL INSURANCE COMPANY OF AMERICA ET AL.
(AC 45222)

Alvord, Suarez and Pellegrino, Js.

Syllabus

The plaintiffs sought to recover damages from the defendant insurance companies, G Co., S Co., L Co., and M Co., in connection with the

[12] In light of our determination that the trial court did not have jurisdiction over the defendant's postsentencing motions, we do not reach the merits of his double jeopardy claims on appeal, including the question of whether he waived such a claim by pleading guilty. See, e.g., *State* v. *Adams*, 186 Conn. App. 84, 88, 198 A.3d 691 (2018) ("defendant's valid guilty plea . . . constitutes a waiver of his double jeopardy claim" (internal quotation marks omitted)).

denial of the plaintiffs' claim under a homeowners insurance policy. The plaintiffs sought to recover damages for breach of contract, breach of the implied covenant of good faith and fair dealing, violation of the Connecticut Unfair Trade Practices Act (§ 42-110a et seq.) and the Connecticut Unfair Insurance Practices Act (§ 38a-815 et seq.), and violation of the Connecticut Unauthorized Insurers Act (CUIA) (§ 38a-271 et seq.). The defendants filed a motion for summary judgment as to all counts of the complaint, arguing, inter alia, that the insurance policy did not provide coverage for the plaintiffs' claim and that the extracontractual claims were unfounded. The trial court granted the defendants' motion, and the plaintiffs appealed to this court. *Held*:

1. The trial court properly rendered summary judgment as to the plaintiffs' breach of contract claim: although the plaintiffs asserted that the policy issued by G Co. and appended to the defendants' motion for summary judgment was not the policy that was the subject of their contract claim, the trial court properly determined that there existed no genuine issue of material fact that the plaintiffs' insurance policy had been issued by G Co. and that G Co. had denied the plaintiffs' insurance claim, as the materials appended to the defendants' motion for summary judgment included a copy of the policy that clearly states that it was issued by G Co., an affidavit of a claims team manager that stated that the policy was issued by G Co. to insure the plaintiffs' property and that G Co. was licensed to issue insurance policies in Connecticut, a policy renewal letter that identified G Co. as the issuer of the policy, and a letter stating that the claim submitted to G Co. for damages to the plaintiffs' property was denied; moreover, the plaintiffs did not submit evidence that created a genuine issue of material fact that the authenticated policy that was appended to the defendants' motion was not the policy at issue in the complaint, as neither their argument that the policy was issued by an entity named Safeco Insurance nor their statements in their affidavits that they did not interact with G Co. created a genuine issue of material fact regarding whether G Co. issued the policy, and both the plaintiffs' argument that the affidavit submitted by the defendants contained false statements regarding the insurer of the policy and that they did not receive a copy of the policy were unmeritorious because the trial court did not find any affidavit submitted by the defendants to be false and the plaintiffs did not append to their opposition any evidence that they had asked for a copy of the policy and had been denied; furthermore, the plaintiffs failed to provide any legal authority for the proposition that any affiliation or involvement the other defendants had with G Co. as the underwriter of the policy could form a basis for liability under the terms of the policy.

2. The trial court properly rendered judgment in favor of S Co., L Co., and M Co. with respect to plaintiffs' CUIA claim: despite the plaintiffs' assertion that S Co., L Co., and M Co. had conducted an unlicensed insurance business in Connecticut in violation of CUIA under the name

of Safeco Insurance, the trial court properly determined that no genuine issue of material fact existed that G Co., which was a licensed insurer in Connecticut, had issued the policy to the plaintiffs and that neither S Co., L Co. nor M Co. had issued the policy.

3. The plaintiffs' claim that the trial court improperly permitted S Co., L Co., and M Co. to file a motion for summary judgment without posting a bond pursuant to the applicable statute (§ 38a-27) was without merit: because there was no genuine issue of material fact that the plaintiffs' policy had not been issued by S Co., L Co., or M Co., there was no evidence that these entities insured the plaintiffs' property; accordingly, S Co., L Co., and M Co. could not have acted as the unauthorized insurers at issue in § 38a-27 and were not required to post a bond.

Argued January 8—officially released April 16, 2024

Procedural History

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of Windham, where the court, *J. Fischer*, *J.*, granted the defendants' motion for summary judgment and rendered judgment thereon, from which the plaintiffs appealed to this court. *Affirmed.*

Brian S. Mead, for the appellants (plaintiffs).

Philip T. Newbury, Jr., for the appellees (defendants).

Opinion

PELLEGRINO, J. The plaintiffs, Christoper S. Travinski and Lena L. Travinski, appeal from the summary judgment rendered by the trial court in favor of the defendants, General Insurance Company of America, Safeco Corporation, Liberty Mutual Insurance Company, and Liberty Mutual Holding Company, Inc., on the plaintiffs' complaint. The plaintiffs claim that the court improperly (1) granted the defendants' motion for summary judgment as to the counts of their complaint alleging breach of contract and a violation of the Connecticut Unauthorized Insurers Act (CUIA), General

Statutes § 38a-271 et seq., and (2) permitted the defendants Safeco Corporation, Liberty Mutual Insurance Company, and Liberty Mutual Holding Company, Inc., to file a motion for summary judgment without posting a bond pursuant to General Statutes § 38a-27. We disagree and, accordingly, affirm the judgment of the trial court.

The following facts, viewed in the light most favorable to the plaintiffs, and procedural history are relevant to our analysis of the plaintiffs' claims on appeal. The plaintiffs discovered that the French doors leading to the back porch of their home were not closing properly and they hired a contractor who discovered that the floor joists under the doors were rotted and moldy. The plaintiffs filed an insurance claim under their homeowners insurance policy, which was denied following an investigation by an adjuster for the reason that the terms of the policy did not cover loss due to rot caused by water damage. In response to the denial of their claim, the plaintiffs filed a four count amended complaint alleging breach of contract; breach of the implied covenant of good faith and fair dealing; violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., and the Connecticut Unfair Insurance Practices Act (CUIPA), General Statutes § 38a-815 et seq.; and a violation of CUIA. The defendants filed a motion for summary judgment as to all counts of the complaint, arguing that the action was time barred, that the policy did not provide coverage for the plaintiffs' insurance claim, and that the extracontractual claims were unfounded. The plaintiffs filed an opposition.

In a memorandum of decision, the court granted the defendants' motion for summary judgment as to all counts of the plaintiffs' complaint. The court determined that the first count of the complaint alleging breach of contract was time barred. The court reasoned that the suit limitation provision in the policy required

that an action be commenced within two years of the date of the loss and that the record was clear that the loss occurred on or before May 12, 2016, on which date Christoper Travinski first reported the loss to his insurer, and that the action was commenced more than two years later on May 23, 2018.

With respect to the second count of the complaint alleging breach of the implied covenant of good faith and fair dealing, the court reasoned, quoting *Capstone Building Corp.* v. *American Motorists Ins. Co.*, 308 Conn. 760, 798, 67 A.3d 961 (2013), that "an action for bad faith is not actionable apart from a wrongful denial of a benefit under the policy." (Internal quotation marks omitted.) The court stated that, because there exists no genuine issue of material fact that (1) the damage to the plaintiffs' property was caused at least in part by the seepage of water over time and (2) the policy provided no coverage for rot caused by water damage, the plaintiffs were not denied a contractual benefit. The court reasoned that the plaintiffs' claim that the defendants breached the covenant of good faith and fair dealing could not stand. The court additionally determined that the third count of the complaint, which alleged violations of CUTPA and CUIPA due to improper conduct in the handling of their single insurance claim, was subject to summary judgment because the alleged misconduct in the processing of one claim without any evidence of misconduct in the processing of any other claim, did not amount to a general business practice as required by CUIPA; see *Lees* v. *Middlesex Ins. Co.*, 229 Conn. 842, 849, 643 A.2d 1282 (1994); and, in the absence of a viable CUIPA claim, the CUTPA claim, which was premised thereon, could not stand. See *Artie's Auto Body, Inc.* v. *Hartford Fire Ins. Co.*, 317 Conn. 602, 624, 119 A.3d 1139 (2015).

Last, the court determined that summary judgment was appropriate as to the fourth count of the complaint

alleging a violation of CUIA against the defendants Safeco Corporation, Liberty Mutual Insurance Company, and Liberty Mutual Holding Company, Inc., because no genuine issue of material fact existed that those entities did not issue the applicable policy. This appeal followed.

I

The plaintiffs claim that the court improperly granted the defendants' motion for summary judgment as to (a) the first count of the complaint alleging breach of contract and (b) the fourth count of the complaint alleging a violation of CUIA.[1] We disagree.

We note the following relevant legal principles. Pursuant to Practice Book § 17-49, summary judgment shall be rendered "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." Our review of the trial court's decision to grant a motion for summary judgment is plenary. *Francis* v. *Briatico*, 214 Conn. App. 244, 251, 280 A.3d 546 (2022).

A

The plaintiffs do not challenge the court's determination that their breach of contract claim is barred by the suit limitation provision in the policy. Rather, they contend that the court improperly determined that no genuine issue of material fact existed that the policy that was the subject of the breach of contract claim was the homeowners insurance policy, policy number OK5568419, that was issued to the plaintiffs by General

[1] To the extent that the plaintiffs also claim that the court improperly rendered summary judgment in favor of the defendants with respect to the second and third counts of the complaint, alleging breach of the covenant of good faith and fair dealing and a violation of CUTPA and CUIPA, we agree with the well reasoned analysis of the court as to its rendering of summary judgment on those counts.

Insurance Company of America and appended to the defendants' motion for summary judgment as exhibit A. The plaintiffs contend that "the evidence placed before [the trial court] by the defendants was a false sworn statement which misrepresented several facts such as who were the insurers. The plaintiffs never dealt with General Insurance Company of America. All of their dealings were with Safeco Insurance. There existed then and now a material question of fact as to who are the parties in the contract." They further argue that the court "did not even consider that the defendants Safeco Corporation, Liberty Mutual Insurance Company, and Liberty Mutual Holding Company, Inc., had anything to do with the amended complaint" and contend that they had entered into an agreement with Safeco Insurance but never received a copy of the policy.

The defendants showed an absence of any genuine issue of material fact that General Insurance Company of America both issued the policy, which was appended to the defendants' motion for summary judgment as exhibit A, and denied the plaintiffs' insurance claim.[2] See *Romprey* v. *Safeco Ins. Co. of America*, 310 Conn. 304, 320, 77 A.3d 726 (2013) (party moving for summary judgment has burden of showing absence of any genuine issue as to all material facts that entitle that party to judgment as matter of law). Also appended to the defendants' motion for summary judgment was the affidavit of Katie Fiondella, a claims team manager for the

[2] The plaintiffs argue that the defendants failed to meet their burden of proving the nonexistence of any genuine issue of material fact because the defendants appended to the motion for summary judgment evidence that pertained only to General Insurance Company of America and failed to present any evidence addressing the breach of contract claim against the remaining defendants. We disagree. The defendants satisfied their burden by showing an absence of any genuine issue of material fact that the policy at issue was issued by General Insurance Company of America. The burden then shifted to the plaintiffs to show the existence of a genuine issue of material fact that justifies a trial. See, e.g., *Romprey* v. *Safeco Ins. Co. of America*, 310 Conn. 304, 320, 77 A.3d 726 (2013).

Liberty Mutual Group Insurance companies. Fiondella stated in her affidavit that the policy attached to the motion for summary judgment as exhibit A was issued to insure the plaintiffs' property by General Insurance Company of America, which is licensed to issue insurance policies in Connecticut. Exhibit A is a copy of the homeowners insurance policy, number OK5568419, that was issued to the plaintiffs by General Insurance Company of America. Section 2 of the definitions portion of the policy states that the terms " '[w]e', 'us' and 'our' refer to the underwriting company providing this insurance as shown in your Policy Declarations." The policy renewal letter contained a document titled "Customer Account Summary," which identified General Insurance Company of America as the issuer of the policy. The defendants also submitted with the motion a letter stating that the claim submitted to General Insurance Company of America for potential payment under policy OK5568419 for damages to the plaintiffs' property was denied. The letterhead of that document included, at the top left in large letters, the logo for Safeco Insurance, with the words "A Liberty Mutual Company" underneath it in smaller font; centered at the top of the letter are the words "General Insurance Company of America."

The plaintiffs did not submit evidence with their opposition that created a genuine issue of material fact that the authenticated policy that was appended to the defendants' motion for summary judgment as exhibit A was not the policy at issue in the complaint. See *Romprey* v. *Safeco Ins. Co. of America*, supra, 310 Conn. 320 (once moving party establishes entitlement to summary judgment, burden shifts to nonmoving party to present evidence that demonstrates existence of disputed factual issue). Neither the plaintiffs' argument that, "to the best of their knowledge and belief, the insurer was Safeco Insurance," nor the statements in

their affidavits that were submitted in connection with their opposition that they did not interact with General Insurance Company of America, creates a genuine issue of fact regarding whether General Insurance Company of America issued the policy. The plaintiffs' further contention that an affidavit submitted by the defendants in connection with the motion for summary judgment contained false statements regarding the insurer of the policy is unmeritorious because the court did not find any affidavit submitted by the defendants to be false. See *Zbras* v. *St. Vincent's Medical Center*, 91 Conn. App. 289, 293, 880 A.2d 999 ("[I]t is conceivable that in some case an affidavit might be so palpably false that the court could properly strike it from the file and render a summary judgment. To support such a judgment, however, there would have to be a finding of the court to the effect that the affidavit was false." (Internal quotation marks omitted.)), cert. denied, 276 Conn. 910, 886 A.2d 424 (2005). Additionally, the plaintiffs' argument that they did not receive a copy of the policy is also not meritorious because they did not append to their opposition any evidence that they had asked for a copy of the policy and were denied such request.

The court correctly stated in its decision that the defendants submitted an authenticated copy of the policy that clearly states that it was issued by General Insurance Company of America. Because there exists no genuine issue of material fact that the plaintiffs' insurance policy was issued by General Insurance Company of America and because the plaintiffs provide no legal authority, and we are aware of none, for the proposition that any affiliation or involvement the remaining defendants had with General Insurance Company of America as the underwriter of the policy can form a basis for liability under the terms of the policy, we conclude that the court properly rendered summary

judgment as to the breach of contract count of the complaint.

B

The plaintiffs allege in the fourth count of the complaint that the defendants Safeco Corporation, Liberty Mutual Insurance Company, and Liberty Mutual Holding Company, Inc., conducted an unlicensed insurance business as Safeco Insurance in the state of Connecticut in violation of the CUIA. As we detailed in part I A of this opinion, the court properly determined that no genuine issue of material fact existed that the plaintiffs' policy was issued by General Insurance Company of America, which is a licensed insurer in Connecticut.[3] The court also properly determined that no genuine issue of material fact existed that none of the defendants named in count four of the complaint issued the policy. Therefore, we conclude that the court properly rendered judgment in favor of Safeco Corporation, Liberty Mutual Insurance Company, and Liberty Mutual Holding Company, Inc., with respect to the plaintiffs' CUIA claim.

II

The plaintiffs next claim that the court improperly permitted the defendants Safeco Corporation, Liberty Mutual Insurance Company, and Liberty Mutual Holding Company, Inc., to file a motion for summary judgment without posting a bond pursuant to § 38a-27. We disagree.

Section 38a-27 (a) provides in relevant part that, "[b]efore any unauthorized . . . insurer files or causes to be filed any pleading in any court action . . . the . . . insurer shall either: (1) [d]eposit with the clerk of

[3] The court considered the status of General Insurance Company of America as a licensed insurer to be judicially admitted. The plaintiffs do not challenge this on appeal.

the court . . . cash or securities or a bond . . . or (2) procure proper authorization to do an insurance business in this state." As we detailed in part I A of this opinion, the court properly determined that there existed no genuine issue of material fact that neither Safeco Corporation, nor Liberty Mutual Insurance Company, nor Liberty Mutual Holding Company, Inc., issued the plaintiffs' policy. Accordingly, because there is no evidence in the present case that these defendants insured the plaintiffs' property, it logically follows that they could not have acted as the subcategory of insurers at issue in § 38a-27, specifically, unauthorized insurers. Accordingly, § 38a-27 cannot apply, and we conclude that the court properly did not require those defendants to post a bond.

The judgment is affirmed.

In this opinion the other judges concurred.

MEMORANDUM DECISIONS

CONNECTICUT APPELLATE REPORTS

VOL. 224

JOHN J. FLYNN *v.* MARK KOHLER ET AL.
(AC 46604)

Cradle, Suarez and Westbrook, Js.

Argued March 4—officially released April 16, 2024

Plaintiff's appeal from the Superior Court in the judicial district of Stamford-Norwalk, *Clark*, *J.*

Per Curiam. The judgment is affirmed.

CITY OF HARTFORD *v.* NEIL JOHNSON ET AL.
(AC 46552)

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

Argued April 9—officially released April 16, 2024

Named defendant's appeal from the Superior Court in the judicial district of Hartford, Housing Session, *Esperance-Smith*, *J.*

Per Curiam. The judgment is affirmed.

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Priti, LLC *v.* Shakespeare (Memorandum Decision) 902
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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.* Berrios 827
Burglary first degree; persistent felony offender; postsentencing motions to vacate guilty plea; claim that defendant's conviction in prior trial of assault in third degree and acquittal of criminal mischief in third degree precluded state from retrying him on charge of burglary in first degree because jury in prior trial had been unable to reach unanimous verdict on burglary charge; whether trial court lacked jurisdiction to rule on defendant's motions.
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.

Travinski *v.* General Ins. Co. of America 838

Breach of contract; Connecticut Unauthorized Insurers Act (CUIA) (§ 38a-271 et seq.); summary judgment; claim that trial court improperly granted defendants' motion for summary judgment with respect to plaintiffs' claims of breach of contract and violation of CUIA; claim that trial court improperly permitted certain of defendants to file motion for summary judgment without posting bond pursuant to applicable statute (§ 38a-27).

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.

Y. H. *v.* J. B. 793

Dissolution of marriage; motion for contempt; whether trial court abused its discretion in declining to award child support to defendant on ground that it was not requested by either party; whether trial court improperly declined to award child support without considering applicable statutes and child support guidelines; claim that trial court's award of attorney's fees, to extent it was imposed as sanction for defendant's contempt, constituted abuse of its discretion; whether trial court reasonably could have concluded that defendant had not complied with trial court's orders and that noncompliance was wilful; whether award of attorney's fees to plaintiff, to extent it was made pursuant to statute (§ 46b-62) providing for award of attorney's fees in marital dissolution action, must be reconsidered in light of remand for new trial on all financial issues.

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.