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On April 20, 2022, the defendant filed a motion for summary judgment as to both counts of the operative complaint. The defendant's motion was accompanied by a memorandum of law, exhibits, including a copy of the mortgage, and a business records affidavit executed by an assistant vice president of the defendant, Stephanie A. Saporita (Saporita affidavit), with additional exhibits appended thereto. In addressing the plaintiff's breach of contract claim, the defendant argued that (1) there was no genuine issue of material fact that (a) it was not a party to the proceeds contract and (b) the plaintiff was not a party to the note or the mortgage, and (2) the express language of the note and the mortgage demonstrated no intent for the plaintiff to be a third-party beneficiary thereof. In addition, the defendant argued that there was no genuine issue of material fact that it was not unjustly enriched by its application of the proceeds to the outstanding mortgage loan balance.

On May 23, 2022, the plaintiff filed a memorandum of law in opposition to the defendant's motion for summary judgment, which was accompanied by the personal affidavit of the plaintiff's managing member, William Leone (Leone affidavit), and a copy of a portion of the mortgage. The plaintiff argued that the defendant was not entitled to summary judgment as to (1) either count of the operative complaint because the evidence

[5] The defendant asserted thirteen additional special defenses, which are not relevant to the issues on appeal.

submitted in support of its motion for summary judgment, including the Saporita affidavit, was "inappropriate and insufficient," (2) count one because there was a genuine issue of material fact as to whether the mortgage conferred third-party beneficiary status on the plaintiff, and (3) count two because (a) unjust enrichment is an equitable claim not suitable for adjudication by way of a motion for summary judgment and (b) the record demonstrated genuine issues of material fact. On June 6, 2022, the defendant filed a reply brief, accompanied by a supplemental affidavit of its counsel, Attorney Pierre-Yves Kolakowski (Kolakowski affidavit), with additional exhibits attached thereto.

On June 24, 2022, the court heard oral argument on the defendant's motion. On August 16, 2022, the court, *Shah*, *J.*, issued a memorandum of decision granting the defendant's motion for summary judgment as to both counts of the operative complaint. Addressing count one, the court determined that, on the basis of the clear and unambiguous language of the note and the mortgage, the plaintiff was not an intended third-party beneficiary thereof and that the plaintiff failed to show the existence of a material fact in dispute. With regard to count two, the court concluded "that the plaintiff . . . failed to raise any genuine issues of material fact given the evidence submitted by the defendant." On August 30, 2022, the plaintiff filed a motion to reargue, which the court denied on September 8, 2022. This appeal followed. Additional procedural history will be provided as necessary.

I

The plaintiff first claims that the trial court erred in granting the defendant's motion for summary judgment as to both counts of the operative complaint because the supporting affidavits submitted by the defendant, i.e., the Saporita affidavit and the Kolakowski affidavit, did not satisfy the requirements of Practice Book § 17-46 and the common law. As to the Saporita affidavit, we disagree on the merits; as to the Kolakowski affidavit, we conclude that the plaintiff's claim is unpreserved.

A

We first turn to the plaintiff's contention that the Saporita affidavit did not constitute competent evidence pursuant to Practice Book § 17-46. Specifically, the plaintiff contends that the Saporita affidavit did not affirmatively show that Saporita possessed personal knowledge of, or was competent to aver to, the facts contained therein as she did not witness the execution of, nor personally execute, any documents relating to Lopez and the defendant, and she had not been personally involved in the matters between Lopez and the defendant. In response, the defendant relies on the business records exception to the hearsay rule to argue that the Saporita affidavit and the exhibits annexed thereto constituted competent evidence supporting the defendant's motion for summary judgment. We agree with the defendant.

We begin by setting forth the well settled legal principles and standard of review governing our resolution of this claim. Summary judgment "shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Practice Book § 17-49. "Generally, [o]ur review of the trial court's decision to grant the . . . motion for summary judgment is plenary. . . . When presented with an evidentiary issue, as in this case, our standard of review depends on the specific nature of the claim presented. . . . Thus, [t]o the extent a trial court's admission of evidence is based on an interpretation of [law], our standard of review is plenary. For example, whether a challenged statement properly may be classified as hearsay and whether a hearsay exception properly is identified are legal questions demanding plenary review. . . . A trial court's decision to admit evidence, if premised on a correct view of the law, however, calls for the abuse of discretion standard of review." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Midland Funding, LLC* v. *Mitchell-James*, 163 Conn. App. 648, 652–53, 137 A.3d 1 (2016).

Practice Book § 17-46 provides: "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto." "Section 17-46 sets forth three requirements necessary to permit the consideration of material contained in affidavits submitted in a summary judgment proceeding. The material must: (1) be based on personal knowledge; (2) constitute facts that would be admissible at trial; and (3) affirmatively show that the affiant is competent to testify to the matters stated in the affidavit. . . . Affidavits that fail to meet the criteria of . . . § 17-46 are defective and may not be considered to support the judgment." (Citation omitted; internal quotation marks omitted.) *Atlantic St. Heritage Associates, LLC* v. *Atlantic Realty Co.*, 216 Conn. App. 530, 550, 285 A.3d 1128 (2022).

"Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. . . . Unless subject to an exception, hearsay is inadmissible. . . . If the proffered evidence consists of business records, the court must determine whether the documents satisfy the modest requirements under [General Statutes] § 52-180[6] to admit them under the business records exception to the hearsay rule. . . .

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

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

"To admit evidence under the business record exception to the hearsay rule, a trial court judge must first find that the record satisfies each of the three conditions set forth in . . . § 52-180. The court must determine, before concluding that it is admissible, that the record was made in the regular course of business, that it was in the regular course of such business to make such a record, and that it was made at the time of the act described in the report, or within a reasonable time thereafter. . . . [B]usiness records may be authenticated by the testimony of one familiar with the books of the concern, such as a custodian or supervisor, who has not made the record or seen it made, that the offered writing is actually part of the records of business." (Citations omitted; footnote added; internal quotation marks omitted.) *HSBC Bank USA, National Assn.* v. *Gilbert*, 200 Conn. App. 335, 348–49, 238 A.3d 784 (2020). Alternatively, the authentication of a business record "may be satisfied by sworn certification of the custodian of the record or other qualified witness attesting to the following: (1) The affiant is the duly authorized custodian of the records or another qualified witness who has and is acting with authority to make the certification; (2) The record was made in the regular course of business, that it was the regular course of such business to make such a record, and that it was made at the time of the act described in the report, or within a reasonable time thereafter, as required by General Statutes § 52-180; (3) The information contained in the record was based on the entrant's own observation or on information of others whose business duty it was to transmit it to the entrant; and (4) To the best of the certifying person's knowledge, after reasonable inquiry, the record or copy thereof is an accurate version of the record that is in the possession, custody or control of the certifying person." Conn. Code Evid. § 9-3A (a).

The following additional procedural history is relevant to our resolution of this claim. In support of its motion for summary judgment, the defendant submitted the Saporita affidavit accompanied by thirteen exhibits,

including copies of (1) the endorsed note, (2) a July 10, 2018 letter addressed to the defendant from Lopez notifying the defendant of the fire and providing the defendant with a copy of the proceeds contract, (3) payment records, and (4) email correspondence reflecting Trusty's request that the defendant apply the balance of the proceeds to the outstanding mortgage loan balance. Saporita attested that the defendant was the mortgage loan servicer, that she, as an assistant vice president of the defendant, was authorized to make the affidavit, and that she had personal knowledge of the facts and matters stated therein. Saporita further attested that, in the regular performance of her job responsibilities, she "[is] familiar with the types of records maintained by [the defendant] in connection with mortgage loans serviced by [the defendant] and/or its predecessor by merger . . . including the loan here at issue." Additionally, she attested that she had access to, and personally reviewed, business records kept in the ordinary course of the defendant's regularly conducted business activities, including the defendant's regularly kept business records pertaining to the property. Saporita also attested that, on the basis of her review of the aforementioned records, (1) Lopez and the plaintiff had entered into the proceeds contract for the restoration of the property, (2) on July 10, 2018, Lopez notified the defendant of the fire and property loss and provided the defendant with a copy of the proceeds contract, (3) the defendant made payments out of the proceeds to the plaintiff, and (4) the defendant was asked by Trusty to apply the remainder of the proceeds to the unpaid mortgage loan balance.[7]

[7] In its memorandum of decision, the court acknowledged the plaintiff's objections to the annexed exhibits, stating that it "review[ed] the evidence submitted by both parties" to reach the conclusion that no issue of material fact was in dispute. Although the court did not expressly make findings that the exhibits fell within the business records exception to the rule against hearsay and, therefore, were admissible, there is nothing in the record to suggest that it relied on the defendant's evidence as a result of an incorrect application of law. Rather, our review of the record reveals that the court

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CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

DEPARTMENT OF PUBLIC HEALTH *v.* JUANITA ESTRADA ET AL.
(SC 20717)

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

Syllabus

The named defendant, E, an employee of the plaintiff, the Department of Public Health, filed a complaint with the defendant Commission on Human Rights and Opportunities, alleging that the plaintiff retaliated against her for a whistleblower disclosure that she had made and that allegedly was protected by statute ((Rev. to 2017) § 4-61dd). E's job duties included reviewing the qualifications of individuals who are appointed to be a municipal director or acting director of health. The department had received an appointment letter from the then director of health of Hartford, requesting approval of W as Hartford's acting director of health. Both the letter and W's resume represented that W held a master's degree in public health, which is one of two alternative statutory ((Rev. to 2015) § 19a-200 (a)) prerequisites for the appointment to the position of municipal director of health. E reviewed the request, including W's resume, and she drafted a letter approving the appointment without first verifying that W actually possessed a master's degree in public health. The Commissioner of Public Health ultimately signed the approval letter. E subsequently learned that W did not possess a master's degree in public health, and, after she notified her supervisor, B, W was removed from the acting director position. Shortly thereafter, E again failed to verify the credentials of an individual who had been appointed to serve as another municipality's acting director of health. When B learned of the repeated error, E received a letter of reprimand. E subsequently received another letter of reprimand and multiple, unsatisfactory performance appraisals, and was ultimately demoted. Pursuant to a collective bargaining agreement, E filed grievances challenging the foregoing, adverse personnel actions but did not raise a whistleblower retaliation claim in connection with those grievances. All of the grievances were denied. E then filed the present whistleblower retaliation claim with the commission pursuant to § 4-61dd (e) (2) (A). E's claim was based on the same personnel actions that formed the basis of her grievances. In E's amended complaint filed with the commission, E alleged, inter alia, that her statement to B that W did not possess a master's degree in public health constituted a report of a violation of § 19a-200 (a). E further alleged that this information constituted a protected whistleblower disclosure under § 4-61dd, in response to which the department retaliated against her. A hearing was held before a human rights referee, who concluded that E had made a protected whistleblower disclosure under § 4-61dd and that the department had retaliated against

her in response to that disclosure. The department appealed the referee's decision to the trial court, which sustained the department's appeal and rendered judgment thereon, concluding that the commission lacked subject matter jurisdiction to adjudicate E's whistleblower complaint, that E had not made a protected whistleblower disclosure under § 4-61dd, and that E had failed to establish a causal connection between any alleged whistleblower disclosure and the alleged retaliation. Thereafter, the commission appealed to the Appellate Court, which concluded that the commission had jurisdiction but nevertheless affirmed the trial court's judgment on the merits in favor of the department. On the granting of certification, the commission appealed to this court. *Held*:

1. The commission had subject matter jurisdiction to adjudicate E's whistleblower retaliation claim:

It was undisputed that § 4-61dd contains a statutory waiver of sovereign immunity, and the department could not prevail on its claim that, because E had filed grievances challenging the same adverse personnel actions that formed the basis of E's retaliation claim before the commission, her claim before the commission fell outside of the waiver of sovereign immunity in § 4-61dd.

Specifically, the statutory scheme contemplates that a state employee may pursue both a grievance alleging a violation of an applicable collective bargaining agreement that does not involve a whistleblower claim, as well as a whistleblower retaliation claim alleging retaliatory animus stemming from the same factual circumstances that formed the basis for an alternative remedy, and the filing of a grievance under § 4-61dd (e) (3) on a ground other than whistleblower retaliation was not a basis for precluding the filing of a whistleblower retaliation complaint with the commission pursuant to § 4-61dd (e) (2) (A).

In the present case, E's grievances, which she asserted under § 4-61dd (e) (3), did not raise a claim of whistleblower retaliation, and E was, therefore, not barred from filing a complaint with the commission alleging whistleblower retaliation pursuant to § 4-61dd (e) (2) (A).

Accordingly, the commission had the authority to adjudicate the type of controversy before it, namely, a whistleblower retaliation claim.

Moreover, this court concluded that the proper vehicle for addressing allegedly duplicative claims under § 4-61dd is a special defense raising an election of remedies claim rather than a challenge based on subject matter jurisdiction.

2. The department could not prevail on its claim that the commission had waived or abandoned certain issues by failing to raise or brief them before this court or the Appellate Court:

An appellant can raise on appeal to this court only those issues set forth in the petition for certification, except when the issues are further limited by this court's order granting certification.

In the present case, the commission's petition for certification focused on the broad claim that the Appellate Court incorrectly had determined that E's disclosure was not a protected disclosure under § 4-61dd, but the commission limited its briefing on the merits to the narrower issue on which this court granted certification, and the interests of justice weighed heavily in favor of not penalizing the commission for this court's certification of a more narrowly tailored issue than the issue on which the commission had sought certification.

Moreover, there was no merit to the department's claim that the commission had abandoned the one issue that it did address before this court by failing to raise or brief that issue in the Appellate Court, which did not decide that issue, as the department conflated the distinction between arguments and claims.

Specifically, the argument concerning whether E was required to prove an actual violation of state law or a reasonable, good faith belief of such a violation was "subsumed within or intertwined with" the broader legal claim of whether her disclosure was a whistleblower disclosure within the meaning of § 4-61dd, and the department never argued that the broader claim was not abandoned in its response to the commission's petition for certification.

3. This court declined to address the department's claim that E's disclosure concerned misconduct in municipal government to which § 4-61dd does not apply because, even if § 4-61dd does not apply to misconduct in municipal government, the misconduct that E reported was that the department, a state agency, made an error in approving W for the position of Hartford's acting director of health:

Although W may have misrepresented his credentials on his resume, which would have amounted to misconduct at the municipal level, E reported wrongdoing by the state, namely, the department's deficient review process of an appointee's credentials, the department's erroneous approval of W, and E's own failure, as a state employee, to verify that W possessed the degree he claimed to have had.

4. The broad language, legislative history and remedial purpose of § 4-61dd compelled the conclusion that a government employee, such as E, is entitled to whistleblower protection under that statute for reporting his or her own error:

The references in § 4-61dd to "[a]ny person" who discloses covered information involving "any matter involving . . . violation of state laws . . . mismanagement . . . or danger to the public safety" were con-

strued broadly to effectuate the statute's remedial purpose of rooting out government misconduct.

Moreover, it was unlikely that the legislature would have wanted employees disciplined merely for the act of bringing their own wrongdoings to light, as that would discourage disclosure and undermine the statutory goals.

Furthermore, the legislative history indicated that the legislature has consistently extended the reach of § 4-61dd since its enactment and has never imposed limitations on the statute's coverage that would suggest an intention to exclude from the purview of that statute employees who report their own misconduct.

Accordingly, E and her disclosure came within the ambit of the broad statutory language, and her disclosure was protected under § 4-61dd despite her involvement in the actions giving rise to it, as her disclosure exposed the fact that the department's error may have led to a violation of § 19a-200 and brought to light the purportedly deficient review process that led to the error in approving W's appointment.

5. This court concluded that E had failed to prove that the department's adverse personnel actions were caused by E's reporting of her errors rather than the errors themselves:

This court declined to apply the rebuttable presumption set forth in § 4-61dd (e) (4) that an adverse personnel action is presumed to be in retaliation for a whistleblower disclosure if that disclosure was made within two years of the adverse personnel action.

Specifically, although the rebuttable presumption enumerated in § 4-61dd (e) (4) applies to "any proceeding" under § 4-61dd (e) (2) or (3), this court concluded that the word "any" was ambiguous, and extratextual sources supported the conclusion that "any proceeding" should not include instances of an employee's self-reporting.

If this court were to apply the presumption under the circumstances of this case, the policy goal of the legislation would have been undermined because it generally would discourage an employer from taking corrective and deterrent action against an employee insofar as the employer would always be subject to an automatic presumption of retaliation, and employers would be encouraged either not to take corrective action or to wait two years before doing so.

Moreover, because state agencies often take corrective action within two years of learning of malfeasance, concluding that temporal proximity, without more, is probative of retaliatory intent would allow a self-reporting employee to automatically satisfy his or her burden under the first step of the burden shifting analysis recognized in *McDonnell Douglas*

Corp. v. *Green* (411 U.S. 792) without submitting evidence of retaliatory animus.

In the present case, E failed to produce any evidence of a retaliatory motive other than temporal proximity, there was no evidence that supported a conclusion that the department took the adverse personnel actions in retaliation for E's disclosure rather than for her underlying misconduct, and, although the human rights referee observed that the department had told E that she "was [being] punished for the . . . incident" involving W, this, alone, did not establish retaliatory motive, as it was E's failure to confirm W's credentials and the potentially improper approval of W's appointment that, in combination with additional instances of deficient work performance, led to the adverse personnel actions.

Furthermore, even if this court had concluded that the rebuttable presumption applied and that E established a prima facie case, the department would have rebutted this presumption by demonstrating that three union grievances led to a determination that the same adverse employment actions E challenged before the commission were taken for just cause, the evidence that the human rights referee credited supported the department's nonretaliatory justifications, including evidence that E exhibited poor work quality both before and after her disclosure, and E's first written reprimand was issued nearly one month after the disclosure, and then only after E again submitted another approval letter to the commissioner for his signature without first confirming the facts reported in connection with that approval.

Argued September 14, 2023—officially released June 11, 2024

Procedural History

Appeal from the decision of a human rights referee for the defendant Commission on Human Rights and Opportunities that the named defendant made a protected whistleblower disclosure for which the plaintiff had retaliated, brought to the Superior Court in the judicial district of New Britain, where the court, *Cordani*, *J.*, rendered judgment sustaining the appeal, from which the defendant Commission on Human Rights and Opportunities appealed to the Appellate Court, *Alexander*, *Suarez* and *DiPentima*, *Js.*, which affirmed the trial court's judgment, and the defendant Commission on Human Rights and Opportunities, on the granting of certification, appealed to this court. *Affirmed.*

Anna-Marie Puryear, human rights attorney, with whom was *Megan K. Graefe*, human rights attorney, for the appellant (defendant Commission on Human Rights and Opportunities).

Michael K. Skold, deputy solicitor general, with whom, on the brief, was *William Tong*, attorney general, for the appellee (plaintiff).

Opinion

McDONALD, J. In this whistleblower retaliation action, the named defendant, Juanita Estrada, who was employed by the plaintiff, the Department of Public Health (department), claims that she made a protected whistleblower disclosure; see General Statutes (Rev. to 2017) § 4-61dd;[1] when she notified her supervisor that (1) the acting director of health for the city of Hartford did not have a master's degree as he had represented on his resume, and (2) she had not confirmed his credentials at the time of his appointment. A human rights referee (referee) with the Office of Public Hearings of the defendant Commission on Human Rights and Opportunities (commission) concluded that Estrada's disclosure constituted a protected whistleblower disclosure. On appeal, the trial court concluded, among other things, that Estrada's disclosure to her supervisor did not constitute a whistleblower disclosure pursuant to § 4-61dd and that the commission lacked subject matter jurisdiction to adjudicate Estrada's complaint because she had brought the same adverse personnel actions at issue through the grievance procedures in her collective bargaining agreement. The commission appealed to the Appellate Court, which held that the trial court had incorrectly determined that the commission lacked subject matter jurisdiction to adjudicate Estrada's whistleblower retaliation complaint. See

[1] Hereinafter, all references to § 4-61dd are to the 2017 revision of the statute.

Dept. of Public Health v. *Estrada*, 211 Conn. App. 223, 226, 271 A.3d 1042 (2022). It also concluded, however, that the trial court correctly decided that Estrada did not make a protected whistleblower disclosure within the meaning of § 4-61dd. See id.

Estrada began working for the department in 1995 as an epidemiologist, and, by 2010, she had been promoted to epidemiologist 4. Since at least 2014, Estrada has had performance issues at the department. Estrada's supervisor, Ellen Blaschinski, downgraded her in some categories on her 2014 performance evaluation because she did not have a strong knowledge of the department's regulations and had not moved the department's Office of Local Health Administration (OLHA) in the regulatory direction that was expected. Shortly thereafter, Estrada mishandled a case involving the removal of a local health director, which required Blaschinski to relieve Estrada and take over the investigation herself. Estrada was then placed on a performance improvement plan.

Estrada's responsibilities as an epidemiologist 4 included, among other things, reviewing an applicant's qualifications to serve as director or acting director of health for a municipality. General Statutes (Rev. to 2015) § 19a-200[2] prescribes the minimum qualifications that a municipality's director of health must possess. At the time of the underlying events, that statute provided that the director of health for a municipality must be either a licensed physician and hold a degree in public health from an accredited institution or hold a graduate degree in public health from an accredited institution. General Statutes (Rev. to 2015) § 19a-200 (a). Section 19a-200 (a) also provides in relevant part: "In case of the absence or inability to act of a city, town

[2] Hereinafter, all references to § 19a-200 are to the 2015 revision of the statute.

or borough director of health or if a vacancy exists in the office of such director, the appointing authority of such city, town or borough may, with the approval of the [Commissioner of Public Health], designate in writing a suitable person to serve as acting director of health during the period of such absence or inability or vacancy . . . . The person so designated, when sworn, shall have all the powers and be subject to all the duties of such director. . . ."

To discharge its statutory responsibilities under the statute, "the customary process within the [department's division of] the OLHA was to review a letter from a municipality or a district board of health appointing an individual to a permanent or acting director of health [position]. Once the OLHA received the appointment letter from a municipality or the district board of health, [Estrada] would review the appointed individual's resume to ensure that it stated that the individual had a graduate degree from an accredited school." "Once [Estrada] reviewed the appointment letter and resume, she would then draft a letter for Blaschinski's review stating that the [department] approved the appointment. After Blaschinski reviewed the letter, she would send it [to] the commissioner of [the department] for [the commissioner's] review."

In May, 2015, Raul Pino, then director of health of the city of Hartford, submitted a letter requesting approval of Ruonan Wang as the city's acting director of health. Both the letter and Wang's resume stated that Wang held a master's degree in public health from the University of Connecticut. Estrada reviewed the request, including Wang's resume, and she drafted a letter approving the appointment for Blaschinski's review.[3]

[3] There is some disagreement about whether department policy required Estrada to independently verify the information contained in Wang's resume. It is undisputed that Estrada's job required her to draft the approval letter for the commissioner's signature.

Estrada did not, however, verify that Wang had actually received a master's degree in public health. The letter was ultimately signed by the commissioner of the department, approving Wang's appointment as acting director of health for the city of Hartford.

Approximately one month later, a department employee notified Estrada that she had received information from an employee of the city of Hartford that Wang did not hold a master's degree in public health. After Estrada confirmed that Wang did not have a master's degree in public health, she notified Blaschinski, and Wang was removed from the position.

Estrada was required to log complaints and track them. Estrada had previously struggled with this task, and her performance improvement plan noted the need for her to improve in that area. When Blaschinski asked for a copy of the Wang complaint, however, she learned that Estrada had not logged it in. Nevertheless, Estrada was not disciplined by Blaschinski. Approximately one week following the Wang incident, Estrada again failed to check the credentials for the appointment of a municipality's acting director of health, this time for the town of Monroe. When Blaschinski learned of the repeated error, she issued Estrada a letter of reprimand.

In September, 2015, Blaschinski issued Estrada an unsatisfactory annual rating. About two months later, Blaschinski issued Estrada another letter of reprimand based on two incidents that reflected Estrada's ongoing resistance to her performance improvement plan. On the basis of these continued issues, Blaschinski gave Estrada an unsatisfactory interim service rating. Estrada received another unsatisfactory rating in her 2016 annual review, based in part on concerns over Estrada's handling of a complaint about a different town health director.

After being on a performance improvement plan for approximately two years, Estrada was ultimately demoted from epidemiologist 4 to epidemiologist 3. In sum, Estrada received three adverse personnel actions: the reprimand following the Wang and town of Monroe incidents, the second reprimand in November, 2015, and her demotion. Estrada grieved these personnel actions in accordance with her collective bargaining agreement pursuant to § 4-61dd (e) (3) but did not raise a whistleblower retaliation claim in the forum provided by that agreement. All the grievances were denied. In addition to filing the grievances, Estrada filed a whistleblower retaliation claim under § 4-61dd (e) (2) (A), based on the same personnel actions, with the commission.

In Estrada's amended complaint before the commission, she alleged that her report to Blaschinski, which stated that Wang did not possess a graduate degree in public health, disclosed a violation of § 19a-200 because the statute requires that a person nominated for the position of acting director of health hold a graduate degree in public health. She alleged that this new information constituted a protected whistleblower disclosure pursuant to § 4-61dd. Estrada further claimed that, after her report to Blaschinski, she was subjected to retaliation on multiple occasions. Estrada alleged that, in response to her disclosure, she received multiple "unwarranted and unjustified written reprimand[s]" and "negative and unsatisfactory performance appraisal[s]," and that she was demoted from the position of epidemiologist 4 to epidemiologist 3.

Following a hearing, the referee concluded that Estrada had made a protected whistleblower disclosure under § 4-61dd and that the department had retaliated against her. The department appealed to the Superior Court, which sustained the appeal and rendered judgment for the department. The trial court concluded that the com-

mission lacked subject matter jurisdiction to adjudicate the complaint, that Estrada had not made a protected whistleblower disclosure under § 4-61dd, and that Estrada had failed to establish a causal connection between any alleged whistleblower disclosure and the alleged retaliation. Thereafter, the commission appealed to the Appellate Court, which concluded that the commission had jurisdiction but nevertheless affirmed the judgment of the trial court on the merits. *Dept. of Public Health* v. *Estrada*, supra, 211 Conn. App. 226, 247. It concluded that, because § 19a-200 does not require an acting director of health to possess a graduate degree, Estrada's report about Wang's credentials did not disclose any violation of state law to which § 4-61dd applies. Id., 245–46. This certified appeal followed.[4]

On appeal, the commission contends that the Appellate Court properly held that the commission had subject matter jurisdiction over Estrada's complaint. On the merits, however, the commission contends that the Appellate Court incorrectly reasoned that an actual violation of a statute is required to satisfy a claim of whistleblower retaliation. Rather, the commission argues that an employee need only prove that he or she had a reasonable, good faith belief that the reported conduct violates state law. For its part, the department contends that the commission lacked subject matter jurisdiction over the complaint. It also contends that the commis-

[4] We granted the commission's petition for certification to appeal, limited to the following issues: (1) "Did the Appellate Court correctly conclude that the Office of Public Hearings of the [c]ommission . . . had subject matter jurisdiction to adjudicate [Estrada's] complaint of whistleblower retaliation under the waiver of sovereign immunity granted by . . . § 4-61dd when [Estrada] had also pursued union grievances with respect to the same adverse employment actions?" And (2) "[d]id the Appellate Court correctly conclude that a prima facie claim of retaliation under § 4-61dd requires a complainant to show that the claimed protected whistleblower disclosure established an actual violation of state law rather than a good faith reasonable belief that such a violation had occurred?" *Dept. of Public Health* v. *Estrada*, 343 Conn. 921, 921–22, 275 A.3d 211 (2022).

sion waived and abandoned its merits arguments by failing to raise and brief them, rendering that aspect of the appeal moot. Finally, if this court does reach the merits, the department agrees with the commission that employees need only have a reasonable and good faith belief that a violation of state law had occurred but claims that Estrada lacked such a belief.

Following oral argument, we ordered the parties to file supplemental briefs on the following questions: (1) "Did the Appellate Court correctly conclude that Estrada's disclosure was not a protected disclosure under . . . § 4-61dd? (A) Specifically, does § 4-61dd apply to purported misconduct in municipal government? (B) Can an employee seek whistleblower protection for reporting her own error?" (2) "Did Estrada establish a causal connection between any alleged whistleblower disclosure and the complained of personnel actions?" And (3) "[t]o the extent that an actual violation of state law is required to establish a prima facie claim of retaliation under . . . § 4-61dd, did the Appellate Court correctly conclude that there were no required qualifications for acting directors of public health under . . . § 19a-200?"

I

SUBJECT MATTER JURISDICTION

We begin with the department's contention that the commission lacked subject matter jurisdiction over Estrada's complaint.[5]

[5] The department also argues that the merits issues of this appeal are moot because the commission abandoned these arguments. See part II of this opinion. It further argues that any decision by this court on the abandonment issue would itself constitute a discretionary decision that necessarily constitutes an exercise of jurisdiction. Cf. *State* v. *Buhl*, 321 Conn. 688, 724–25 n.29, 138 A.3d 868 (2016). We agree with the department on this latter point and, therefore, consider the jurisdictional question before we consider the department's waiver arguments. See, e.g., *Baldwin Piano & Organ Co.* v. *Blake*, 186 Conn. 295, 297, 441 A.2d 183 (1982) ("[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

The following additional facts and procedural history are relevant to this claim. In addition to filing its answer to Estrada's amended whistleblower retaliation complaint, the department also asserted numerous special defenses, including that "[t]he [commission] lacks subject matter jurisdiction over this complaint, as [Estrada] fail[ed] to make a valid claim of whistleblower retaliation, as required by . . . § 4-61dd." The department also filed a motion to dismiss and/or strike in which it argued, among other things, that the commission lacked "jurisdiction to hear a whistleblower claim for any of [Estrada's] alleged[ly] adverse personnel actions for which she has filed a grievance under her collective bargaining contract . . . because the two remedies are mutually exclusive," and that Estrada's claims did not "fall under the purview of . . . § 4-61dd and [were] therefore barred by sovereign immunity." This motion was denied by the referee. In its posthearing brief, the department reiterated these arguments related to subject matter jurisdiction.

The referee concluded that the commission had subject matter jurisdiction over Estrada's whistleblower retaliation complaint. On appeal, the trial court concluded that the commission lacked subject matter jurisdiction, reasoning that, because § 4-61dd "clearly provides a mutually exclusive choice in this regard, [Estrada was] precluded from relitigating the propriety of the same personnel actions before the [referee]. The statute offered [Estrada] a clear choice of either filing grievances or bringing the [present whistleblower retaliation] case to address the personnel actions, but not both." The Appellate Court ultimately rejected the department's jurisdictional argument, reasoning that "the department attempts to transform an election of remedies claim into an issue of subject matter jurisdic-

move one further step in the cause . . . as any movement is necessarily the exercise of jurisdiction" (internal quotation marks omitted)).

tion by implicating sovereign immunity." *Dept. of Public Health* v. *Estrada*, supra, 211 Conn. App. 234. The Appellate Court explained that, "[w]hen a complainant elects to pursue one of the avenues provided for in § 4-61dd and then subsequently proceeds to pursue the second avenue, the issue concerns the complainant's election of remedies, not subject matter jurisdiction. Estrada's complaint to the [O]ffice of [P]ublic [H]earings, even if it is pursued after the initial grievance process, does not create a lack of subject matter jurisdiction. Instead, it may result in a want of a cause of action . . . which the department may challenge in a special defense." (Citation omitted; internal quotation marks omitted.) Id., 238–39.

"When reviewing an issue of subject matter jurisdiction on appeal, [w]e have long held that because [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary. . . . The subject matter jurisdiction requirement may not be waived by any party, and also may be raised by a party, or by the court sua sponte, at any stage of the proceedings, including on appeal." (Internal quotation marks omitted.) *Sousa* v. *Sousa*, 322 Conn. 757, 770, 143 A.3d 578 (2016).

"Subject matter jurisdiction does not rest on the viability of the claims that a court is asked to adjudicate." (Internal quotation marks omitted.) *State* v. *Fairchild*, 155 Conn. App. 196, 206, 108 A.3d 1162, cert. denied, 316 Conn. 902, 111 A.3d 470 (2015). "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 [court] 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; emphasis added; internal quotation marks omitted.) *Amodio* v. *Amodio*, 247 Conn. 724, 727–28, 724 A.2d 1084 (1999); see, e.g., *Pereira* v. *State Board of Education*, 304 Conn. 1, 43 n.30, 37 A.3d 625 (2012).

It is equally well established that "[t]he sovereign immunity enjoyed by the state is not absolute." (Internal quotation marks omitted.) *Columbia Air Services, Inc.* v. *Dept. of Transportation*, 293 Conn. 342, 349, 977 A.2d 636 (2009). There are three exceptions to sovereign immunity; relevant to this appeal is the first, which applies "when the legislature, either expressly or by force of a necessary implication, statutorily waives the state's sovereign immunity . . . . For a claim made pursuant to [this] exception, this court has recognized the well established principle that statutes in derogation of sovereign immunity should be strictly construed. . . . [When] there is any doubt about their meaning or intent they are given the effect which makes the least rather than the most change in sovereign immunity. . . . In the absence of a proper factual basis in the complaint to support the applicability of these exceptions, the granting of a motion to dismiss on sovereign immunity grounds is proper." (Citations omitted; internal quotation marks omitted.) Id., 349–50.

On appeal, the department contends that § 4-61dd (e) waives sovereign immunity, and the meaning of that waiver necessarily implicates sovereign immunity, not an election of remedies issue. According to the department, the "alternative" mechanisms in § 4-61dd (e) are mutually exclusive, and, therefore, the commission lacked subject matter jurisdiction because § 4-61dd (e) does not waive sovereign immunity with respect to duplicative claims. In this case, the department contends that,

after Estrada filed her grievances in accordance with her collective bargaining agreement, the commission lacked subject matter jurisdiction over her whistleblower retaliation claim because the legislature did not waive sovereign immunity for this second action, given that both actions arose from the same underlying facts. The commission disagrees and contends that, because the Appellate Court correctly concluded that § 4-61dd "confers on the [O]ffice of [P]ublic [H]earings the authority to adjudicate the type of controversy presented in this case"; *Dept. of Public Health* v. *Estrada*, supra, 211 Conn. App. 238; the commission had subject matter jurisdiction over Estrada's whistleblower retaliation claim. The commission also agrees with the Appellate Court that a choice of remedy under § 4-61dd raises an election of remedies issue, not a subject matter jurisdictional one.

The question of when the alternative remedies in § 4-61dd apply is a question of statutory interpretation over which we exercise plenary review. See, e.g., *Dept. of Transportation* v. *White Oak Corp.*, 287 Conn. 1, 7, 946 A.2d 1219 (2008). Accordingly, we review § 4-61dd in accordance with General Statutes § 1-2z and our familiar principles of statutory construction. See, e.g., *Sena* v. *American Medical Response of Connecticut, Inc.*, 333 Conn. 30, 45–46, 213 A.3d 1110 (2019).

We begin with subdivision (1) of § 4-61dd (e), which provides in relevant part that "[n]o state officer or employee . . . shall take or threaten to take any personnel action against any state or quasi-public agency employee . . . *in retaliation for* (A) such employee's . . . disclosure of information to . . . (ii) an employee of the state agency or quasi-public agency where such state officer or employee is employed . . . ." (Emphasis added.) The disclosure that is protected under § 4-61dd is one related to "any matter involving corruption, unethical practices, violation of state laws or regula-

tions, mismanagement, gross waste of funds, abuse of authority or danger to the public safety occurring in any state department or agency . . . .'' General Statutes (Rev. to 2017) § 4-61dd (a). Thus, § 4-61dd protects a state employee from retaliation by a state employer for that employee's disclosure of certain information. In other words, the right provided by the statute is not to be retaliated against for engaging in a protected whistleblower activity. Section 4-61dd, then, waives sovereign immunity for claims that allege that the employee was retaliated against for disclosing information related to ''any matter involving . . . violation of state laws . . . .'' General Statutes (Rev. to 2017) § 4-61dd (a).

Section 4-61dd provides a state employee with multiple ways to bring such a claim. Subdivision (2) (A) of § 4-61dd (e) provides in relevant that, ''[n]ot later than ninety days after learning of the specific incident giving rise to *a claim that a personnel action has been threatened or has occurred in violation of subdivision (1) of this subsection*, a state or quasi-public agency employee . . . may file a complaint against the state agency . . . [or] quasi-public agency . . . concerning such personnel action with the Chief Human Rights Referee . . . .'' (Emphasis added.) Subdivision (3) of § 4-61dd (e) goes on to provide in relevant part that, ''[*a*]*s an alternative to the provisions of subdivision (2) of this subsection*: (A) A state or quasi-public agency employee who alleges that a personnel action has been threatened or taken may file an appeal not later than ninety days after learning of the specific incident giving rise to *such claim* with the Employees' Review Board under section 5-202, or, in the case of a state or quasi-public agency employee covered by a collective bargaining contract, in accordance with the procedure provided by such contract . . . .'' (Emphasis added.)

The department does not dispute that § 4-61dd contains a statutory waiver of sovereign immunity. Rather, the department argues that, because Estrada filed grievances challenging the same adverse personnel actions that form the basis of her whistleblower complaint, her whistleblower retaliation action falls outside of the waiver of sovereign immunity in § 4-61dd, and, therefore, the Office of Public Hearings lacks subject matter jurisdiction to hear Estrada's whistleblower claim. We disagree.

The plain language of § 4-61dd (e) (2) (A) provides that the authorized claim to be brought before the commission is one alleging that "a personnel action has been threatened or has occurred in violation of subdivision (1) of this subsection . . . ." Subdivision (1) of subsection (e) limits those claims to ones that allege that the employee was retaliated against for disclosing certain information. General Statutes (Rev. to 2017) § 4-61dd (e) (1). Indeed, the referee is limited to "issu[ing] a decision concerning whether the officer or employee taking or threatening to take the personnel action *violated any provision of this section*." (Emphasis added.) General Statutes (Rev. to 2017) § 4-61dd (e) (2) (A). Because the referee is vested only with the authority to decide whether the alleged conduct violates § 4-61dd, and the only right protected under this section is the right not to be retaliated against for whistleblowing activity, it is logical that the only type of claim that can be brought before the commission pursuant to § 4-61dd (e) (2) (A) is one that alleges whistleblower retaliation.

Subdivision (3) of § 4-61dd (e) provides the second and "alternative" mechanism for bringing a claim that an adverse personnel action has been taken or threatened. Specifically, the state employee may pursue "such claim" through the grievance process outlined in his or her collective bargaining agreement. Although subdivision (3) does not explicitly define the type of claim that

may be submitted through the grievance process that would trigger the alternative remedies scheme, the right provided for by § 4-61dd (e) (2) (A) is a right not to be retaliated against for disclosing certain whistleblower information. Cf. *Southern New England Telephone Co.* v. *Cashman*, 283 Conn. 644, 652, 931 A.2d 142 (2007) ("[i]n determining the meaning of a statute . . . [the court] look[s] not only at the provision at issue, but also to the broader statutory scheme to ensure the coherency of [its] construction" (internal quotation marks omitted)). Put differently, the "claim" subject to the alternative scheme delineated in § 4-61dd (e) (3) is a claim for whistleblower retaliation—the same type of claim, with an alternative remedy, may be pursued under § 4-61dd (e) (2) (A).

It is important to note that human rights referees do not adjudicate collective bargaining agreements, and grievances do not address whistleblower retaliation claims unless specifically provided for in the employee's collective bargaining agreement. The department concedes that, "when employees challenge a personnel action through the grievance process in § 4-61dd (e) (3), they do not technically bring a statutory whistleblower retaliation claim." An interpretation that an employee's filing of a grievance on a ground other than whistleblower retaliation under § 4-61dd (e) (3) precludes the employee's filing of a complaint of whistleblower retaliation under § 4-61dd (e) (2) (A) would force an employee to choose between vindicating his or her rights under the collective bargaining agreement or his or her rights under the whistleblower statute, even though the grievance was based on a ground other than retaliation. Such an interpretation would, at a minimum, be counterintuitive for a remedial statute, and we will not find such an intention by implication. Cf. *Meriden* v. *Freedom of Information Commission*, 338 Conn. 310, 328, 258 A.3d 1 (2021) ("we construe statutes to

avoid . . . absurd result[s]"). The statute allows an employee to pursue both grievances alleging contractual violations that do not implicate a whistleblower claim and whistleblower retaliation claims alleging retaliatory animus arising from the same underlying factual circumstances. As we have recognized, the same type of harm may be caused by many different motivations. See, e.g., *Graham* v. *Friedlander*, 334 Conn. 564, 586, 223 A.3d 796 (2020) ("the fact that the one kind of harm caused may also be the kind of harm caused in a case involving the denial of [another right] does not mean that this kind of harm cannot be caused by other actions").

We agree with a referee's succinct explanation in a similar case: "[A]n employee is required to make an election not as to where to challenge the specific incident but as to where to challenge *the underlying retaliatory animus* . . . . The phrase 'giving rise to such claim' [in § 4-61dd (e) (3)] . . . validates an interpretation that it is the retaliation claim that is at issue in § [4-61dd], not simply the specific incident." (Citations omitted; emphasis added.) *Saeedi* v. *Dept. of Mental Health & Addiction Services*, WBR/OPH No. 2008-090 (C.H.R.O. December 9, 2010) pp. 75–76, appeal dismissed, Superior Court, judicial district of New Britain, Docket No. HHB-CV-11-6008678-S (February 7, 2012), rev'd in part on other grounds sub nom. *Commissioner of Mental Health & Addiction Services* v. *Saeedi*, 143 Conn. App. 839, 71 A.3d 619 (2013).

To the extent that the language of the statute creates ambiguity on this point, the legislative history also supports this interpretation. The sponsor of the 2002 amendment to § 4-61dd, which added the commission as a forum for the adjudication of whistleblower claims; see Public Acts 2002, No. 02-91, § 1; noted that the legislature intended to "create a more favorable environment whereby state workers . . . feel free to bring forth

important information . . . in order to protect the public tax dollar and the proper running of our government." 45 H.R. Proc., Pt. 9, 2002 Sess., p. 2857, remarks of Representative James A. O'Rourke III; see Conn. Joint Standing Committee Hearings, Government Administration and Elections, Pt. 1, 2002 Sess., p. 119, remarks of Attorney General Richard Blumenthal (bill is "designed to promote law enforcement against waste and corruption in government by providing protection for people who risk their careers and livelihoods to come forward"). The legislature's goal was to create an alternative forum for whistleblower retaliation claims; accordingly, it is only a whistleblower retaliation claim that triggers the alternative remedy scheme under § 4-61dd.

We conclude that the alternative remedies enumerated in § 4-61dd (e) (2) (A) and (3) operate independently, in that the filing of a grievance under § 4-61dd (e) (3) on a ground other than whistleblower retaliation is not a ground for precluding an employee from bringing a whistleblower retaliation complaint before the commission pursuant to § 4-61dd (e) (2) (A).

Our holding in *Dept. of Transportation* v. *White Oak Corp.*, supra, 287 Conn. 1, is not to the contrary. We held in *White Oak Corp.* that the waiver of sovereign immunity set forth in General Statutes § 4-61, which waives the state's sovereign immunity with respect to certain claims arising under public works contracts, requires all existing disputed claims arising under a public works contract to be litigated or arbitrated in a single action. Id., 2–4, 6. This court reasoned that, "[i]n light of the ambiguous language of the statute, and the dearth of any extratextual evidence indicating an affirmative legislative intent to enact a blanket waiver of sovereign immunity permitting a contractor to file multiple actions against the state, we are constrained to conclude that § 4-61 waives the state's sovereign immunity only with respect to a *single action or arbi-*

tration wherein all existing disputed claims arising under a public works contract must be pursued and resolved." (Emphasis added.) Id., 13–14. We found additional support for this conclusion in the legislative history, which provided that the goal of the legislation was to "increas[e] the quality of construction in the state while, at the same time, reducing its cost by permitting contractors to sue the state directly to resolve disputed claims arising under public works contracts quickly and efficiently." Id., 14. We reasoned that, "[i]f we were to construe § 4-61 as a blanket waiver of sovereign immunity that permits a contractor to file multiple actions against the state, the cost to the state of public works contracts effectively would increase while, at the same time, the speed and efficiency with which such claims are resolved effectively would decrease." Id.

The statute at issue in *White Oak Corp.* is distinguishable from § 4-61dd. The language in § 4-61 provides in relevant part that the plaintiff "may, in the event of *any disputed claims* under [a public works] contract," bring an action in the Superior Court. (Emphasis added.) General Statutes § 4-61 (a). In contrast, § 4-61dd (e) provides in relevant part that a complainant may file a complaint with the commission within ninety days of "the specific incident giving rise to *a claim that a personnel action has been threatened or has occurred in violation of subdivision (1) of this subsection . . . .*" (Emphasis added.) General Statutes (Rev. to 2017) § 4-61dd (e) (2) (A). Whereas § 4-61 (a) covers "any disputed claims," the similar provision in § 4-61dd (e) (2) (A) is concerned only with "a claim that a personnel action has been threatened or has occurred in violation of" the prohibition on whistleblower retaliation. Had the legislature intended to enact a statute that subjected "any disputed claims" to an alternative remedial scheme —rather than identifying one type of claim—it could have done so. Cf. *State* v. *Heredia*, 310 Conn. 742, 761,

81 A.3d 1163 (2013) ("[W]hen 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. . . . That tenet of statutory construction is well grounded because [t]he General Assembly is always presumed to know all the existing statutes and the effect that its action or [nonaction] will have [on] any one of them." (Internal quotation marks omitted.)).

Here, Estrada's grievances were not predicated on a claim of whistleblower retaliation. The first grievance filed by Estrada grieved the department's issuance of a letter of reprimand on July 7, 2015, contending that it was for an issue that did not constitute just cause. Specifically, this grievance referenced "recent events involving the process used to confirm the credentials of local health directors." (Internal quotation marks omitted.) This grievance did not mention or concern whistleblower retaliation. It was ultimately denied. Estrada's second grievance "echoe[d] [the] unresolved . . . grievance about reprimand for issues not constituting 'just cause' " and concerned a reprimand that Estrada was issued on November 20, 2015, for "poor work quality and poor judgment." This grievance similarly did not mention or concern whistleblower retaliation. It was also denied. Estrada's third grievance concerned her demotion from epidemiologist 4 to epidemiologist 3. The department responded to this grievance by claiming that "[t]he central issue of this grievance is whether the demotion of [Estrada] to [e]pidemiologist 3 was for just cause under the contract." Although this grievance mentioned that Estrada had "filed a whistleblower complaint regarding the incident [that] led to the reprimand," this issue was not discussed or resolved during the grievance process. The department's conclusion with respect to this grievance was

that the decision to demote Estrada had been "for just cause," there was "no contract violation," and, therefore, "the grievance must be denied."

Because Estrada's grievances did not raise a claim of whistleblower retaliation, they do not fall within the ambit of the alternative remedies scheme in § 4-61dd (e) (3). Thus, the mutual exclusivity provision of § 4-61dd was not triggered, and Estrada was not barred from filing a complaint with the commission alleging whistleblower retaliation pursuant to § 4-61dd (e) (2) (A). The commission had the authority to adjudicate the type of controversy before it and, therefore, had subject matter jurisdiction over the action, regardless of its merits. See, e.g., *Amodio* v. *Amodio*, supra, 247 Conn. 727–28. As the Appellate Court correctly noted, "[t]here is no dispute that § 4-61dd contains a waiver of sovereign immunity and confers on the [commission] the authority to adjudicate the type of controversy presented in this case: a whistleblower retaliation claim. The fact that the statute also provides for an 'alternative' avenue for a complainant to seek redress for adverse personnel actions taken in retaliation for a whistleblower disclosure; General Statutes [Rev. to 2017] § 4-61dd (e) (3); does not deprive the [O]ffice of [P]ublic [H]earings of subject matter jurisdiction [over] the claim." *Dept. of Public Health* v. *Estrada*, supra, 211 Conn. App. 238.

We agree with the Appellate Court that the proper avenue for addressing allegedly duplicative claims under § 4-61dd is a special defense raising an election of remedies claim. See id., 238–39. "As a general rule, facts must be pleaded as a special defense when they are consistent with the allegations of the complaint but demonstrate, nonetheless, that the plaintiff has no cause of action." (Internal quotation marks omitted.) *Coughlin* v. *Anderson*, 270 Conn. 487, 501, 853 A.2d 460 (2004). We have held that an election of remedies claim

is properly raised by a special defense rather than as a challenge to the jurisdiction of the court.

In *Grant* v. *Bassman*, 221 Conn. 465, 604 A.2d 814 (1992), we held that a defendant's claim that the plaintiffs had made an exclusive election of workers' compensation pursuant to General Statutes (Rev. to 1991) § 31-284 (a) was not raised properly by a motion to dismiss challenging the court's subject matter jurisdiction and should have been raised in a special defense. See id., 469–70, 473. In that case, an employee who was a minor was injured at work and applied for, and began receiving, workers' compensation benefits for his injuries. Id., 468. Thereafter, the injured employee and his mother filed a personal injury action against the defendant employer and its president, seeking damages for injuries sustained by the employee. Id., 466. The defendant employer moved to dismiss the plaintiffs' complaint, arguing that the trial court lacked subject matter jurisdiction because the employee had applied for and received workers' compensation benefits for those injuries. Id. This court explained that "[t]he purpose of a special defense is to plead facts that are consistent with the allegations of the complaint but demonstrate, nonetheless, that the plaintiff has no cause of action. . . . The claim that a plaintiff has elected an exclusive remedy relies on facts outside those alleged in the complaint that operate to negate what may once have been a valid cause of action. . . . It is therefore both rational and fair to place the burden of pleading and proving an election of remedies on the party asserting the claim, usually the defendant." (Citations omitted.) Id., 472–73. The court concluded that a special defense, and not a motion to dismiss, was the proper procedural mechanism for the defendant employer's challenge to the plaintiffs' complaint. Id., 473.

The Appellate Court has addressed the same issue with regard to whistleblower retaliation claims. In *Com-*

missioner of Mental Health & Addiction Services v. *Saeedi*, supra, 143 Conn. App. 839, the defendant employee filed a whistleblower retaliation complaint with the Office of Public Hearings in which he alleged that he had been subjected to retaliation for making a whistleblower disclosure pursuant to § 4-61dd. Id., 845. The plaintiffs filed, among other things, a motion to dismiss in which they alleged that the Office of Public Hearings did not have subject matter jurisdiction because the defendant had filed grievances through his union and, therefore, had elected to pursue his remedies though his collective bargaining agreement. Id., 846. On appeal to the Appellate Court, the plaintiffs argued "that [the defendant's] use of the grievance process served to invalidate [the defendant's] claims because he chose to pursue them through the forum provided by the collective bargaining agreement. . . . [The plaintiffs] claim[ed] that [the defendant's] claims should have been dismissed because § 4-61dd requires the employee to elect an exclusive forum in which to pursue these claims, and [the defendant] elected his exclusive forum when his union filed its grievances." (Footnote omitted; internal quotation marks omitted.) Id., 855–56. The Appellate Court declined to review the plaintiffs' claim because it was raised for the first time on appeal. See id., 856–57. The court stated, however, that "[t]he plaintiffs' abandonment of their jurisdictional argument [was] unsurprising considering [this court's] holding in *Grant* v. *Bassman*, [supra, 221 Conn. 472]." *Commissioner of Mental Health & Addiction Services* v. *Saeedi*, supra, 856 n.16.

Here, the department pleaded special defenses in its answer to Estrada's complaint. It also pleaded special defenses in response to Estrada's amended complaint. None of these special defenses, however, raised an election of remedies claim. The subject matter jurisdiction issue was raised by the department in a motion to dis-

miss and/or strike. When an employee elects to pursue one of the avenues provided for in § 4-61dd and then subsequently proceeds to pursue the second avenue, the issue concerns the employee's election of remedies, not subject matter jurisdiction. Estrada's complaint to the commission, even if it was filed after the initial grievance process, did not create a lack of subject matter jurisdiction. Instead, it may have resulted in "a want of a cause of action"; (emphasis omitted; internal quotation marks omitted) *Grant* v. *Bassman*, supra, 221 Conn. 472; which the department could have raised in a special defense. See id., 473. The department should have pleaded its election of remedies argument as a special defense if it wished to make such a claim. In failing to do so, it has waived that issue.

Accordingly, we conclude that the commission had subject matter jurisdiction to adjudicate Estrada's whistleblower retaliation claim.

II

WAIVER

The department next raises two waiver arguments. First, the department argues that the commission waived and abandoned its merits arguments by failing to raise and brief all but one of them before this court, rendering that aspect of this appeal moot. Second, the department argues that the one merits issue the commission does address in its brief was also abandoned because the commission had failed to raise or brief that issue before the Appellate Court. Specifically, the department contends that the lower courts sustained its appeal on several merits grounds: "(1) Estrada's report concerned misconduct in municipal government to which § 4-61dd does not apply; (2) Estrada's report did not concern a violation of state law by Wang, the city of Hartford, or [the department], and Estrada did not have a good faith belief to the contrary; (3) if any

errors in state government occurred, they were Estrada's, and she cannot seek whistleblower protection for reporting her own error; (4) § 4-61dd does not transform Estrada into a whistleblower for doing what 'she was obliged by her normal work responsibilities' to do; and (5) there [is] no causal connection between Estrada's report and her subsequent discipline, which was instead based on Estrada's underlying mistakes and ongoing performance issues over a four year period." Therefore, the department contends, because the commission fails to mention or challenge all but one of those grounds in its brief, it has abandoned any argument on the unbriefed grounds.

"It is well settled that, in a certified appeal, the focus of our review is not the actions of the trial court, but the actions of the Appellate Court. . . . The only questions that we need consider are those squarely raised by the petition for certification, and we will ordinarily consider these issues in the form in which they have been framed in the Appellate Court." (Internal quotation marks omitted.) *State* v. *Saucier*, 283 Conn. 207, 221, 926 A.2d 633 (2007); see, e.g., id., 222–23 (declining to consider issue that was not briefed before Appellate Court and not raised in petition for certification). Practice Book § 84-9 limits those issues that the appellant can present on appeal to ones "set forth in the petition for certification, except where the issues are further limited by the order granting certification." See, e.g., *State* v. *Turner*, 334 Conn. 660, 686 n.13, 224 A.3d 129 (2020) (appellant "may present only those issues for which certification has been granted").

We are also mindful that "[o]ur rules of preservation apply to claims, but they do not apply to legal arguments, and, therefore, [this court] may . . . review legal arguments that differ from those raised below if they are subsumed within or intertwined with arguments related to the legal claim before the court." (Inter-

nal quotation marks omitted.) *Jobe* v. *Commissioner of Correction*, 334 Conn. 636, 644 n.2, 224 A.3d 147 (2020).

This case presents a unique situation in which the petition for certification and the statement in response to the petition indicate that certification was sought regarding two main questions: (1) whether the commission had subject matter jurisdiction, and (2) whether the Appellate Court properly held that Estrada's disclosure was not a protected disclosure under § 4-61dd. Although, in its petition for certification, the commission broke this second question into four interrelated questions, it is fair to characterize them as falling within the department's broader second question. This court granted certification on the jurisdictional question and a narrower second question focusing only on the actual violation of a statute or a reasonable, good faith belief that such a violation had occurred. See footnote 4 of this opinion. Accordingly, the commission limited its briefing to this question and the jurisdictional question. Unlike cases in which an unpreserved claim was not raised before the Appellate Court or not raised in a petition for certification, in the present case, the petition filed by the commission satisfied both of these requirements. "[A]lthough [this] court is not bound to consider claims that were not raised at trial [or in the Appellate Court], it has the authority to do so in its discretion . . . ." (Emphasis omitted.) *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 143, 84 A.3d 840 (2014). Interests of justice weigh heavily in favor of not penalizing the commission for this court's certification of a more narrowly tailored question than what the parties had requested. Cf. id., 160 ("interests of justice, fairness, integrity of the courts and consistency of the law significantly outweigh the interest in enforcing procedural rules governing the preservation of claims"). Cases cited by the department are inapposite because they do not involve situations

in which this court failed to certify a question requested by the parties.

The department also argues that the commission abandoned the one merits issue it does address before this court by failing to raise or brief that issue in the Appellate Court, which did not decide that issue. The department contends that the commission did not argue in its appeal to the Appellate Court that § 4-61dd protected Estrada because she had a reasonable and good faith belief that a violation of the statute had occurred. This claim of abandonment is unpersuasive. The department conflates the distinction between arguments and claims. The commission's claim has consistently been that Estrada made a protected whistleblower disclosure pursuant to § 4-61dd. The trial court and the Appellate Court each characterized the issue raised by the commission broadly. The argument as to whether Estrada needed to prove an actual violation of state law or a reasonable, good faith belief of such a violation is "subsumed within or intertwined with" the broader legal claim of whether her disclosure was a whistleblower disclosure under the statute. (Internal quotation marks omitted.) *Jobe* v. *Commissioner of Correction*, supra, 334 Conn. 644 n.2. It should also be noted that the department never argued that this broader claim was abandoned in its response to the commission's petition for certification; rather, it agreed that this court should take up the issue. Cf. U.S. Sup. Ct. R. 15.2 (effective January 1, 2023) ("Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition. Any objection to consideration of a question presented based on what occurred in the proceedings below, if the objection does not go to jurisdiction, may be deemed waived unless called to the Court's attention in the brief in opposition.").

Accordingly, we ordered the parties to file supplemental briefing on the broader question on which the parties' sought certification. We conclude that the commission did not waive its merits arguments, and, as a result, this appeal is not moot. Thus, we will consider the merits of the commission's appeal.

III

WHISTLEBLOWER RETALIATION

We now turn to the commission's contention that Estrada's disclosure constituted a protected whistleblower disclosure.

At the outset, we note our agreement with the parties that § 4-61dd claims should be analyzed using the three part, burden shifting framework set forth in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802–805, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) (*McDonnell Douglas*). See, e.g., *Eagen* v. *Commission on Human Rights & Opportunities*, 135 Conn. App. 563, 577–79 and n.5, 42 A.3d 478 (2012); see also, e.g., *Ford* v. *Blue Cross & Blue Shield of Connecticut, Inc.*, 216 Conn. 40, 53–54, 578 A.2d 1054 (1990).

A

Applicability of § 4-61dd to Purported Misconduct in Municipal Government

The department contends that Estrada's statement to her supervisor, Blaschinski, was not a protected disclosure because § 4-61dd does not apply to misconduct in municipal government. Specifically, the department frames the issue as Wang's misrepresentation on his resume and his resulting appointment as acting director of health for the city of Hartford. The department notes that § 4-61dd (a) applies to misconduct occurring in only three enumerated contexts, namely, in (1) "any state department or agency," (2) "any quasi-public agency,"

or (3) "any large state contract . . . ." General Statutes (Rev. to 2017) § 4-61dd (a). Because municipalities are not included in this list, the department contends that the protections of § 4-61dd are not applicable in this case. The commission contends that § 4-61dd applies to purported misconduct in municipal government in situations in which the state is "substantially involved." The commission also contends, however, that we need not reach this issue because the error reported by Estrada to Blaschinski was that the department, a state agency, erred in approving Wang for the position of acting director of health. We agree with the commission that we need not reach this issue.

Although Wang may have misrepresented his credentials on his resume, which would have amounted to misconduct at the municipal level, the record is clear that Estrada reported wrongdoing by the department—namely, its deficient review process of an appointee's credentials and its erroneous approval of Wang—and her own failure to verify that Wang had the degree he claimed to have on his resume. The referee found that Estrada had "told [Blaschinski] that Wang did not possess the proper credentials to be interim director of health, which violated . . . § 19a-200." Whether Estrada was reporting her own error in failing to ensure Wang's credentials were accurate or revealing that the department had no policy to guide the review of credentials for prospective acting directors of health, Estrada's disclosure concerned the misconduct of a state department and/or employee—even if there was also misconduct by Wang at the municipal level.[6] Any error at the city's level did not obviate the department's obligation to review Wang's credentials or the department's

[6] The department's one page analysis of this issue does not address why Estrada's failure to investigate or the department's failure to have a policy does not amount to allegations of misconduct of a state department or employee.

error in ultimately approving Wang. Accordingly, even if § 4-61dd does not apply to purported misconduct in municipal government, it applies in this case because Estrada reported alleged misconduct at the state level.

B

Whistleblower Protection for Reporting Employee's Own Error

The parties agree that, at least in some circumstances, the text of § 4-61dd and the policy behind it support the conclusion that employees might be entitled to whistleblower protection when they self-report. Specifically, the commission correctly points out that the statute protects reporting by state employees "having knowledge of *any matter involving* . . . violation of state laws . . . mismanagement . . . or danger to the public safety" in applicable scenarios who report that information to a covered entity. (Emphasis added.) General Statutes (Rev. to 2017) § 4-61dd (a); see also General Statutes (Rev. to 2017) § 4-61dd (e). The department notes, however, that whistleblower statutes cannot "be used by employees to shield themselves from the consequences of their own misconduct or failures." *Trimmer* v. *United States Dept. of Labor*, 174 F.3d 1098, 1104 (10th Cir. 1999). To avoid such a result, the department argues, these claims must be resolved through the causal connection prong of the *McDonnell Douglas* test; see, e.g., *Arnone* v. *Enfield*, 79 Conn. App. 501, 507, 831 A.2d 260, cert. denied, 266 Conn. 932, 837 A.2d 804 (2003); see also *McDonnell Douglas Corp.* v. *Green*, supra, 411 U.S. 802; under which the self-reporting employee must present evidence of retaliatory intent beyond the simple fact that the employer promptly disciplined the employee for the same misconduct the employee reported. For the reasons that follow, we agree that, as long as the self-reporting employee can prove the necessary causal nexus between the act of

reporting and the ensuing discipline, that employee is entitled to receive whistleblower protection for reporting his or her own error.

There are two important phrases in § 4-61dd that support this conclusion. First, the statute provides that "[a]ny person" who discloses covered information is included under the statute. General Statutes (Rev. to 2017) § 4-61dd (a). Second, the statute covers "any matter involving" various types of misconduct specified in the statute. General Statutes (Rev. to 2017) § 4-61dd (a). The broad language of each of these phrases is consistent with the remedial purpose of § 4-61dd, which is to "root out" misconduct in government. *Hartford County Sheriffs Dept. Communities Charities Assn.* v. *Blumenthal*, 47 Conn. Supp. 447, 459, 806 A.2d 1158 (2001). It is well settled that remedial statutes are interpreted broadly to effectuate their purpose. See, e.g., *Thames Talent, Ltd.* v. *Commission on Human Rights & Opportunities*, 265 Conn. 127, 137, 827 A.2d 659 (2003).

We recognize that this court has previously concluded that the word "any" "can have a variety of meanings," depending on the statutory context, including "all, every, some or one." (Internal quotation marks omitted.) *Ames* v. *Commissioner of Motor Vehicles*, 267 Conn. 524, 531, 839 A.2d 1250 (2004). But, as the department concedes, to the extent that there is ambiguity in the language of the statute, extratextual sources resolve any ambiguity in favor of a broader interpretation. See General Statutes § 1-2z (permitting resort to extratextual sources if statutory language is ambiguous). First, it is unlikely that the legislature would have wanted employees disciplined for bringing their own actions to light, as that would discourage disclosure and undermine the statutory goals. See, e.g., 45 H.R. Proc., supra, pp. 2857, 2877 (original intent of statute was "to protect people who have found some [wrongdoing] in a state

agency" and to encourage people "to bring forth important information . . . in order to protect . . . the proper running of our government"); Conn. Joint Standing Committee Hearings, Government Administration and Elections, Pt. 2, 1998 Sess., p. 281, remarks of Attorney General Blumenthal (value of whistleblowers is that they "very simply are often the best watchdogs when something goes wrong in state programs"); 22 S. Proc., Pt. 17, 1979 Sess., p. 5648, remarks of Senator Clifton A. Leonhardt ("I think it's very important that state employees who come across malfeasance or inefficiencies or incompetence be encouraged to report these [wrongdoings] to their superiors").

Second, since § 4-61dd was enacted in 1979, the legislature has consistently extended the reach of the statute. See, e.g., Public Acts 1997, No. 97-55 (extending coverage to employees of quasi-public agencies); Public Acts 1998, No. 98-191, § 1 (protecting disclosures relating to large state contractors); Public Acts 2002, No. 02-91, § 1 (adding rebuttable presumption to antiretaliation provision); Public Acts 2011, No. 11-48, § 17 (extending filing deadline for whistleblower complaints from thirty days to ninety days). At no time has the legislature imposed limitations on the statute's coverage that would suggest an intention to exclude employees.

Finally, because remedial statutes are construed broadly to effectuate their purpose, exceptions to those statutes should be construed narrowly. See, e.g., *Commission on Human Rights & Opportunities* v. *Edge Fitness, LLC*, 342 Conn. 25, 37, 268 A.3d 630 (2022). Section 4-61dd does not contain an exception for state employees who report their own errors, and there is no indication in the legislative history of such an implied exception to the phrase "[a]ny person" in § 4-61dd (a). Supplying an exception, when not explicitly provided by the legislature, for state employees who self-report would dilute the efficacy of the statute by creating perverse incen-

tives. Employees who were involved in any of the misconduct would be discouraged from coming forward because their disclosure would not entitle them to any protections. The department concedes as much. Thus, we conclude that, so long as an employee can prove causation (i.e., that he or she was disciplined as a result of the *disclosure* and not the underlying *conduct*), the employee is entitled to receive whistleblower protection despite his or her involvement in the facts giving rise to the disclosure.[7]

[7] In related contexts, federal courts agree that self-reporting can be a protected activity but also emphasize that whistleblower statutes cannot "be used by employees to shield themselves from the consequences of their own misconduct or failures." *Trimmer* v. *United States Dept. of Labor*, supra, 174 F.3d 1104; see, e.g., *Smith* v. *Dept. of Labor*, 674 Fed. Appx. 309, 316 (4th Cir. 2017) (holding that whistleblowers cannot "shield [themselves from the consequences of] their own misconduct by providing negative information about their own activities" and that "[the] [p]rotected activity will not shield an [underperforming] worker from discipline" (internal quotation marks omitted)); *Kahn* v. *United States Secretary of Labor*, 64 F.3d 271, 279 (7th Cir. 1995) ("[an employee's] attempt to hide behind his protected activity as a means to evade termination [of employment] for [nondiscriminatory] reasons is flawed"); see also, e.g., *Norfolk Southern Railway Co.* v. *United States Dept. of Labor*, Docket No. 21-3369, 2022 WL 17369438, *10 (6th Cir. December 2, 2022) ("employees cannot immunize themselves against wrongdoing by disclosing it" (internal quotation marks omitted)); *Dakota, Minnesota & Eastern Railroad Corp.* v. *U.S. Dept. of Labor Administrative Review Board*, 948 F.3d 940, 946 (8th Cir. 2020) (same); *BNSF Railway Co.* v. *United States Dept. of Labor*, 816 F.3d 628, 639 (10th Cir. 2016) (same). We agree with the department that these cases rightly direct courts to allow whistleblower protection for an employee who reports his or her own error if the employee is able to demonstrate causation. The relevant question is whether the employer disciplined the employee for the disclosure itself or the underlying conduct. See, e.g., *Smith* v. *Dept. of Labor*, supra, 316–18; *BNSF Railway Co.* v. *United States Dept. of Labor*, supra, 638–41.

We also note that, when there are "dual motives" for the adverse personnel action, under the *McDonnell Douglas* three part, burden shifting framework, "once the [employee] has shown that the protected activity played a role in the employer's decision . . . the employer has the burden to prove by a preponderance of the evidence that it would have [discharged] the employee even if the employee had not engaged in the protected conduct." (Citation omitted; internal quotation marks omitted.) *Kahn* v. *United States Secretary of Labor*, supra, 64 F.3d 278; see also *Mt. Healthy City School District Board*

In the present case, we conclude that Estrada's disclosure falls within the protection of § 4-61dd (a) and its broad definition of "any matter involving . . . violation of state laws . . . mismanagement . . . or danger to the public safety," despite her involvement in the actions giving rise to the disclosure. Her disclosure exposed the fact that the department had approved an acting director of health arguably in violation of § 19a-200 because the acting director did not have the master's degree he claimed to have on his resume. The disclosure also brought to light the deficient review process that led to the error of approving Wang. Specifically, the disclosure reported that the department had no policy to guide the review of credentials for prospective acting directors. Blaschinski testified that "she did not have personal knowledge of the customary procedure or whether there was even a policy in place about reviewing credential[s]." Following Estrada's disclosure, the department implemented a policy for reviewing credentials for acting directors. The policy "does not require the [department] to undertake independent verification of the appointed individual's credentials;

of Education v. *Doyle*, 429 U.S. 274, 287, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977) (first to set forth dual motive discharge test). In cases in which the employee has proven that the employer had an illegal motive to discharge the employee, the burden of proof fairly rests with the employer because "[t]he employer is a wrongdoer; [the employer] has acted out of a motive that is declared illegitimate by the statute. It is fair that [the employer] bear the risk that the influence of legal and illegal motives cannot be separated . . . because the risk was created . . . by [the employer's] own wrongdoing." *National Labor Relations Board* v. *Transportation Management Corp.*, 462 U.S. 393, 403, 103 S. Ct. 2469, 76 L. Ed. 2d 667 (1983), overruled in part on other grounds by *Director*, *Office of Workers' Compensation Programs*, *Dept. of Labor* v. *Greenwich Collieries*, 512 U.S. 267, 114 S. Ct. 2251, 129 L. Ed. 2d 221 (1994). Once the employer satisfies its burden, either of persuasion or production, the rebuttable presumption that the employee was discharged for impermissible factors is dissolved. See, e.g., *Loyd* v. *Phillips Bros., Inc.*, 25 F.3d 518, 522 (7th Cir. 1994). The employee is then required to prove that the employer's proffered reason for the termination of employment is a mere pretext for an unlawful discharge. See, e.g., *Fisher* v. *Transco Services-Milwaukee, Inc.*, 979 F.2d 1239, 1243 (7th Cir. 1992).

instead, the local health department provides the OLHA with a copy of the appointed individual's transcript or diploma."

Concluding that Estrada's disclosure did not fall within the ambit of § 4-61dd due to her involvement in the underlying conduct would disincentivize her and other state employees, out of fear that they may face disciplinary consequences as a result of self-reporting, from disclosing "malfeasance or inefficiencies or incompetence . . . ." 22 S. Proc., supra, p. 5648, remarks of Senator Leonhardt. Affording this disclosure protection under § 4-61dd would encourage state employees "to report these [wrongdoings] to their superiors . . . ." Id. Accordingly, the broad language of the statute, the legislative history, and the remedial policy of the statute compel the conclusion that an employee may seek whistleblower protection for reporting his or her own error under § 4-61dd.

C

Causation

The department contends that Estrada failed to prove causation and that the referee mistakenly concluded that the department had retaliated against Estrada for reporting her errors instead of for making those errors. The department argues that the referee improperly (1) presumed a retaliatory motive under § 4-61dd (e) (4), and (2) excluded three grievance decisions establishing the department's nonretaliatory grounds for discipline. The commission contends that Estrada established a causal connection by inference. The commission also points to the two year statutory presumption in § 4-61dd (e) (4) and contends that, because Estrada blew the whistle within two years of the adverse personnel action, there was a rebuttable presumption that the adverse personnel action was in retaliation for the whistleblower disclosure. The department contends that this

presumption should not apply when a whistleblower reports his or her own error, and, even if it does, the department rebutted this presumption.[8] We agree with the department.

We begin by considering whether the two year statutory presumption applies when an employee reports his or her own error. Section 4-61dd (e) (4) provides in relevant part that, "[i]n any proceeding under subdivision (2) or (3)" of § 4-61dd (e), if the "personnel action occurs not later than two years after the employee first [makes a protected disclosure] . . . there shall be a rebuttable presumption that the personnel action is in retaliation" for that disclosure.

As we explained in part III B of this opinion, the word "any" is ambiguous, and can refer to "all, every, some or one," depending on the statutory context.[9] (Internal quotation marks omitted.) *Ames* v. *Commissioner of Motor Vehicles*, supra, 267 Conn. 531. Given this ambiguity, we may look to extratextual sources for interpretive guidance; see General Statutes § 1-2z; and there are several such sources that support the conclusion that "any proceeding" should not include instances of self-reporting for purposes of the statutory presumption. First, as the department points out, the goal of § 4-

[8] The department had not previously advanced this argument but urges this court to consider it because it is merely a new "point or line of reasoning made in support of" the broader issue about why Estrada failed to make a prima facie case. (Internal quotation marks omitted.) *Jobe* v. *Commissioner of Correction*, supra, 334 Conn. 644 n.2. We agree that this is merely a different argument and not a new claim. See, e.g., id. Moreover, the commission has briefed the applicability of the statutory presumption, so this court has the benefit of thorough briefing on the issue.

[9] Even if the term "any proceeding" is not ambiguous, concluding that the statutory presumption applies in situations in which an employee reports his or her own misconduct would lead to absurd and unintended consequences that we discuss subsequently in this opinion. See, e.g., *Desrosiers* v. *Diageo North America, Inc.*, 314 Conn. 773, 784–86, 105 A.3d 103 (2014) (plain and unambiguous text is not dispositive when it creates absurd results that defeat legislative intent).

61dd is to create a better functioning government by encouraging employees to disclose misconduct so that appropriate corrective action can be taken to remedy the problem. The statute's protections are the means to the end of "root[ing] out waste and corruption in government . . . ." *Hartford County Sheriffs Dept. Communities Charities Assn.* v. *Blumenthal*, supra, 47 Conn. Supp. 459; see 45 H.R. Proc., supra, p. 2857, remarks of Representative O'Rourke (statute's protections exist "in order to protect the public tax dollar and the proper running of our [state] government").

Construing the two year statutory presumption to apply in this case would undermine the policy goal of the legislation. Such an interpretation would prevent an employer from taking corrective and deterrent action against the employee because the employer would always be subjected to an automatic presumption of retaliation. The effect would be that employers either would not take corrective action or would wait two years to take corrective action, thwarting the statutory policy of deterrence and accountability. It would be of little use if an employee reported his or her misconduct, but the employer could not take corrective action with respect to that misconduct. Indeed, it does not make practical sense to shift the burden to the employer to justify its action after an employee has admitted to his or her own misconduct. For example, if an employee admitted to stealing thousands of dollars from an employer, it would not be reasonable to infer that the employee was disciplined for the disclosure rather than for the theft itself.

State agencies often, and should, take corrective action within two years of learning of malfeasance. That is precisely what § 4-61dd intends. Temporal proximity will always be present in these types of cases but will not be, without more, probative of retaliatory intent. To conclude otherwise would allow every self-reporting

employee to automatically satisfy his or her burden under the first step of the *McDonnell Douglas* analysis and to move to a modified second step pursuant to which the employer immediately has the burden to affirmatively disprove the employee's claim, all without the employee ever submitting any evidence of a retaliatory animus for the disclosure. See *McDonnell Douglas Corp.* v. *Green*, supra, 411 U.S. 802–805 (employee bears initial burden to make prima facie case of discrimination, employer then must produce evidence of legitimate, nondiscriminatory reason for adverse personnel action, and burden then shifts back to employee to show that employer's proffered reason is pretextual); see also, e.g., *Ford* v. *Blue Cross & Blue Shield of Connecticut, Inc.*, supra, 216 Conn. 53–54 (adopting well established employment discrimination burden shifting analysis of *McDonnell Douglas* for use in discrimination or wrongful discharge cases brought under General Statutes § 31-290a, which is provision designed to protect employees who file for workers' compensation benefits).[10]

[10] Under the *Ford* analysis, "[t]he plaintiff bears the initial burden of proving by the preponderance of the evidence a prima facie case of discrimination. . . . In order to meet this burden, *the plaintiff must present evidence that gives rise to an inference of unlawful discrimination.* . . . If the plaintiff meets this initial burden, the burden then shifts to the defendant to rebut the presumption of discrimination by producing evidence of a legitimate, nondiscriminatory reason for its actions. . . . If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity." (Citations omitted; emphasis added; internal quotation marks omitted.) *Ford* v. *Blue Cross & Blue Shield of Connecticut, Inc.*, supra, 216 Conn. 53–54.

We note that the Appellate Court has approved of the use of the *McDonnell Douglas* framework in the context of retaliatory discharge claims, brought pursuant to General Statutes § 31-226a, for retaliation against employees assisting former employees with the filing of claims for unemployment compensation; see *Beizer* v. *Dept. of Labor*, 56 Conn. App. 347, 354–56, 742 A.2d 821, cert. denied, 252 Conn. 937, 747 A.2d 1 (2000); in the context of retaliatory discharge claims, brought pursuant to § 31-290a, for the discharge of employees after they file for workers' compensation benefits; see *Otero* v. *Housing Authority*, 86 Conn. App. 103, 104–105, 108–109, 860 A.2d 285

Federal case law similarly treats self-reporting as an "exception to [the normal causation] rule" that requires the employee "to show more" than just that the report led to the adverse personnel action. *BNSF Railway Co.* v. *United States Dept. of Labor*, 816 F.3d 628, 639 (10th Cir. 2016); see, e.g., *Dakota, Minnesota & Eastern Railroad Corp.* v. *U.S. Dept. of Labor Administrative Review Board*, 948 F.3d 940, 946 (8th Cir. 2020). The relevant question is whether the employer disciplined the employee for the disclosure itself or the underlying conduct. See, e.g., *Smith* v. *Dept. of Labor*, 674 Fed. Appx. 309, 316–18 (4th Cir. 2017); *BNSF Railway Co.* v. *United States Dept. of Labor*, supra, 638–41.

In the present case, Estrada failed to produce any evidence of a retaliatory motive other than temporal proximity. There is no evidence that supports a conclusion that the department took the adverse personnel actions in retaliation for the disclosure rather than for the underlying misconduct. Estrada could have alleged, but did not, that she was treated differently from other employees who made similar mistakes, that her supervisors attempted to dissuade her from reporting or threatened her with discipline if she did, or that her supervisors already knew of her mistakes but ignored them until after she made the public disclosure. See, e.g., *Dakota, Minnesota & Eastern Railroad Corp.* v. *U.S. Dept. of Labor Administrative Review Board*, supra, 948 F.3d 947. Rather, the evidence establishes that Blaschinski did not reprimand Estrada or take any other disciplinary action when Estrada made the disclosure regarding Wang and, instead, tried to address the underlying mistake and to prevent its recurrence by explaining to Estrada "the critical importance of ensur-

(2004); and in the context of whistleblower claims for retaliation, brought pursuant to General Statutes § 31-51m (b), for the discharge of employees who report employers for suspected violations of state or federal law. See *Arnone* v. *Enfield*, supra, 79 Conn. App. 506–507.

ing [that future] documents that are submitted for the [department] [c]ommissioner's signature . . . [are] accurate." It was only after Estrada made the same mistake again one week later that the department reprimanded her. The only evidence to the contrary that the referee identified at the prima facie step of the analysis was the fact that the department told Estrada she "was [being] punished for the Wang incident." But this alone does not establish retaliatory motive. It was Estrada's failure to confirm Wang's credentials and the potentially improper approval of Wang that, in combination with additional instances of deficient work performance, led to the adverse personnel actions. The referee's statement that the department's reprimands indicated that their cause was Estrada's "protect[ed] disclosure regarding [Wang's] credentials" is incorrect. Neither of the reprimands indicate that Estrada was being disciplined for the disclosure rather than for Estrada's underlying conduct.

Even if we were to hold that the statutory presumption applies and that Estrada made out a prima facie case, the department rebutted this presumption.[11] The department submitted three union grievances explicitly holding that the same adverse employment actions Estrada challenged before the commission were taken for just cause. The trial court held that the referee's decision to exclude these decisions "was clear error and an abuse of discretion" because they "establish a legitimate reason for each action, namely, the poor performance of [Estrada]," and are "relevant probative evidence" that serves to "rebut" any presumption or inference of retaliation Estrada may have made at the prima facie stage of the *McDonnell Douglas* analysis.

[11] The trial court concluded that, even if the two year statutory presumption applied, it is rebuttable, and "[t]he record here clearly and unmistakably rebuts the presumption."

Evidence credited by the referee also supports the department's nonretaliatory justifications, including evidence that Estrada (1) had a history of declining work quality and performance improvement plans before her disclosure, (2) prepared the inaccurate letters she was initially reprimanded for—the second of which was submitted after she was put on notice of the problem with the Wang letter and the importance of not repeating it—and also failed to appropriately log the Wang complaint, and (3) continued to exhibit poor work quality after those incidents, including the failure to track and keep files, more problems communicating with her supervisors about appointment letters, and continued resistance to the issues identified in her ongoing performance improvement plan.

Estrada's first written reprimand was issued nearly one month after the disclosure, and then only after Estrada had again, less than one week after the Wang incident, submitted another letter to the department's commissioner for his signature without first confirming the facts reported in the letter. Thus, regardless of whether the two year statutory presumption applies, Estrada presented no evidence that contradicted the department's proffered reason for the adverse personnel actions.[12]

Significantly, and contrary to the referee's decision, at this procedural stage, the department's burden was only one of production, not persuasion. See, e.g., *Craine* v. *Trinity College*, 259 Conn. 625, 643, 791 A.2d 518 (2002); see also, e.g., *Texas Dept. of Community Affairs* v. *Burdine*, 450 U.S. 248, 254, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981) (when burden shifts, defendant "need not persuade the court that it was actually motivated by

[12] The referee concluded that the department's proffered reasons for discipline were pretextual but provided no explanation as to why it was pretextual to support that conclusion.

the proffered reasons"); *Texas Dept. of Community Affairs* v. *Burdine*, supra, 253 ("[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff"). Accordingly, the referee improperly held the department to a higher standard than was required when she concluded that the department must submit evidence that was "sufficiently credible to meet [the] burden of *persuasion* . . . ." (Emphasis added; internal quotation marks omitted.)

The interest served by addressing underlying misconduct is manifestly separate and distinct from that served by penalizing whistleblower activity, so it is imperative that the employee establish a causal connection between the adverse employment action and the whistleblowing activity itself. Estrada failed to do so. As the trial court concluded, "the record unmistakably points to the fact that Blaschinski and [the department] were not dissatisfied that [Estrada] made the *disclosure* that a mistake had been made. Blaschinski and [the department] were instead dissatisfied that the *mistake had been made in the first place*. Thus, the negative employment actions were taken, not because [Estrada] made the disclosure, but because [Estrada] made and repeated the mistake." (Emphasis added; footnotes omitted.)

Accordingly, we cannot conclude that there is substantial evidence in the administrative record to support the conclusion that the adverse personnel actions were caused by the disclosure itself rather than Estrada's underlying conduct.[13] See generally *Dolgner* v. *Alander*,

[13] The department also contends that, although an employee need only have a reasonable, good faith belief that a violation of state law occurred, Estrada lacked such a belief in this case. Given our conclusion in part III C of this opinion that Estrada failed to establish a causal connection, we need not decide whether a reasonable, good faith belief that there was a violation of state law is sufficient to afford an employee protection under § 4-61dd. Even if Estrada had such a reasonable, good faith belief, she failed to establish that the adverse personnel actions were taken as a result of her whistleblower disclosure. Similarly, we need not decide whether § 19a-200 requires acting directors of public health to have certain qualifications.

237 Conn. 272, 280–81, 676 A.2d 865 (1996) (discussing substantial evidence rule).

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

ORDERS

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CECIL GRANT *v.* COMMISSIONER
OF CORRECTION

The petitioner Cecil Grant's petition for certification to appeal from the Appellate Court, 225 Conn. App. 55 (AC 45569), is granted, limited to the following issues:

"1. Did the Appellate Court correctly conclude that the petitioner had failed to establish prejudice on the basis of trial counsel's deficient performance in failing to investigate the cell phone records of a state's witness?

"2. Did the Appellate Court correctly conclude that the petitioner had failed to establish his claim of ineffective assistance of counsel on the basis of trial counsel's failure to present additional alibi testimony?

"3. If the petitioner has established deficient performance with respect to both his cell phone record and alibi testimony claims but has not independently established prejudice with respect to each of those claims, should this court consider the cumulative effect of the deficiencies in evaluating whether the prejudice prong has been satisfied under *Strickland* v. *Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)?"

Katharine S. Goodbody and *Evan Parzych*, assistant public defenders, in support of the petition.

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

Decided May 28, 2024

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CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

IN RE A. H. ET AL.*
(AC 47052)

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

Syllabus

The respondent father appealed to this court from the judgments of the trial court terminating his parental rights with respect to his minor children, A and K. Following the court's adjudication of A as neglected, the court ordered the father and the respondent mother, C, to undergo a psychological evaluation conducted by L, a clinical psychologist. Following K's birth, the petitioner, the Commissioner of Children and Families, filed a neglect petition for K, and the father and C both participated in an evaluation with R, a court-appointed psychological evaluator. At the start of the consolidated trial on the termination of parental rights petitions for both children and the neglect petition for K, counsel for C addressed the court regarding C's motion in limine. The motion, joined by the father's counsel, challenged various hearsay statements in the petitioner's exhibits, including, inter alia, statements or information within multiple social studies prepared by the Department of Children and Families and status reports that derived from L's evaluation. The trial court denied the motion and overruled the objections to the hearsay statements except with statements made by A, which the court concluded were not admissible. The court considered this information in both the adjudicatory and dispositional phases of the termination of

* In accordance with the spirit and intent of General Statutes § 46b-142 (b) and Practice Book § 79a-12, the names of the parties involved in this appeal are not disclosed. The records and papers of this case shall be open for inspection only to persons having a proper interest therein and upon order of the court.

parental rights proceedings and concluded that the father had failed to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable period of time, given and ages and needs of the children, he could assume a responsible position in their lives. On appeal, the father claimed, inter alia, that the court's reliance on the social studies submitted into evidence by the petitioner during the adjudicatory phase of the trial constituted both a violation of the applicable statute (§ 45a-717) and rule of practice (§ 35a-9). *Held*:

1. The trial court's use of and reliance on the social studies in the adjudicatory phase of the trial was not improper; this court was bound by its precedent in *In re Tabitha P.* (39 Conn. App. 353), which held that a court properly may rely on a social study in the adjudicatory phase of a termination of parental rights proceeding, and the respondent father failed to seek en banc review of his appeal to overrule that precedent.
2. This court declined to review the respondent father's unpreserved claim that the trial court's consideration of the social studies during the adjudicatory phase of the trial violated his rights to due process; the claim challenged the admission of the social studies and thus was evidentiary in nature and not of constitutional magnitude, and, thus, it was not reviewable pursuant to the second prong of *State* v. *Golding* (213 Conn. 233).
3. The respondent father could not prevail on his claim that the trial court improperly admitted hearsay evidence contained in the petitioner's exhibits, specifically the multiple social studies and status reports that derived from L's psychological evaluation and statements from the children's foster mother, and that the alleged hearsay was harmful: assuming, without deciding, that the testimony was improperly admitted into evidence, the father has failed to demonstrate the harmfulness of the challenged hearsay as it was cumulative of other properly admitted evidence, including testimony from a social worker regarding the father's inconsistent participation in recommended services, his inability to provide for the children's safety and well-being, and concerns as to his parenting skills, mental health and substance abuse, testimony from R including, inter alia, that the father would not shield the children from the adverse impact of C's behavior and that he suffered from a personality disorder, and the psychological evaluation performed by R, which was admitted as a full exhibit without objection and which set forth information that was cumulative of alleged hearsay statements from L and referenced a separate evaluation of the father that made an identical statement to the one in L's evaluation but to which the father did not object; moreover, the alleged hearsay statements of the foster mother were also cumulative of other evidence in the record, including testimony from a visitation supervisor and a social worker and R's evaluation.

Argued March 4—officially released June 3, 2024**

** June 3, 2024, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Procedural History

Petitions by the Commissioner of Children and Families to terminate the respondents' parental rights with respect to their minor children, brought to the Superior Court in the judicial district of New London, Juvenile Matters at Waterford, and tried to the court, *Hoffman*, *J.*; judgments terminating the respondents' parental rights, from which the respondent father appealed to this court. *Affirmed.*

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

Nisa Khan, assistant attorney general, with whom, on the brief, was *William Tong*, attorney general, for the appellee (petitioner).

Opinion

SEELEY, J. The respondent father,[1] Terrel H., appeals from the judgments of the trial court, rendered in favor of the petitioner, the Commissioner of Children and Families (commissioner), terminating his parental rights with respect to his minor children, A. H. (A) and K. H. (K). On appeal, the respondent claims that (1) the court's reliance on social studies prepared by the Department of Children and Families (department) in the adjudicatory phase of the trial violated General Statutes § 45a-717 and Practice Book § 35a-9, despite this court's holding in *In re Tabitha P.*, 39 Conn. App. 353, 664 A.2d 1168 (1995), (2) the court's use of the social studies in the adjudicatory phase violated his due process rights, and (3) the court improperly admitted hearsay evidence contained in exhibits submitted by the commissioner, and the admission of that evidence was

[1] The parental rights of Alexandria C., the respondent mother of the minor children, also were terminated with respect to both children. She has not appealed from those judgments. All references in this opinion to the respondent are to Terrel H. only.

harmful to the respondent. We disagree with the respondent's claims and, accordingly, affirm the judgments of the court.

The following relevant facts, which the court found by clear and convincing evidence, and procedural history are relevant to this appeal. A, the second child of the respondent and Alexandria C., was born in May, 2018. At that time, Alexandria C. was incarcerated and a petition for the termination of the parental rights of the respondent and Alexandria C. had been filed as to their first child, E. H. (E). Thus, immediately following A's birth, on May 25, 2018, the commissioner sought an order of temporary custody for A, which was granted that day and sustained on May 31, 2018. Also on May 25, 2018, the commissioner filed a neglect petition with respect to A, and the court ordered specific steps for the respondent to facilitate his reunification with A.[2]

A consolidated trial was held with respect to the termination petition concerning E and the neglect petition concerning A. On January 11, 2019, the court rendered judgments terminating the respondent's parental rights as to E and adjudicating A neglected and committing her to the custody of the commissioner until further order of the court. On December 4, 2019, the commissioner filed a petition to terminate the respondent's parental rights as to A. The petition alleged that reasonable efforts had been made to reunify the respondent with A, that the respondent was unable or unwilling to

[2] The specific steps ordered the respondent, inter alia, to keep all appointments set by or with the department; to take part in counseling and make progress toward parenting and individual treatment goals, specifically, to maintain stable mental health and learn appropriate parenting skills; to submit to a substance abuse evaluation and follow the recommendations about treatment; not to use illegal drugs or abuse alcohol or medicine; to cooperate with service providers recommended for parenting/individual/family counseling; to get and/or maintain adequate housing and a legal income; not to get involved with the criminal justice system; and to visit with the children as often as the department permits.

benefit from reunification efforts, and that reasonable efforts to reunify were not required because the court previously had approved a permanency plan other than reunification in accordance with General Statutes § 17a-111b. The petition further alleged that A had been found in a prior proceeding to have been neglected, abused, or uncared for and that the respondent had failed to achieve the degree of personal rehabilitation as would encourage the belief that, within a reasonable time, considering the age and needs of A, the respondent could assume a responsible position in her life.

In February, 2021, the court ordered the respondent and Alexandria C. to undergo a psychological evaluation to help determine (1) "the present relationship between each parent and [A]," (2) whether "[t]he parents have a good understanding of [A's] needs and the capacity to meet them," (3) which permanent placement would be in A's best interest, and (4) whether the parents could "achieve such a degree of rehabilitation as would encourage the belief that, within a reasonable period of time, they could resume a responsible position in the life of [A]." The evaluation was conducted by Dr. Wendy Levy, a clinical psychologist, in August, 2021.

In December, 2021, the respondent and Alexandria C.'s third child, K, was born. On December 27, 2021, the commissioner sought an order of temporary custody, which the court granted that day and sustained on January 6, 2022. Subsequently, the commissioner filed a neglect petition with respect to K. Also on December 27, 2021, the court ordered specific steps for the respondent to facilitate his reunification with K.[3] On June 20, 2022, the commissioner filed a petition to terminate the respondent's parental rights as to K. The petition alleged

[3] The December 27, 2021 specific steps were similar to the May 25, 2018 specific steps; see footnote 2 of this opinion; with an updated treatment goal of gaining an understanding "of the importance of stability . . . in the life of a child."

that the department had made reasonable efforts to reunify K with the respondent, that the respondent was unable or unwilling to benefit from reunification efforts, and that the respondent had failed to achieve such a degree of personal rehabilitation as would encourage the belief that, within a reasonable period of time, considering the age and needs of K, he could assume a responsible position in her life.

In January, 2023, the respondent and Alexandria C. both participated in an evaluation with Dr. Kelly F. Rogers, a court-appointed psychological evaluator. Dr. Rogers' evaluation concluded that the respondent "evinces a long-standing pattern of maladaptive behavior characterized by criminal activity, impulsive action and decision-making, negativity and resistance to influence. He has few effective coping skills, and external pressures episodically make him 'overwhelmed.' Perceiving himself to be the victim of cruel fate and an uncaring society, he has few qualms about violating rules and proscriptions to gain the rewards of which he feels he has been cheated. He accepts little blame for his action[s], inaction and circumstances. Though his decisions and behavior have brought him little satisfaction or reward, he remains resistant to self-examination or change. His unenviable situation has made him sour on life, and he has little joy or satisfaction. Findings support a primary diagnosis of [o]ther [s]pecified [p]ersonality [d]isorder ([p]assive-[a]ggressive, [n]arcissistic and [a]ntisocial [t]raits with inadequate information for diagnosis of a specific personality disorder). His present unhappiness is best described as an [a]djustment [d]isorder with [d]epressed [m]ood." Dr. Rogers further opined that, although the respondent "could potentially serve as an appropriate caretaker" if he were no longer in a relationship with Alexandria C., he was too strongly "enmeshed" with her to "be expected to shelter [their children] from her volatility and its attendant risks. Any

representations he makes about willingness to divorce himself from [Alexandria C.] to care for [the children] should be regarded skeptically, and because of the likelihood of his failing to protect [the children] from [Alexandria C.'s] adverse impact, termination of his parental rights is . . . most consistent [with the children's] psychological well-being."

A consolidated trial on the termination of parental rights petition for A and the neglect and termination of parental rights petitions for K was held on July 10 and 14 and August 7, 2023. During the trial, the commissioner presented testimony from the following witnesses: Susan Allen, the assistant director of Safeway Family Services; Haley Flax, a department social worker; and Dr. Rogers. Alexandria C. testified, and called as a witness M'Kayla Gay, a friend of hers. The respondent did not testify or call any witnesses.

On the first day of trial, before any witnesses were called, counsel for Alexandria C. addressed the court, *Hoffman*, *J.*, regarding her motion in limine, filed on July 10, 2023. Counsel for the respondent joined in the motion, which challenged various hearsay statements in the commissioner's exhibits, including, inter alia, statements or information within multiple social studies[4] and status reports that derived from Dr. Levy's 2021 psychological evaluation, statements of the children's foster mother contained in those documents, and statements attributable to A. [5] The commissioner argued in

[4] A social study is a document prepared by the department that compiles relevant information regarding the respondent's history with the department, including notes from caseworkers, medical professionals, visit supervisors, and other relevant parties. See *In re Gabriel C.*, 196 Conn. App. 333, 358, 229 A.3d 1073 ("'[t]he purpose of the social study is to put parents on notice of allegations that need to be explained or denied' "), cert. denied, 335 Conn. 938, 248 A.3d 708 (2020). In a termination of parental rights proceeding, there may be multiple social studies produced by the department as the case develops and the department's goals progress (i.e., shift from reunification to termination, or vice versa).

[5] Specifically, during argument on the motion in limine, counsel for the respondent orally joined in the motion, arguing that "any statements that

opposition that certain of the challenged statements were admissible under the business records exception to the rule against hearsay.

Following argument on the motion in limine, the trial court denied the motion and overruled the objections to the hearsay statements contained within the exhibits, except with respect to statements made by A, which the court concluded were not admissible. As a result, the following department social studies and reports

come from someone who is not testifying is hearsay. We do not have the ability to cross-examine them." In response to the motion in limine, with respect to the statements from Dr. Levy's report contained within various department exhibits, counsel for the commissioner argued that Dr. Levy's report was "part of the court file. . . . [H]er report is part of the department's record. The department has put [Dr. Levy's] record within its own business record. The court is able to take judicial notice of any part of the court file that the court deems appropriate at any time. Dr. Rogers additionally relied on Dr. Levy's report." The court overruled the respondent's objection and admitted the statements from Dr. Levy's report, stating that "[t[he report was relied on by Dr. Rogers in preparing his report. . . . [C]ounsel can go ahead and question Dr. Rogers on what he relied on of Dr. Levy's report . . . ."

The court next addressed statements from Joel Tudisco in exhibit three, a social worker affidavit dated December 27, 2021, in which Tudisco, an advanced practice registered nurse who has provided psychiatric care for Alexandria C. since June, 2020, commented on Alexandria C.'s medication management and her mental health issues, and expressed concerns about Alexandria C.'s use of medical marijuana. Counsel for the commissioner argued that the statements should be admitted as a business record, as they were made "pursuant to a valid release" and were "collected [by the department] in the ordinary course of business." Counsel for Alexandria C. reiterated the objection, arguing that "[i]t's not a business record exception. They will repeat this completely, all throughout. . . . I mean, everything that is contained in [the department] arguably is subject to being admitted because it's in their business records. That's not what the hearsay rule is about." The court overruled the objection and allowed the statements in as "part of the medical evaluation."

At that point, there was an exchange between counsel for Alexandria C. and the court regarding the remaining objections. Counsel indicated that he would be making the "same argument" for the remaining objections and, therefore, chose not to proceed paragraph by paragraph through the rest of the motion in limine. The court proceeded to overrule the remaining objections, with the exception of the statements made by A.

were admitted as full exhibits over objection from Alexandria C. and the respondent: exhibit three, a social worker affidavit dated December 27, 2021; exhibit seven, a study in support of the permanency plan dated August 17, 2021; exhibit eight, a social study in support of the termination petition for K dated June 14, 2022; exhibit nine, a status report dated September 6, 2022; exhibit ten, a study in support of the motion to support the permanency plan dated September 16, 2022; exhibit eleven, an addendum to a social study in support of the termination petitions dated September 8, 2022; exhibit twelve, a status report dated November 28, 2022; exhibit thirteen, a status report dated December 16, 2022; exhibit fourteen, a status report dated January 20, 2023; exhibit fifteen, a status report dated January 23, 2023; exhibit sixteen, an addendum to a social study in support of the termination petitions dated April 21, 2023; and exhibit seventeen, an addendum to a social study in support of the termination of parental rights petitions dated June 27, 2023.

Although the motion in limine raised hearsay objections regarding exhibit eighteen, a preliminary report from Dr. Rogers, and exhibit nineteen, the court-ordered psychological evaluation from Dr. Rogers, the motion in limine asserted that there would be no objection to those exhibits so long as Dr. Rogers testified, which he did. No further objection was raised concerning the admission of those two exhibits.

On September 1, 2023, the court issued a memorandum of decision in which it adjudicated K neglected and terminated the respondent's parental rights as to A and K. After setting out the procedural history and finding that it had jurisdiction, the court stated that it had "carefully considered the termination of parental rights petition[s], the criteria set forth in the relevant General Statutes, the applicable case law, as well as the evidence and testimony presented, the demeanor

and credibility of the witnesses, the evidence, and the arguments of counsel according to the standards of law. With [regard] to the termination of parental rights petition[s], the court makes its findings by clear and convincing evidence."

Relevant to the adjudicatory phase[6] of the termination proceeding, the court made the following findings concerning the respondent. The respondent became involved with the department in 2016, when he was caring for E. "In April, 2016, there was a Careline[7] report over concerns that [the respondent] was on parole stemming from a conviction for robbery, was using marijuana, and . . . was not providing adequate supervision for [E]. [E] was removed from [the respondent's] care in April, 2016.

"In May, 2016, [the respondent] was incarcerated due to a violation of probation and remained in prison until June, 2016. Upon his release, [the department] referred him for parenting education and substance abuse/mental health assessment in December, 2016.

"In December, 2016, [the respondent] absconded from the halfway house and was considered a fugitive

[6] "Proceedings to terminate parental rights are governed by . . . [General Statutes] § 17a-112. . . . Under § 17a-112, a hearing on a petition to terminate parental rights consists of two phases: the adjudicatory phase and the dispositional phase. During the adjudicatory phase, the trial court must determine whether one or more of the . . . grounds for termination of parental rights set forth in § 17a-112 [(j) (B) (3)] exists by clear and convincing evidence. . . . If the trial court determines that a statutory ground for termination exists, then it proceeds to the dispositional phase. During the dispositional phase, the trial court must determine whether termination is in the best interests of the child. . . . The best interest determination also must be supported by clear and convincing evidence." (Internal quotation marks omitted.) *In re Niya B.*, 223 Conn. App. 471, 476 n.5, 308 A.3d 604, cert. denied, 348 Conn. 958, 310 A.3d 960 (2024).

[7] "'Careline is a department telephone service that mandatory reporters and others may call to report suspected child abuse or neglect.' *In re Katherine H.*, 183 Conn. App. 320, 322 n.4, 192 A.3d 537, cert. denied, 330 Conn. 906, 192 A.3d 426 (2018)." *In re Anthony S.*, 218 Conn. App. 127, 136 n.9, 290 A.3d 901 (2023).

on the run until he was found hiding in [Alexandria C.'s] basement. [The respondent] was discharged to the Isaiah House in June, 2017. The department referred [the respondent] to the Renaissance Program on several occasions for a full assessment of his needs, however, he failed to participate in any services until October, 2018. . . .

"On January 11, 2019, [the respondent's parental] rights were terminated as to [E]. Following the termination of his parental rights, [the respondent] was minimally engaged in case planning; he was discharged from the Renaissance Program and failed to maintain consistent contact with the department. [The respondent] did not reengage with the department until January, 2020, although he refused to discuss services until July, 2020, at which time he was referred to [Community Health Resources]. [The respondent] completed the services offered by [Community Health Resources], but [Community Health Resources] did not conduct urine screens and [the respondent] admitted to continued marijuana use.

"From January, 2021, to December, 2021, the department recommended [that the respondent] attend services and assessments at [Community Health Resources]. [The respondent] did not complete the intake until the day [K] was born. [The respondent] was diagnosed with cannabis use disorder, moderate, and tobacco use disorder, mild. [The respondent] was recommended to engage in services with [Community Health Resources], however, his last kept appointment with [Community Health Resources] was in March, 2022 . . . . [A]ll appointments since then have been no shows, and he was unsuccessfully discharged [in] October, 2022. [The respondent] was recommended to complete an updated mental health and substance abuse evaluation . . . . To date, [the respondent] is not engaged in treatment. There are concerns that [the respondent] minimizes his

marijuana use, and he is noted to arrive at supervised visits, court dates and appointments, smelling strongly of marijuana and perfume.

"In January, 2023, [the respondent] participated in a court-ordered psychological evaluation with [Dr. Rogers]. Dr. Rogers indicated that his diagnostic impressions of [the respondent] included other specified personality disorder, noting passive-aggressive, narcissistic, and antisocial traits but [that he] had inadequate information for [a] diagnosis of a specific personality disorder. He reported [that the respondent's] present unhappiness is best described as an adjustment disorder with depressed mood. Dr. Rogers stated that [the respondent] 'accepts little blame for his actions, inaction and circumstances, and remains resistant to self-examination or change.' He indicated that [the respondent] could potentially benefit from individual psychotherapy, although noting that, given [the respondent's] 'resistance to influence, the prognosis for meaningful engagement is guarded.' Dr. Rogers opined that [the respondent] is 'largely resistant to efforts at education and remediation' and 'has made little adjustment in his circumstances to encourage the belief that, within a reasonable period, he could assume the role of caretaker for either child.' Dr. Rogers further opined that [the respondent] 'fails to recognize [Alexandria C.'s] serious limitations and the impact of her labile emotions and behavior'[8] and is likely to permit such behavior to continue in the [children's] presence. [The respondent] continues to maintain a relationship with [Alexandria

[8] Alexandria C. has a documented history of erratic and problematic behavior. Despite the multitude of services offered to her over the years, she has struggled to regulate her behavior appropriately, including while interacting with her and the respondent's children. Although she is not a party to this appeal; see footnote 1 of this opinion; department social workers and clinical evaluators, such as Dr. Rogers, expressed concern over the respondent's ongoing relationship with Alexandria C. and his inability to understand the negative impact her behavior has on the children.

C.], and they continue to reside in an apartment together. [The respondent] reported that he worked for Target in April, 2022, but the department does not have an update as to his current employment status." (Footnotes added.)

After making those findings, the court addressed the statutory ground of failure to rehabilitate. With respect to the respondent, the court stated: "As to personal rehabilitation . . . [the respondent] has attempted to engage in services for many years to address his substance use and mental health issues. [He] has also historically engaged in, and completed, numerous parenting programs. His participation has been inconsistent, and his progress is limited. [He] has a history of unaddressed mental health needs, substance abuse, parenting deficits, and transient housing. [He] has not complied with his specific steps and has not successfully engaged in services and, therefore, has not achieved sufficient rehabilitation." The court also noted its continued "concerns regarding [the respondent's] insight into [Alexandria C.'s] behaviors, which impacts his ability to safely care for his children." The court further concluded that the respondent does not have "the stability in [his] own [life] to enable [him] to care for [A] and [K]. [The respondent] has [not] made significant progress toward personal rehabilitation and clearly cannot assume a responsible position in [the children's] lives considering their age[s] and needs." The court explained: "Of paramount consideration to the court is the issue of stability and permanency for [the children]. . . . [Their] need for permanence far outweighs any remote chance that . . . [the respondent] may rehabilitate in the far distant future. . . . [The respondent has] . . . failed to successfully accomplish what was needed to consider reunification as an appropriate conclusion. [A] and [K] cannot wait for their parents to rehabilitate." (Citation omitted.)

Accordingly, the court concluded, by clear and convincing evidence, that the department had made reasonable efforts to reunify the respondent with A and K, that the respondent was unable or unwilling to benefit from those reunification efforts, and that the respondent had "failed to gain the necessary insight needed to care for [A] and [K]" Furthermore, the court determined, by clear and convincing evidence, that the respondent had failed to achieve the degree of personal rehabilitation as would encourage the belief that, within a reasonable period of time, given the ages and needs of A and K, the respondent could assume a responsible position in their lives.

In the dispositional phase of the termination of parental rights trial; see footnote 6 of this opinion; the court considered and made the requisite factual findings pursuant to General Statutes § 17a-112 (k)[9] and concluded

[9] General Statutes § 17a-112 (k) provides in relevant part: "Except in the case where termination of parental rights is based on consent, in determining whether to terminate parental rights under this section, the court shall consider and shall make written findings regarding: (1) The timeliness, nature and extent of services offered, provided and made available to the parent and the child by an agency to facilitate the reunion of the child with the parent; (2) whether the [d]epartment . . . has made reasonable efforts to reunite the family pursuant to the federal Adoption and Safe Families Act of 1997, as amended from time to time; (3) the terms of any applicable court order entered into and agreed upon by any individual or agency and the parent, and the extent to which all parties have fulfilled their obligations under such order; (4) the feelings and emotional ties of the child with respect to the child's parents, any guardian of such child's person and any person who has exercised physical care, custody or control of the child for at least one year and with whom the child has developed significant emotional ties; (5) the age of the child; (6) the efforts the parent has made to adjust such parent's circumstances, conduct, or conditions to make it in the best interest of the child to return such child home in the foreseeable future, including, but not limited to, (A) the extent to which the parent has maintained contact with the child as part of an effort to reunite the child with the parent, provided the court may give weight to incidental visitations, communications or contributions, and (B) the maintenance of regular contact or communication with the guardian or other custodian of the child; and (7) the extent to which a parent has been prevented from maintaining a meaningful relationship with the child by the unreasonable act or conduct of the other parent

that the commissioner had proven by clear and convincing evidence that terminating the respondent's parental rights was in the children's best interests. Accordingly, the court granted the petitions and rendered judgments terminating the respondent's parental rights. This appeal followed. Additional facts will be set forth as necessary.

We first set forth the following relevant legal principles governing termination of parental rights proceedings. "A hearing on a termination of parental rights petition consists of two phases, adjudication and disposition. . . . In the adjudicatory phase, the court must determine whether the [petitioner] has proven, by clear and convincing evidence, a proper ground for termination of parental rights. . . . In the dispositional phase, once a ground for termination has been proven, the court must determine whether termination is in the best interest of the child." (Internal quotation marks omitted.) *In re Aurora H.*, 222 Conn. App. 307, 317, 304 A.3d 875, cert. denied, 348 Conn. 931, 306 A.3d 1 (2023).

"Proceedings to terminate parental rights are governed by § 17a-112. . . . Because a respondent's fundamental right to parent his or her child is at stake, [t]he statutory criteria must be strictly complied with before termination can be accomplished and adoption proceedings begun. . . . Section 17a-112 (j) provides in relevant part that [t]he Superior Court, upon notice and hearing . . . may grant a petition filed pursuant to this section if it finds by clear and convincing evidence that (1) the [d]epartment . . . has made reasonable efforts to locate the parent and to reunify the child with the parent in accordance with subsection (a) of section 17a-111b, unless the court finds in this proceeding that the parent is unable or unwilling to benefit from reunification efforts, except that such finding is not required

of the child, or the unreasonable act of any other person or by the economic circumstances of the parent."

if the court has determined at a hearing pursuant to section 17a-111b, or determines at trial on the petition, that such efforts are not required, (2) termination is in the best interest of the child, and (3) . . . (B) the child (i) has been found by the Superior Court . . . to have been neglected, abused or uncared for in a prior proceeding . . . and the parent of such child has been provided specific steps to take to facilitate the return of the child to the parent pursuant to [General Statutes §] 46b-129 and has failed to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of the child, such parent could assume a responsible position in the life of the child . . . .

"The trial court is required, pursuant to § 17a-112, to analyze the [parent's] rehabilitative status as it relates to the needs of the particular child, and further . . . such rehabilitation must be foreseeable within a reasonable time. . . . The statute does not require [a parent] to prove precisely when [he or she] will be able to assume a responsible position in [his or her] child's life. Nor does it require [him or her] to prove that [he or she] will be able to assume full responsibility for [his or her] child, unaided by available support systems. It requires the court to find, by clear and convincing evidence, that the level of rehabilitation [he or she] has achieved, if any, falls short of that which would reasonably encourage a belief that at some future date [he or she] can assume a responsible position in [his or her] child's life. . . . Personal rehabilitation as used in [§ 17a-112 (j) (3) (B) (i)] refers to the restoration of a parent to his or her former constructive and useful role as a parent. . . . [I]n assessing rehabilitation, the critical issue is not whether the parent has improved [his or her] ability to manage [his or her] own life, but rather whether [he or she] has gained the ability to care for the particular needs of the child at issue. . . . [The]

completion or noncompletion [of the specific steps], however, does not guarantee any outcome. . . . Accordingly, successful completion of expressly articulated expectations is not sufficient to defeat a department claim that the parent has not achieved sufficient rehabilitation. . . .

"During the adjudicatory phase of a termination proceeding, a court generally is limited to considering only evidence that occurred before the date of the filing of the petition or the latest amendment to the petition, often referred to as the adjudicatory date. . . . Nevertheless, it may rely on events occurring after the [adjudicatory] date . . . [in] considering the issue of whether the degree of rehabilitation is sufficient to foresee that the parent may resume a useful role in the child's life within a reasonable time." (Citations omitted; internal quotation marks omitted.) *In re Niya B.*, 223 Conn. App. 471, 487–89, 308 A.3d 604, cert. denied, 348 Conn. 958, 310 A.3d 960 (2024); see also *In re Phoenix A.*, 202 Conn. App. 827, 841–42, 246 A.3d 1096, cert. denied, 336 Conn. 932, 248 A.3d 1 (2021).

Furthermore, "[i]t is well established that a respondent's failure to acknowledge the underlying personal issues that form the basis for the department's concerns indicates a failure to achieve a sufficient degree of personal rehabilitation. See *In re Kamora W.*, 132 Conn. App. 179, 190, 31 A.3d 398 (2011) (respondent refused to acknowledge drug or alcohol problem); *In re Jocquyce C.*, 124 Conn. App. 619, 626–27, 5 A.3d 575 (2010) (respondent failed to acknowledge habitual involvement with domestic violence); *In re Christopher B.*, 117 Conn. App. 773, 784, 980 A.2d 961 (2009) (respondent blamed others for problems); *In re Jermaine S.*, 86 Conn. App. 819, 834, 863 A.2d 720 (respondent's inability to admit she had substance abuse problem thwarted

her ability to achieve rehabilitation), cert. denied, 273 Conn. 938, 875 A.2d 43 (2005); *In re Sheila J.*, 62 Conn. App. 470, 481, 771 A.2d 244 (2001) (respondent failed to recognize her need for recommended counseling). . . . *In re Shane M.*, 318 Conn. 569, 589–90, 122 A.3d 1247 (2015). [A]s a general proposition, the failure to acknowledge and make progress in addressing the issues that led to a child's removal may be one of many contributing factors to a court's determination that a parent has failed to achieve a sufficient degree of personal rehabilitation." (Internal quotation marks omitted.) *In re Niya B.*, supra, 223 Conn. App. 491–92. With these principles in mind, we turn to the claims on appeal.

I

The respondent first claims that the court's reliance on social studies submitted into evidence by the commissioner during the adjudicatory phase was impermissible under § 45a-717 (e) (1) and Practice Book § 35a-9, which he argues permit the court's consideration of and reliance on information in social studies solely during the dispositional phase. He further argues that, because *In re Tabitha P.*, supra, 39 Conn. App. 353, was decided prior to the enactment of General Statutes § 1-2z,[10] which he asserts "establishes policies of statutory construction that were not utilized by this court in considering the relevant statutory elements at work," this court should conduct a new analysis of "the judicial gloss applied in" *In re Tabitha P.* We disagree that the

[10] General Statutes § 1-2z provides: "The 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."

court's reliance on the social studies in the adjudicatory phase violated § 45a-717 (e) (1) and Practice Book § 35a-9, but we take this opportunity to resolve the persistent issue of the scope of *In re Tabitha P.* and the permissible use of a social study in the adjudicatory phase.

"Whether the trial court applied the proper legal standard is subject to plenary review on appeal. . . . The interpretation of a trial court's judgment presents a question of law over which our review is plenary." (Citation omitted; internal quotation marks omitted.) *In re Fayth C.*, 220 Conn. App. 315, 320, 297 A.3d 601, cert. denied, 347 Conn. 907, 298 A.3d 275 (2023).

Section 45a-717 (e) (1) and Practice Book § 35a-9 address the use of a social study in a termination of parental rights hearing. Section 45a-717 (e) (1) provides in relevant part that, in a hearing for the termination of parental rights, "[t]he court may, and in any contested case shall, request the [commissioner] . . . to make an investigation and written report to it, within ninety days from the receipt of such request. The report shall indicate the physical, mental and emotional status of the child and shall contain such facts as may be relevant to the court's determination of whether the proposed termination of parental rights will be in the best interests of the child, including the physical, mental, social and financial condition of the biological parents, and any other factors which the commissioner . . . finds relevant to the court's determination of whether the proposed termination will be in the best interests of the child." Practice Book § 35a-9 provides that "[t]he judicial authority may admit into evidence any testimony relevant and material to the issue of the disposition, including events occurring through the close of the evidentiary hearing, but no disposition may be made by the judicial authority until any mandated social study has been submitted to the judicial authority. Said study

shall be marked as an exhibit subject to the right of any party to be heard on a motion in limine requesting redactions and to require that the author, if available, appear for cross-examination." Because both the statute and the rule of practice reference the issue of disposition and material in a social study that may be relevant to a court's determination of whether a termination of parental rights is in a child's best interest, the respondent argues that they do not authorize the court's reliance on information in a social study during the adjudicatory phase of a termination of parental rights trial.

This court first considered the appropriateness of a court's reliance on a social study in the adjudicatory phase of a termination of parental rights proceeding in *In re Tabitha P.*, supra, 39 Conn. App. 353. On appeal in that case, the respondent mother claimed that "the trial court improperly relied on dispositional material in adjudicating the termination petitions"; id., 367; which material included "social studies prepared by [the department] after the filing of the termination petition[s] for use in the dispositional phase." Id., 368. This court disagreed that the use of the social studies in the adjudicatory phase was improper, concluding that, although the court was prohibited "from considering *events* subsequent to the filing of the termination petition[s] during the adjudicatory phase, the court is not prohibited from considering *material* prepared after the filing of the petitions, provid[ed] the facts and events discussed in that material predate the filing of the petition.[11] Social studies conducted by [the department] are submitted to be used by the court in the dispositional phase . . . but that does not preclude the studies from being filed or considered by the court or used by counsel during the adjudicatory phase of the hearing. In fact,

[11] In the present case, no claim has been raised that any of the facts and events discussed in the social studies admitted into evidence do not predate the filing of the termination petition for each child.

copies of the dispositional reports and any evaluations are made available to counsel for the respondent, and the author of any such report, if available, can be required to testify and be subject to cross-examination as to the reasoning supporting the conclusions contained therein. . . . Furthermore, the procedural statutes guiding termination hearings explicitly direct the court to order evaluations and to consider the results of the evaluations in ruling on the merits of the petition. See General Statutes § 45a-717 (d)." (Citations omitted; emphasis in original; footnote added; footnotes omitted.) *In re Tabitha P.*, supra, 368–69. Following our decision in *In re Tabitha P.*, this court consistently has held that a court properly may rely on a social study in the adjudicatory phase of a termination of parental rights proceeding.[12]

In the present case, the respondent, in effect, asks this court to reconsider our holding in *In re Tabitha*

[12] See *In re Prince S.*, 219 Conn. App. 629, 647, 296 A.3d 296 (court properly may rely on social study in both adjudicatory and dispositional phases of termination of parental rights proceeding), cert. denied, 347 Conn. 907, 297 A.3d 1011 (2023); *In re Lillyanne D.*, 215 Conn. App. 61, 80 n.15, 281 A.3d 521 ("[a]lthough the petitioner must submit a social study to the court for purposes of the dispositional hearing in contested cases . . . the court may rely on the social study in both the adjudicatory and dispositional phases of a termination of parental rights proceeding" (citations omitted)), cert. denied, 345 Conn. 913, 283 A.3d 981 (2022); *In re Gabriel C.*, 196 Conn. App. 333, 355 n.20, 229 A.3d 1073 ("any mandated department social study reports submitted for the court's use in the dispositional phase . . . may be filed or considered by the court or used by counsel during the adjudicatory phase of the hearing" (internal quotation marks omitted)), cert. denied, 335 Conn. 938, 248 A.3d 708 (2020); *In re Anna Lee M.*, 104 Conn. App. 121, 128, 931 A.2d 949 ("[s]ocial studies submitted by the department may be used by the court in both the adjudicatory and dispositional phases of a termination of parental rights hearing"), cert. denied, 284 Conn. 939, 937 A.2d 696 (2007); *In re Galen F.*, 54 Conn. App. 590, 600, 737 A.2d 499 (1999) ("the trial court is not precluded from considering material in social studies . . . in the adjudicatory phase of the hearing, even when the social study is prepared after the filing of the petitions, provided that the events considered did not occur after the petition date"); *In re Angellica W.*, 49 Conn. App. 541, 549, 714 A.2d 1265 (1998) (social studies submitted for use in dispositional phase may be considered by court during adjudicatory phase).

P. We first note that, in the absence of en banc consideration, we are unable to overrule our own precedent. See *State* v. *Gonzalez*, 214 Conn. App. 511, 524, 281 A.3d 501 ("[O]ne panel of this court cannot overrule the precedent established by a previous panel's holding. . . . As we often have stated, this 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." (Internal quotation marks omitted.)), cert. denied, 345 Conn. 967, 285 A.3d 736 (2022). The respondent did not seek en banc review of his appeal;[13] accordingly, we are unable to overturn our own precedent in *In re Tabitha P.*, which authorizes the court's use of a social study in the adjudicatory phase of a termination of parental rights proceeding, as well as in the dispositional phase.[14] Thus, because we are bound by our decision in *In re Tabitha P.* and its progeny,[15] we conclude

[13] The respondent acknowledges in his appellate brief that he did not seek en banc review of this appeal and that this court is bound by its own precedent. Nevertheless, he asserts that "this court has significant power in determining issues that will be reviewed by our Supreme Court, either through concurring opinions or dissents. Therefore, the respondent presents the full argument for examination by this court." In his reply brief he further explains that he "did not seek consideration en banc because he is not asking [this court] to reverse its own precedent . . . ." Instead, he recognizes that any such change in the law on this issue "must be decided by our Supreme Court."

[14] Because we conclude that we are bound by our precedent in *In re Tabitha P.*, it is therefore unnecessary for us to conduct a new analysis of the plain language of § 45a-717 and Practice Book § 35a-9 pursuant to § 1-2z. Nevertheless, we note that our Supreme Court has held that the passage of § 1-2z does not require that we "abandon prior interpretations of statutory language [in cases that predate the enactment of the statute]. 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). Accordingly, although *In re Tabitha P.* was decided prior to the enactment of § 1-2z, it does not follow that an application of § 1-2z would dictate a different analysis of § 45a-717 and Practice Book § 35a-9.

[15] See footnote 12 of this opinion.

that the court's use of and reliance on the social studies in the adjudicatory phase was not improper.[16]

Nonetheless, we believe that this case presents an opportunity to clarify the scope of our decision in *In re Tabitha P.* As we have stated, the respondent mother in *In re Tabitha P.* claimed on appeal "that the trial court improperly relied on dispositional material in adjudicating the termination petitions." *In re Tabitha P.*, supra, 39 Conn. App. 367. Specifically, the respondent mother's challenge concerned the trial court's extensive citations in its memorandum of decision to multiple reports of a court-appointed psychologist and social studies that were prepared after the filing of the termination petitions. Id., 368.

The issue before this court, therefore, was whether it was appropriate for the trial court to consider those materials when they "were prepared after the date the termination petitions were filed." Id. In answering that question in the affirmative, we explained that the prohibition on a trial court's consideration of events occurring after the filing of a petition to terminate parental rights did not prohibit the court "from considering *material* prepared after the filing of the petitions, provid[ed] the facts and events discussed in that material predate the filing of the petition." (Emphasis in original.) Id. Because "[t]he materials cited to by the court throughout the adjudicatory portion of its decision contained facts, findings and conclusions based on events prior to the filing of the termination petitions

[16] We also note that, although the issue before this court in *In re Tabitha P.* did not concern whether the statute authorizes a court to consider a social study in the adjudicatory phase of a termination of parental rights proceeding, we specifically concluded that the court's consideration of such material in the adjudicatory phase "did not violate any statute or rule of practice." *In re Tabitha P.* supra, 39 Conn. App. 369. Moreover, even though the respondent argues that "[t]he plain language of the statute does not authorize such use," there is no language in the statute or the rule of practice precluding the court from doing so.

. . . [and] [t]he events on which the adjudication was premised all occurred prior to the date of the petitions," this court concluded that "the trial court's consideration of the challenged materials did not violate any statute or rule of practice." Id., 369.

The record available in *In re Tabitha P.* does not indicate whether there was a hearsay objection to the admission of the reports and social studies during the trial. Moreover, the focus of our decision was whether the court could consider social studies that were prepared after the filing of the termination petitions in the adjudicatory phase. Id., 368. Our holding that the court could do so, however, was limited to the circumstances of that case, in which the facts, findings and conclusions contained in the social studies were based on *events that occurred prior* to the filing of the termination petitions, and the events on which the adjudication was premised all occurred *before* the termination petitions were filed. Our decision, thus, in no way created an exception to any evidentiary rule, including the rule against hearsay,[17] nor did it prohibit counsel from

[17] Furthermore, this court previously has held "that the rules of evidence—including the prohibition on the admission of hearsay statements not covered by an exception—apply to juvenile proceedings, which include child protection matters, to the same extent that they do in other civil proceedings. See General Statutes § 46b-121; see also Conn. Code Evid. §§ 1-1 (b) and commentary (b) (5), and 8-2 (a). [C]ertain procedural informalities are authorized in juvenile proceedings under our common law, including a liberal rather than a strict application of the formal rules of evidence, provided due process is observed. . . . *In re Juvenile Appeal (85-2)*, 3 Conn. App. 184, 190, 485 A.2d 1362 (1985). Any such looser application of the rules of evidence, however, including the rule against hearsay, is unwarranted [if] such evidence is likely to be determinative of the matter, in which case, the court should return to the more formal rules of evidence. . . . Id. Given the significant rights that a parent has in the companionship, care, custody, and management of his or her children . . . laxity in procedural safeguards cannot be swept away by mere reference to the so-called informalities of [j]uvenile [c]ourt procedure. . . . *Anonymous* v. *Norton*, 168 Conn. 421, 425, 362 A.2d 532, cert. denied, 423 U.S. 935, 96 S. Ct. 294, 46 L. Ed. 2d 268 (1975). Accordingly, unlike in proceedings in which no adherence to the rules of evidence is required, courts in juvenile proceedings, despite their

objecting to the admission of hearsay. Id., 368–69. Therefore, counsel for a respondent parent may object to the admission of material contained within a social study on evidentiary or other grounds, and our decision in *In re Tabitha P.* should not be construed to tacitly allow admission of material that is otherwise inadmissible.[18]

II

The respondent next claims that, notwithstanding our decision in *In re Tabitha P.*, the court's consideration of the social studies during the adjudicatory phase of the trial violated his due process rights under the three part test set forth by the United States Supreme Court in *Mathews* v. *Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).[19] The respondent concedes that

inherently informal nature, must remain cautious in admitting hearsay statements that go to the very heart of the issue to be decided." (Footnote omitted; internal quotation marks omitted.) *In re Alizabeth L.-T.*, 213 Conn. App. 541, 572–73, 278 A.3d 547 (2022).

[18] We note that the commissioner agrees with this conclusion, acknowledging in her appellate brief that "social studies are subject to the normal rules of evidence, which ensures that trial courts do not erroneously terminate parental rights on irrelevant, unreliable, or prejudicial information contained in the social studies."

[19] "The three factors to be considered [under *Mathews*] are (1) the private interest that will be affected by the state action, (2) the risk of an erroneous deprivation of such interest, given the existing procedures, and the value of any additional or alternate procedural safeguards, and (3) the government's interest, including the fiscal and administrative burdens attendant to increased or substitute procedural requirements. . . . Due process analysis requires balancing the government's interest in existing procedures against the risk of erroneous deprivation of a private interest inherent in those procedures." (Internal quotation marks omitted.) *In re Zoey H.*, 183 Conn. App. 327, 336, 192 A.3d 522, cert. denied, 330 Conn. 906, 192 A.3d 425 (2018).

In the present case, the respondent argues that the private interest at stake is the right to family integrity and that the risk of erroneous deprivation is high because "under the current interpretation, the department is allowed to compile all of its evidence and present it in a prosecutorial document which is statutorily mandated to be admitted into evidence." The respondent further argues that the potential burdens to the state are limited to "requiring the department to offer its proof at trial rather than relying upon hearsay and unattributed statements from the social study as a substitute," and that,

this claim was not preserved for appeal and seeks review pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 576 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). We decline to review this unpreserved claim.

"Pursuant to *Golding*, a [respondent] can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the [respondent] of a fair trial; and (4) if subject to harmless error analysis, the [petitioner] has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. . . . [S]ee *In re Yasiel R.*, [supra, 317 Conn. 781] (modifying third prong of *Golding*). The first two steps in the *Golding* analysis address the reviewability of the claim, [whereas] the last two steps involve the merits of the claim." (Emphasis in original; internal quotation marks omitted.) *In re Maliyah M.*, 216 Conn. App. 702, 707, 285 A.3d 1185 (2022), cert. denied sub nom. *In re Edgar S.*, 345 Conn. 972, 286 A.3d 907 (2023).

The respondent argues that (1) the record is adequate for review "because there is no dispute that the social [studies] and [the] various amendments were admitted into evidence and relied upon by the trial court in the adjudicatory [phase]"; (2) the claim is of constitutional magnitude because "the use of [a] social study for adjudicatory purposes creates a fundamentally unfair proceeding that violates due process"; (3) the constitutional violation exists because, without reliance on the

on the whole, "the *Mathews* factors weigh heavily in favor of limiting the social study, which is a prosecutorial document . . . to the dispositional portion of the hearing."

social studies and supporting documents, "[t]he evidence introduced at trial was not sufficient to warrant termination of the [respondent's] parental rights"; and (4) "the [commissioner] cannot prove that the constitutional error was harmless beyond a reasonable doubt." We agree with the respondent that the record is adequate for review; however, we conclude that the claim is not of a constitutional magnitude.

Although the respondent characterizes his claim as a violation of his due process rights, the claim, in essence, challenges the admission of the social studies and, thus, is evidentiary in nature. See *In re Lillyanne D.*, 215 Conn. App. 61, 70–73, 281 A.3d 521 (respondent mother challenged trial court's evidentiary ruling admitting into evidence social study and addendum), cert. denied, 345 Conn. 913, 283 A.3d 981 (2022); *In re Galen F.*, 54 Conn. App. 590, 600–601, 737 A.2d 499 (1999) (challenge to admission of social study on hearsay grounds was evidentiary in nature). It is well established that a "defendant cannot raise a constitutional claim by attaching a constitutional label to a purely evidentiary claim or by asserting merely that a strained connection exists between the evidentiary claim and a fundamental constitutional right. . . . Thus, [o]nce identified, unpreserved evidentiary claims masquerading as constitutional claims will be summarily [rejected]. . . . We previously have stated that the admissibility of evidence is a matter of state law and unless there is a resultant denial of fundamental fairness or the denial of a specific constitutional right, no constitutional issue is involved." (Internal quotation marks omitted.) *State* v. *Waters*, 214 Conn. App. 294, 314, 280 A.3d 601, cert. denied, 345 Conn. 914, 284 A.3d 25 (2022); see also *Kovachich* v. *Dept. of Mental Health & Addiction Services*, 344 Conn. 777, 815 n.22, 281 A.3d 1144 (2022) ("[r]obing garden variety claims [of an evidentiary nature] in the majestic garb of constitutional claims does not make such claims

constitutional in nature" (internal quotation marks omitted)). This principle applies equally in a termination of parental rights proceeding. "The fact that this is a termination of parental rights case does not transform an evidentiary matter into a constitutional matter." *In re Miyuki M.*, 202 Conn. App. 851, 860, 246 A.3d 1113 (2021); see *In re Antonio M.*, 56 Conn. App. 534, 544, 744 A.2d 915 (2000) (Even though "[t]he right of a parent to raise his or her children has been recognized as a basic constitutional right . . . [u]npreserved hearsay claims do not automatically invoke constitutional rights . . . . The appellate courts of this state have consistently held that admission of statements that are either irrelevant or impermissible hearsay is not a constitutional error." (Citations omitted; internal quotation marks omitted.)).[20] Accordingly, we conclude that the respondent's claim is not of a constitutional magnitude, and, therefore, the claim is not reviewable.

III

The respondent's final claim is that the trial court improperly admitted hearsay evidence contained in the commissioner's exhibits and that the improperly admitted hearsay was harmful. The commissioner concedes that most of the challenged hearsay statements were improperly admitted[21] but claims that their admission

[20] We note that our Supreme Court "has recognized that an unpreserved evidentiary claim may be constitutional in nature *if* there is a resultant denial of fundamental fairness or the denial of a specific constitutional right . . . ." (Emphasis added; internal quotation marks omitted.) *State* v. *Turner*, 334 Conn. 660, 674, 224 A.3d 129 (2020). In light of our determination that any error was harmless; see part III of this opinion; we need not reach the issue of whether there was a denial of fundamental fairness or of a specific constitutional right.

[21] The only exception to the commissioner's concession concerns the hearsay statements of the children's foster mother, which the commissioner argues were admissible under the business records exception to the hearsay rule because she was an agent of the department. See *In re Barbara J.*, 215 Conn. 31, 42, 574 A.2d 203 (1990). Because we conclude that any error in the admission of the alleged hearsay statements in the commissioner's exhibits, including those of the foster mother, was harmless, we need not

was harmless because "the outcome of the trial would have been no different had the statements been excluded." Specifically, the commissioner asserts, inter alia, that "there is evidence to [the] same effect in the record" and that "[t]he unchallenged portions of the [social] studies provide additional, cumulative evidence regarding [the respondent's] history with the department, his continued criminal behaviors, his inconsistent engagement in mental health and substance use services, his continued relationship with Alexandria C., his lack of insight into her mental health, and his inability to protect [A] and [K] from Alexandria C.'s erratic behaviors." We agree with the commissioner. Without deciding whether the alleged hearsay was improperly admitted,[22] we conclude that the respondent has not demonstrated that its admission was harmful.

decide whether the hearsay statements of the foster mother were properly admitted under the business records exception to the rule against hearsay.

[22] We note that portions of the alleged hearsay in this case were contained in the evaluation performed by Dr. Rogers, who the parties stipulated is an expert in clinical and forensic psychology. We further note that " '[t]he fact that an expert opinion is drawn from sources not in themselves admissible does not render the opinion inadmissible, provided the sources are fairly reliable and the witness has sufficient experience to evaluate the information. *Vigliotti* v. *Campano*, 104 Conn. 464, 133 A. 579 (1926); *Schaefer, Jr. & Co.* v. *Ely*, 84 Conn. 501, 508, 80 A. 775 (1911). An expert may base his opinion on facts or data not in evidence, provided they are of a type reasonably relied on by experts in the particular field. *State* v. *Cuvelier*, 175 Conn. 100, 107–108, 394 A.2d 185 (1978); see Fed. R. Evid. 703. This is so because of the sanction given by the [witness'] experience and expertise. *Burn* [*& Crump*] v. *Metropolitan Lumber Co.*, 94 Conn. [1] 5, 6, 107 A. 609 (1919).' [C. Tait, Tate and LaPlante's Handbook of Connecticut Evidence (2d Ed. 1988) § 7.16.8 (c), p. 182]. '[W]hen the expert witness has consulted numerous sources, and uses that information, together with his own professional knowledge and experience, to arrive at his opinion, that opinion is regarded as evidence in its own right and not as hearsay in disguise.' " *In re Barbara J.*, 215 Conn. 31, 42–43, 574 A.2d 203 (1990); see also *Kohl's Dept. Stores, Inc.* v. *Rocky Hill*, 219 Conn. App. 464, 487–88, 295 A.3d 470 (2023); Conn. Code Evid. § 7-4 (b); E. Prescott, Tait's Handbook of Connecticut Evidence (6th Ed. 2019) § 7.7.4, pp. 465–66. As we have indicated in this opinion, however, we do not reach the issue of whether the alleged hearsay was properly admitted.

We first set forth our standard of review and the legal principles that govern our resolution of this claim. "Our standard of review regarding challenges to a trial court's evidentiary rulings is that these rulings will be overturned on appeal only where there was . . . a showing . . . of substantial prejudice or injustice. . . . Additionally, it is well settled that even if the evidence was improperly admitted, the [party challenging the ruling] must also establish that the ruling was harmful and likely to affect the result of the trial." (Internal quotation marks omitted.) *In re Prince S.*, 219 Conn. App. 629, 644, 296 A.3d 296, cert. denied, 347 Conn. 907, 297 A.3d 1011 (2023). "It is [also] well recognized that any error in the admission of evidence does not require reversal of the resulting judgment if the improperly admitted evidence is merely cumulative of other validly admitted [evidence]. . . . *In re Anna B.*, 50 Conn. App. 298, 305–306, 717 A.2d 289 (1998); see also *Duncan* v. *Mill Management Co. of Greenwich, Inc.*, 308 Conn. 1, 23, 60 A.3d 222 (2013) ([i]n determining whether evidence is merely cumulative, we consider the nature of the evidence and whether any other evidence was admitted that was probative of the same issue as the evidence in controversy)." (Internal quotation marks omitted.) *In re Lillyanne D.*, supra, 215 Conn. App. 74; see also *Kovachich* v. *Dept. of Mental Health & Addiction Services*, supra, 344 Conn. 819.

We next set forth the following additional facts, which are relevant to this claim. As we stated previously in this opinion, the petitioner joined in Alexandria C.'s motion in limine, which sought to exclude various alleged hearsay contained within the commissioner's exhibits. Specifically, the motion in limine first sought to exclude alleged hearsay statements or information within multiple social studies and status reports that derived from Dr. Levy's 2021 psychological evaluation, some of which concerned Alexandria C. and others the

respondent.[23] For example, exhibit eight is a social study in support of the termination of the respondent's parental rights with respect to K dated June 14, 2022. In the portion of the social study addressing the respondent, the study references the psychological evaluation that was conducted by Dr. Levy in 2021, including her conclusions that the respondent's "emotional functioning confirms his history of antisocial behavior. It also suggests failures [to form] close relationships, [sensitivity] in interpersonal relationships, distrust, depression, inflated self-esteem, hostility and bitterness; stress in the environment and compulsiveness or rigidity." It further provides: "Dr. Levy . . . opined that [the respondent] did not understand how [Alexandria C.'s] own '[dysregulation] affects others, particularly' his child. Dr. Levy noted that while [the respondent] demonstrated some competencies in parenting such as knowledge of child development, 'the competency of clear parental priorities, i.e. putting the child's needs first, is the least met competency and perhaps one of the most important. The parental lack of consistency, stability and trust, manifested by emotional dysregulation, inadequate and transient housing, employment, financial struggles and frequent incarcerations do not place the

[23] In his appellate brief, the respondent has not briefed or provided any analysis regarding how he was harmed by the alleged hearsay from Dr. Levy's evaluation related to Alexandria C. "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 properly. . . . [F]or this court judiciously and efficiently to consider claims of error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs. . . . The parties may not merely cite a legal principle without analyzing the relationship between the facts of the case and the law cited." (Internal quotation marks omitted.) *Colandrea* v. *Connecticut State Dental Commission*, 221 Conn. App. 597, 620 n.25, 302 A.3d 348 (2023), cert. denied, 348 Conn. 933, 306 A.3d 475 (2024). Accordingly, any such claim is deemed abandoned, and we focus our analysis on the alleged hearsay from Dr. Levy concerning the respondent.

child's needs first.' Ultimately, Dr. Levy opined that "[i]t is unclear if the father would be able to sustain employment and housing, in order to care for himself and his child." Similar statements from Dr. Levy's evaluation are contained in exhibit three (a social worker affidavit dated December 27, 2021), exhibit ten (a study in support of the motion to support the permanency plan dated September 16, 2022), and exhibit eleven (an addendum to a social study in support of the termination petitions dated September 8, 2022). The motion in limine also sought to exclude alleged hearsay statements from the foster mother[24] in which the foster

[24] The motion in limine also sought to exclude alleged hearsay statements from Susan Allen, a visitation supervisor; statements within various exhibits that summarize information contained within the evaluation of Dr. Rogers; and exhibits eighteen and nineteen, which included Rogers' initial report and psychological evaluation. The motion acknowledged, however, that any of those hearsay issues could be cured so long as Allen and Dr. Rogers testified at trial, which did occur. Therefore, their statements and the reports of Dr. Rogers in those exhibits are not at issue with respect to this claim.

Additionally, the motion in limine sought to exclude alleged hearsay statements (1) from Joel Tudisco, who, as we stated previously in this opinion, is an advanced practice registered nurse who has provided psychiatric care for Alexandria C. since June, 2020, and whose comments related to Alexandria C.'s medication management and her mental health issues and expressed concerns about Alexandria C.'s use of medical marijuana; (2) attributable to A; (3) from Akisha Cassermere, a visitation supervisor, in which she referenced statements made to her by A and regarding her observations of visits between A and the respondent and Alexandria C.; and (4) from Alicea Corey, a psychologist who treated A, detailing conversations she had with and statements made by A, expressing her opinion that it was not in A's best interest to continue visitations, and describing A's behavior.

The respondent has not provided any analysis or argument in his appellate brief regarding how he was harmed by any alleged hearsay from Tudisco, Cassermere or Corey. Therefore, we deem any such claim abandoned. "[B]eyond their bald assertion of harm, the respondents do not explain how the exclusion of this evidence was harmful to them. See *In re Nevaeh G.-M.*, 217 Conn. App. 854, 885–86, 290 A.3d 867 ('[i]t is well settled that even if [an evidentiary error is proven], the [party challenging the ruling] must also establish that the ruling was harmful and likely to affect the result of the trial' . . .), cert. denied, 346 Conn. 925, 295 A.3d 418 (2023). Accordingly, we deem this claim to be abandoned." *In re Olivia W.*, 223 Conn. App. 173, 196, 308 A.3d 571 (2024). Moreover, with respect to statements attributed to A, and to the extent that the alleged hearsay from the foster mother, Cassermere and Corey concern statements made by A, the court granted

mother commented about concerns she had with how A reacted to visits with the respondent and Alexandria C., describing A's behavior before and after such visits and how she becomes "clingy," and relating statements made by A concerning the visits. [25] Thus, in this appeal, the two sources of alleged hearsay to be addressed are Dr. Levy and the foster mother.

We conclude that the respondent has failed to demonstrate the harmfulness of the challenged hearsay

the motion in limine in part with respect to any statements made by A, which, therefore, are not at issue in this appeal.

[25] In his principal appellate brief, the respondent refers to alleged hearsay statements in exhibit eleven, an addendum to a social study in support of the petition for the termination of his parental rights with respect to K dated September 8, 2022, from Joseph Ortiz, a case manager who was assigned to the respondent in connection with fatherhood engagement services he sought at Madonna Place. Ortiz' alleged hearsay statements concern the respondent's attendance at Madonna Place, specifically, his failure to follow through with attending a final group session. The hearsay objections raised in the motion in limine before the trial court did not specifically mention any statements made by Ortiz, nor did the respondent raise any such specific claims regarding Ortiz or the particular statement in exhibit eleven before the trial court, although the respondent objected at trial to " 'any statements that come from someone who is not testifying' . . . ." The commissioner argues in her appellate brief that this court should decline to review the respondent's harmful error claim as it pertains to the statements of Ortiz. We conclude that we need not decide whether the respondent's objection was sufficiently specific to include the statements of Ortiz because, even if we review this aspect of the respondent's claim, it nonetheless fails, as the challenged hearsay from Ortiz is cumulative of other evidence and testimony in the record concerning the respondent's failure to complete services to which he had been referred, including the testimony of Haley Flax, a social worker, who specifically referenced the respondent's failure to complete parenting classes at Madonna Place.

The respondent also refers to an "unattributed opinion" in exhibit eleven stating that "[the respondent] has made limited progress and appears to lack judgment about healthy boundaries. Although [the respondent] has not presented with threatening behaviors, he continues to support [Alexandria C.'s] decision and it appears as though he has limited insight about the impact of her erratic and threatening behaviors." We note that it appears that the alleged "unattributed opinion" in exhibit eleven was made by the author of the addendum to the social study, Flax, who testified at trial consistent with the challenged statement. In fact, the social studies, status reports and addenda included in exhibits eight, ten, eleven, twelve, thirteen,

because it is cumulative of other properly admitted evidence and testimony. We first address the alleged hearsay from Dr. Levy. At the trial, Haley Flax, a social worker assigned to this matter, testified about the respondent's history with the department and the concerns that led to the children's removal, including the respondent's inconsistent participation in recommended services, his inability to provide for the children's safety and well-being, and the department's concerns as to his "parenting skills, mental health, and substance abuse." Flax testified concerning the respondent's housing, explaining that, for the past two years, he and Alexandria C. have had stable housing but that, prior thereto, it was not consistent; that they currently reside in an apartment; and that they were issued a notice to quit in February, 2023, and a formal eviction proceeding had been commenced, but they have not vacated. She also testified as to Alexandria C.'s "erratic and compulsive behavior." For instance, she testified about an incident in which Alexandria C. "had shown up at the [department] office and was acting out in a way to where the police almost needed to be called," and that there were also concerns regarding what [the department] perceived to be as passive threats made on social media [by Alexandria C.] regarding the department." Flax also testified that the respondent and Alexandria C. continued to present as a couple, that Flax has ongoing concerns regarding the respondent's limited insight and ability to manage his emotions, and that her biggest concerns regarding the respondent are his lack of engagement and failure to follow through with treatment recommendations, as well as his limited insight into Alexandria C.'s behaviors and how that affects the children. According to Flax, she is concerned that the respondent "would not be able to step in to protect the

fourteen, fifteen, sixteen, and seventeen all indicate that they were submitted by Flax.

children and be that protective capacity when [Alexandria C.] is acting erratically."

Dr. Rogers echoed these concerns in his testimony. Specifically, he testified that Alexandria C. "is highly impulsive [and] doesn't cope well even with minor stresses, and she is likely to act in highly impulsive ways that would endanger the safety of someone who is dependent on her," and that the respondent "shows very little insight into [Alexandria C.'s] behavior and its impact on [the] children and would not, in fact, shield [the] children from that adverse impact." Dr. Rogers also testified that the respondent presented with "a number of problematic personality traits that he exhibited over a number of years, beginning in adolescence with some conduct problems. Those extended into adulthood with some criminal activity, and generally a negative and angry attitude about life and a feeling of being cheated and misused. At times, this feeling serves as rationale for acting likewise to other individuals and if you will, taking the law into his own hands. Again, I think that's been evidenced in his criminal activity. Certainly, his anger is often present . . . usually expressed in indirect ways; resistance, negativity, that kind of thing. And I indicated on that basis that I thought that he suffered from a personality disorder." Dr. Rogers testified further that the respondent does not have the ability to meet the emotional, developmental, and physical needs of the children, who need permanency and stability, about the respondent's failure to "substantially change, in the period since removal," and regarding his concern that the children would suffer from "a lack of permanency and from continued contact with the parents."

In addition to the testimony presented at the trial, exhibit nineteen, which contains the psychological evaluation performed by Dr. Rogers, was admitted as a full exhibit without objection. The psychological evaluation

performed was based on an "[e]valuation of each adult [that] consisted of review of records, discussion of [those] records, review of a demographics questionnaire, clinical interview, mental status examination, psychological testing, parent/child observations and collateral contacts as directed and approved by the court." Dr. Levy's psychological evaluation was one of many records Dr. Rogers reviewed in conducting his evaluation. Dr. Rogers' evaluation addresses the respondent's work history, education, residence history, criminal history, rearing, relationship history, physical health, mental health, and substance use. An examination of Dr. Rogers' comprehensive and detailed evaluation demonstrates that it sets forth information that is cumulative of the alleged hearsay statements from Dr. Levy.

The evaluation notes that the respondent has had an unsettled work history, often "bouncing from job to job," with his longest job lasting three and one-half years. His housing history has been equally unsteady. With respect thereto, the evaluation provides: "Living arrangements have been disrupted by incarcerations and related halfway house placements upon release. In and around [A's] removal, he was living with his aunt. [Alexandria C.] was also there. On occasion, he noted he had been homeless for a time. He reported stable housing since May, 2021, and he and [the respondent] have cohabited since that time."

In his evaluation, Dr. Rogers referenced Dr. M. Deborah Gruen, a psychologist who had performed a psychological evaluation of the respondent in November, 2016, and Dr. Gruen's "contention that the [respondent] did not understand how [Alexandria C.'s] dysregulation affects the children." Notably, the respondent has not raised any issue with Dr. Gruen's statement, even though it is identical to the one made by Dr. Levy in her evaluation to which the respondent has objected.

Dr. Rogers' evaluation further addresses the respondent's low self-esteem and how he is "sour on life," and provides that his pervasive emotion is anger, he has "few skills for coping with the trials of everyday life," and that "his behavior is difficult to predict." According to Dr. Rogers, the respondent "perceives little responsibility for the children's removal or for their continued placement outside the home. Though he can function adequately in some employment situations, he evinces little skill in coping with pressures outside his narrow routine, and added stresses readily precipitate impulse decisions and erratic actions. His flight from a halfway house, resulting in further criminal sanctions, seems a good case in point. Though his actions have brought him little success, he remains stubborn in his outlook and resistant to examining or changing his approach." Moreover, the evaluation provides that, "[w]hile the [respondent] does not suffer from any major psychiatric illness, he has demonstrated at best inconsistent participation in services. He is largely resistant to efforts at education and remediation, and has made few adjustments in his circumstance to encourage the belief that, within a reasonable period, he could assume the role of caretaker for either child. In addition, he fails to recognize [Alexandria C.'s] serious limitations and the impact of her labile emotions and behavior on a dependent child, and he is likely to permit such behavior to continue in their presence should reunification take place." In his evaluation, Dr. Rogers points out that the respondent "is strongly enmeshed in a relation[ship] with [Alexandria C.] . . . and would not be expected to shelter [K] from her volatility and its attendant risks. Any representations he makes about willingness to divorce himself from [Alexandria C.] to care for this child should be regarded skeptically . . . ." As reported by Dr. Rogers, the respondent "evinces a long-standing pattern of maladaptive behavior characterized

by criminal activity, impulsive action and decision-making, negativity and resistance to influence," and "he has few qualms about violating rules and proscriptions to gain the rewards of which he feels he has been cheated."[26]

In sum, the foregoing evidence and testimony are probative of the same information as the challenged hearsay from Dr. Levy's evaluation regarding the respondent's history of antisocial behavior; his distrust, hostility, and bitterness; his inability to understand how Alexandria C.'s erratic and emotional behavior affects others, especially the children; his failure to acknowledge the issues that led to the children's removal and to make progress in addressing those issues; his failure to comply with the specific steps ordered to facilitate his reunification with the children; his lack of ability to care for the needs of the children; his parental lack of consistency; his unstable employment and his inadequate and transient housing; and his criminal history.

[26] The record also contains other exhibits that were admitted in full without objection, including exhibit one, a January 10, 2019 memorandum of decision by the court, *Randolph*, *J.*, terminating the respondent's parental rights as to E and adjudicating A neglected; exhibit eighteen, the initial report of Dr. Rogers; exhibit twenty-one, the respondent's criminal records; and exhibits twenty-two, twenty-five, and twenty-six, the specific steps ordered for the respondent. For instance, Judge Randolph's decision discusses the respondent's criminal history, his failure to attend treatment sessions and other appointments for an outpatient substance abuse program, and his need to participate in extensive parental skills training. The criminal records show that, despite having been issued specific steps in 2018, 2019, and 2021, which directed the respondent not to become involved with the criminal justice system, the respondent had been arrested on multiple occasions since December, 2019, for interfering with an officer, resisting arrest, larceny in the fourth degree, larceny in the sixth degree, and other misdemeanor offenses such as illegally operating a motor vehicle.

Moreover, with respect to the social studies, status reports and addenda contained in exhibits eight, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, and seventeen, the hearsay objections pertained only to portions of those exhibits. The portions to which the hearsay objections do not apply contain ample information similar to the alleged hearsay.

For that reason, any alleged hearsay from Dr. Levy is cumulative of other properly admitted evidence and, thus, was not likely to have affected the result of the trial.

Like with the challenged hearsay from Dr. Levy's evaluation, the alleged hearsay statements of the foster mother also are cumulative of other evidence in the record. Those statements primarily relate to the foster mother's concerns about A's conduct before and after visits with the respondent and Alexandria C., in that she described A as being hesitant to attend weekly visits, upset about having to go and refusing to attend some of the visits, and being "clingy" after such visits. That information, however, can be found throughout the record before the court. For example, Allen, a visitation supervisor, provided similar testimony at the termination of parental rights trial. Specifically, she described A as being very vocal, engageable and talkative while in her foster home, as opposed to during visits with the respondent and Alexandria C. She also recounted a visit in which A was hesitant to attend, how she was upset afterward and that there was another visit that A refused to attend. Additionally, Flax testified that A would cry before visits or refuse to attend and that, when she arrived back at her foster home, she would be "clingy" or emotional. Finally, Dr. Rogers' evaluation includes statements from collateral contacts such as the foster mother that are similar to the ones objected to on hearsay grounds contained in other exhibits, and it sets forth in great detail A's reluctance to attend visits, as well as her conduct before and after visits with the respondent.

Accordingly, we conclude that the respondent has not demonstrated that he was harmed by any of the alleged hearsay from Dr. Levy's evaluation or the foster mother's statements in light of the abundance of similar evidence and testimony in the record. In order to dem-

onstrate that he was harmed by the court's alleged improper admission of hearsay, it was incumbent on the respondent to "establish that, but for the evidentiary error, the outcome of the trial likely would have been different." *In re Lillyanne D.*, supra, 215 Conn. App. 73. The respondent cannot do so, however, in light of the fact that the information contained in the alleged hearsay is available elsewhere in the record. "It is well established that if erroneously admitted evidence is merely cumulative of other evidence presented in the case, its admission does not constitute reversible error." (Internal quotation marks omitted.) *In re Daniel D.*, 219 Conn. App. 211, 220, 294 A.3d 1027, cert. denied, 347 Conn. 906, 297 A.3d 1011 (2023). Because the challenged hearsay was cumulative of other properly admitted evidence, the respondent has failed to demonstrate substantial prejudice or injustice, or that the result would have been different without the alleged hearsay. See *In re Prince S.*, supra, 219 Conn. App. 644–45; *In re Latifa K.*, 67 Conn. App. 742, 752, 789 A.2d 1024 (2002). The respondent, therefore, has not met his burden of demonstrating harm. See *DiNardo Seaside Tower, Ltd.* v. *Sikorsky Aircraft Corp.*, 153 Conn. App. 10, 47–48, 100 A.3d 413, cert. denied, 314 Conn. 947, 103 A.3d 976 (2014).

The judgments are affirmed.

In this opinion the other judges concurred.

TOWN OF GREENWICH ET AL. *v.* FREEDOM OF INFORMATION COMMISSION ET AL.

(AC 46003)

(AC 46064)

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

Syllabus

The defendants, the Freedom of Information Commission (commission) and B, appealed to this court from the judgment of the trial court sustaining

the administrative appeal filed by the town plaintiffs from the final decision of the commission. The commission found that the plaintiffs violated the Freedom of Information Act (§ 1-200 et seq.) (act) by denying B's request for records of any changes made to an investigative file for a reported sexual assault and an associated application for an arrest warrant because the plaintiffs failed to meet their burden of proving that the requested records were exempt from disclosure as preliminary drafts or records of standards, procedures, processes, software and codes pursuant to statute (§ 1-210 (b) (1) and (20)). The court found that the commission's decision was clearly erroneous because the requested records were exempt from disclosure pursuant to § 1-210 (b) (1) as preliminary drafts. *Held*:

1. The trial court improperly substituted its judgment for that of the commission by concluding that the requested records were preliminary drafts that were exempt from disclosure under § 1-210 (b) (1): because it was undisputed that the plaintiffs failed to conduct a search to determine whether the records requested by B existed and, to the extent they existed, to review such records, the plaintiffs could not satisfy their burden of establishing that those records were exempt from disclosure as the parties claiming the exemption, and they could not have conducted the statutorily mandated balancing test, which required that they determine whether the public interest in withholding such documents clearly outweighed the public interest in disclosure, as that interest necessarily depended on the nature of the information contained in the records; moreover, the commission's order directing the plaintiffs to retrieve the requested records and to disclose them to B constituted an abuse of its discretion, and, accordingly, the appropriate remedy in this case was to have the plaintiffs conduct the search for the requested records and to review any responsive records to determine whether any material is exempt from disclosure under the act; furthermore, the commission's order requiring the plaintiffs to bear the cost of locating and producing the records, when B had agreed, pursuant to statute (§ 1-212 (b)), to pay those costs was unwarranted.

2. This court was not persuaded by the plaintiffs' proffered alternative ground for affirmance, that the requested records were exempt from disclosure as records of standards, procedures, processes, software and codes under § 1-210 (b) (20): the plaintiffs failed to present any evidence before the commission to substantiate their alleged safety concern involving the specific software or codes that would be revealed by disclosure of the requested records, merely asserting a vague safety concern based on revealing information about the way that the database operated, such that this court could not conclude that the plaintiffs satisfied their burden of proving that the requested records were exempt from disclosure under § 1-210 (b) (20); moreover, in accordance with the act, the plaintiffs were free to develop their own method of retrieving and producing the

requested records, and, thus, could avoid their concerns about potential disclosures regarding their software or codes.

Argued February 5—officially released June 11, 2024

Procedural History

Administrative appeal from the decision of the named defendant, brought to the Superior Court in the judicial district of Stamford-Norwalk and transferred to the judicial district of New Britain where the matter was tried to the court, *Cordani*, *J.*; judgment sustaining the appeal, from which the defendants appealed to this court. *Reversed*; *judgment directed*.

Meredith Braxton, self-represented, with whom was *Mark Sommaruga*, for the appellant in Docket No. 46003 (defendant Meredith Braxton).

Valicia Harmon, commission counsel, with whom, on the brief, were *Paula S. Pearlman*, associate general counsel, *Colleen M. Murphy*, general counsel, and *C. Zack Hyde*, commission counsel, for the appellant in Docket No. 46064 (named defendant).

Abby R. Wadler, assistant town attorney, for the appellees in both appeals (plaintiffs).

Opinion

BRIGHT, C. J. The defendants, the Freedom of Information Commission (commission) and Attorney Meredith Braxton, appeal from the judgment of the trial court sustaining the administrative appeal filed by the plaintiffs, the Chief of Police of the Greenwich Police Department, the Greenwich Police Department (department), and the town of Greenwich (town), from the final decision of the commission. The commission found that the plaintiffs violated the Freedom of Information Act (act), General Statutes § 1-200 et seq., by denying Braxton's request for records of any changes made to an investigative file and an associated application for an

arrest warrant because the plaintiffs failed to meet their burden of proving that the requested records are exempt from disclosure pursuant to General Statutes § 1-210 (b) (1) and (20). The trial court concluded that the records are exempt as preliminary drafts under § 1-210 (b) (1) and sustained the plaintiffs' appeal on that basis. On appeal, the defendants claim that the court improperly substituted its judgment for that of the commission by concluding that the requested records are preliminary drafts that are exempt from disclosure under § 1-210 (b) (1). We agree with the defendants. We also are not persuaded by the plaintiffs' proffered alternative ground for affirmance, namely, that the requested records are exempt from disclosure under § 1-210 (b) (20). Accordingly, we reverse the judgment of the trial court.

The following facts, either as found by the commission's hearing officer or undisputed in the record, and procedural history are relevant to the parties' claims. "[B]y letter dated May 22, 2020, [Braxton], on behalf of her client Brian Scanlan, requested a copy of: '[d]ocuments and/or database information reflecting all changes made (i.e., text inserted, changed or deleted from the file) to the investigation file of CFS No. 1600027332 (the investigation file for the complaint by Doe against Roe) and of all changes made to the application for an arrest warrant in that case.' . . . [W]ith [that letter], [Braxton] provided the [plaintiffs] with a set of database commands and suggested [that] the [plaintiffs] use such commands to retrieve the requested records. [Braxton] also informed the [plaintiffs] that she would pay the cost of retrieval by a qualified technician, if necessary. . . .

"[B]y letter dated June 16, 2020, the [plaintiffs] informed [Braxton] that they did not 'have any information reflecting any changes that could have been made.' In addition, the [plaintiffs] informed [Braxton] that

'NexGen [Public Safety Solutions, the software vendor responsible for developing and maintaining the department's databases (NexGen)] has informed the [department] that they cannot produce any prior versions.' . . . [B]y letter dated June 19, 2020, [Braxton] clarified for the [plaintiffs] that she was not seeking 'different versions' of the investigative file and the arrest warrant applications; but rather, was seeking 'database information that reflects changes made to those files in the NextGen system.' "

By letter dated June 23, 2020, the town again stated "that NexGen has informed [the department] that it cannot produce previous versions of reports once they are finalized. Any requested changes, should they exist, would essentially identify a previous version. In addition, [§] 1-210 (b) (1) of the [act] exempts preliminary drafts from mandatory disclosure. Your request is essentially seeking preliminary drafts."

On July 7, 2020, Braxton filed an appeal with the commission, stating, in relevant part: "I represent the plaintiff in the case of *Doe* v. *Greenwich*, currently pending in [the] United States District Court for the District of Connecticut. This litigation involves a sexual assault reported to the [department] by the plaintiff. The sexual assault was investigated by the [department], but ultimately no arrest was made and no prosecution of the perpetrator was commenced.

* * *

"On May 22, [2020], I requested documents and/or database information reflecting all changes made to the NextGen file by the [department] in its investigation of the sexual assault reported by the plaintiff, and all changes made to any application for an arrest warrant in that investigation. At the same time, I supplied the method to retrieve such changes from the NexGen database in the form of database commands. . . .

* * *

"With respect to the NexGen request, [the town] reiterated its belief that it is unable to comply with my request, despite the fact that I provided them with the database code search parameters directly from NexGen itself. [The town] now also argues that my request is for 'preliminary drafts' exempted from mandatory disclosure under . . . § 1-210 (b) (1). My request was not for any preliminary draft, rather for the database information that reflects changes made to those files in the NexGen system.

"Moreover, even if my request had been for a preliminary draft, [the town] has not demonstrated that the public interest in withholding that information clearly outweighs the public interest in its disclosure. . . . [The town] has remained silent on this issue, seemingly defaulting to the idea that all preliminary drafts are exempt from disclosure, without regard to showing that the public interest favors either withholding or disclosure." (Citation omitted.)

"At the contested case hearing held on August 2, 2021, the [plaintiffs] claimed that they do not maintain any 'prior versions' of the investigative report or arrest warrant application, or any other record that would show any edits made to such records. [Braxton] claimed that such records are, in fact, maintained in the [department's] database, and at the November 4, 2021 contested case hearing, offered the testimony and affidavit of Lee Wezenski, Chief Development Officer for NexGen . . . in support of her claim. . . .

"[T]he electronic records management system and software used by the [plaintiffs] is provided by NexGen. . . . [P]olice incident reports and arrest warrant applications, among other records, are created, revised and maintained in such database. . . . [R]eports and other documents may be edited or revised in the database

up until the time they are reviewed and approved by the commanding officer. . . . NexGen has access to all of the . . . department's computer servers and all of the information located on such servers. . . .

"Wezenski wrote the database commands, referenced . . . above, and provided such commands to . . . Scanlan, in response to a subpoena. . . . [T]hese database commands are the same commands that [Braxton] provided to the department with the records request at issue herein . . . . [E]xecution of the database commands would produce a 'rich text format' (RTF) file reflecting additions or deletions to the text of a record maintained in the [department's] database, and the time and date such changes were made. . . . [I]f the [plaintiffs] so requested . . . Wezenski could, and would, execute the database commands for the [plaintiffs] so that such file could be produced. . . .

"[P]rior to receiving the database commands from . . . Scanlan, the [plaintiffs] had no knowledge of such commands, were unaware that such commands could be used to produce the file . . . and did not have a staff member trained to execute such commands. . . . [A]t least by August 2, 2021 (the date of the initial hearing in this matter), the [plaintiffs] had information, in the form of . . . Wezenski's affidavit, dated June 9, 2021, that a file showing additions and deletions to the report and arrest warrant application, to the extent those records had been edited, would be maintained in the database and accessible by running the database commands . . . .

"[D]espite having such information, the [plaintiffs] had not, as of the date of the initial or continued hearing in this matter, requested that NexGen execute the database commands in order to determine whether . . . there is a record or records in the database that would be responsive to [Braxton's] request . . . .

"Rather, without having made an attempt to retrieve and review any potentially responsive record or records, at the hearing in this matter, and in their posthearing brief, the [plaintiffs] claimed that the requested records are exempt from disclosure pursuant to [§] 1-210 (b) (1) . . . and (20) . . . .

"With respect to § 1-210 (b) (1) . . . such provision states that disclosure is not required of 'preliminary drafts or notes provided the public agency has determined that the public interest in withholding such documents clearly outweighs the public interest in disclosure.' . . . [T]he [plaintiffs] did not review any potentially responsive records prior to the hearing in this matter, and it is therefore further found that the testimony offered at the hearing was not specific to any particular record. Although the assistant police chief testified that it would violate an unspecified policy of the department to execute the database commands . . . the assistant police chief did not testify that he had determined that the public interest in withholding the record clearly outweighed the public interest in disclosure. Accordingly, [the hearing officer] found that the [plaintiffs] failed to prove that the requested records, if they exist, are exempt from disclosure pursuant to § 1-210 (b) (1) . . . ."

The hearing officer concluded that § 1-210 (b) (20) did not apply "because the requested records are not 'standards, procedures, processes, software or codes' but rather, are records that may be produced upon execution of certain database commands . . . ." Accordingly, the hearing officer found that the plaintiffs violated the act and ordered that, "[w]ithin fourteen days of the date of the notice of final decision, the [plaintiffs] shall provide a copy of the records . . . to [Braxton], free of charge." The commission adopted the hearing officer's report in a final decision, and the

plaintiffs filed an administrative appeal in the Superior Court pursuant to General Statutes § 4-183.

In their brief in support of their administrative appeal, the plaintiffs argued that "requiring the plaintiffs to run data commands on the [department's] computer system in order to elicit 'text inserted, changed or deleted' from a certain file, violates [§] 1-210 (b) (1) and (20). In addition, the commission . . . arbitrarily ignored evidence presented at [the] hearing[s] that (1) the records being sought were, in fact, preliminary drafts, (2) that the plaintiffs made a good faith determination that withholding the records outweighed the public interest in disclosure, (3) that . . . Braxton's request to run the computer [database] commands or codes . . . would create a record of software and codes which are not otherwise available to the public and would compromise the security of the plaintiffs' information technology system, and (4) that the commission incorrectly considered novel information presented at the hearing and discounted the contradictory information available at the time of . . . Braxton's request." The defendants filed separate briefs in support of the commission's final decision. In its brief, the commission argued that, because "the plaintiffs cannot definitively claim to know the nature of any potentially responsive records" without first reviewing those records, their failure to run the database commands in order to review any potentially responsive records precluded their claims that the requested records are preliminary drafts and that the plaintiffs had performed the balancing test required under § 1-210 (b) (1). The commission also argued that it "properly found that the requested records are not 'standards, procedures, processes, software or codes' [within the meaning of § 1-210 (b) (20)] . . . ." In her brief, Braxton made substantially similar arguments to those made by the commission, but she also contended that "[s]ubstantial evidence supports

the conclusion that the records are not preliminary drafts or notes." Braxton, however, acknowledged that "[t]he hearing officer did not explicitly rule on whether . . . the records sought were 'preliminary drafts or notes' [within the meaning of § 1-210 (b) (1)]."

The trial court issued a memorandum of decision sustaining the plaintiffs' administrative appeal. The court agreed in part with the plaintiffs, concluding that the commission's decision was clearly erroneous because the requested records are exempt from disclosure pursuant to § 1-210 (b) (1), but it rejected their claim that the requested records are exempt pursuant to § 1-210 (b) (20). As to the application of § 1-210 (b) (1), the court reasoned that "a review of the records produced by executing the database commands was not necessary to determine whether any responsive documents produced were preliminary drafts because the request itself specifically and solely sought preliminary drafts by [its] very terms." The court noted that "[w]hether the changes, insertions and deletions are provided in red-line form or merely in notation or list form, the possession of the changes, insertions and deletions along with the final document is the possession of preliminary drafts of the documents." (Internal quotation marks omitted.) "Accordingly, either the records produced would be nonresponsive to the request or they would be responsive preliminary drafts.

"To the extent that executing the database commands produced responsive preliminary drafts, it was also not necessary to review these documents to discern certain basic attributes of the documents. . . . [T]he request sought preliminary drafts of police reports, warrants, and warrant applications relating to a specific alleged sexual assault. . . . [B]asic assessments concerning whether the public interest in withholding the documents outweighs the public interest in disclosure can be made without reviewing the specific documents.

. . . In view of the importance of these documents, it is not surprising that procedures for [their] creation, review, authorization and finalization . . . are in place to ensure that the official final documents are accurate, well considered, and consistent with our law. . . . [U]ndermining [those] procedures . . . by releasing preliminary drafts of these documents to the public poses a real risk of undermining police operations, investigations, prosecutions, and the faith and confidence in our legal system. Preliminary drafts of these documents are nonfunctional and have not been considered and reviewed as is required by the normal review and authorization process. Accordingly, they may contain mistakes, poor judgment, and investigatory and prosecutorial thought processes that have not been finalized, any of which may unnecessarily negatively impact the rights of defendants, victims, and the state . . . . [Exposing] [s]uch preliminary mistakes, poor judgment, and . . . investigatory and prosecutorial thoughts, all of which would have been properly corrected and refined through the applicable procedures, run the risk of unfairly and unnecessarily undermining confidence in the police and the justice system.

"Officer [Gene] Chan and Deputy Chief [of Police] [Robert] Berry [of the department] generally testified as to the foregoing concerns, and Deputy Chief Berry testified that the . . . department determined that releasing such preliminary drafts was not in the public's best interest. Officer Chan testified that the police department had a process for reviewing reports and warrants before they were authorized and finalized, that producing previous versions of police reports and warrants endangered the integrity of the reports and warrants, and that it was important that each document be 'locked' in final form after the writing, authorization and review process was complete.[1] . . . Officer Chan

[1] Officer Chan testified that "[t]he term is actually not locking, it's signing off on a report which your direct supervisor does, and a [commanding

also testified concerning the importance of only having one . . . official signed off version of each report or warrant.[2] . . . Deputy Chief Berry testified concerning the process of finalizing reports and warrants, the importance of the review process, and the importance of only maintaining the final official documents.[3] . . . Deputy Chief Berry also testified that he was concerned that running nonstandard, previously unknown database commands might endanger the integrity or security

officer will] review it. In terms of locking a report, that means if the report is sensitive, you lock the report so no one else can access or look at the report. So it's really signing off [on] the report and the commander reviewing the report. . . . So, the first step is it's signed off [on] and it goes to a higher supervisor, meaning a captain or above. They will [command] review. Once it's command reviewed, it will [block] the tab to change [the document] in any way, shape or form. . . . I believe—well, there's another step in the process so—if [I] could backtrack. So, the officer will complete the report, whether it's a motor vehicle accident or [some other] report. He will . . . sign off on it. The direct supervisor will then sign off on it, [but] it's [a] PDF, meaning they electronically sign it. So then the direct supervisor signs off on it, then it gets pushed forward to the commanding officer. . . . [After the commanding officer reviews it], [t]hat incident, the call for servicing, called the CFS, it becomes locked. That report becomes locked. Not locked, it—there's different terms for it. It becomes [that] it cannot be changed, that report itself. . . . The official report is the command reviewed report on file." During Braxton's cross-examination of Officer Chan, however, he acknowledged that a supervisor could "unsign" a report in NexGen for someone to make changes to the report.

[2] When asked "what would be the danger in [changes to reports] becoming public," Officer Chan testified that "the integrity of the report would be in question. Once it's signed off, the whole purpose of it is . . . similar to chain of custody of evidence, once it's signed off and given to court, that is the final version. And we can't have different versions floating around in public or different versions even in court. So that's the whole purpose of commander review and signing off on a report."

[3] During direct examination, Deputy Chief Berry testified that "[w]hat we maintain are the PDF, the permanent data files that are created once the officer completes their report. An officer prepares the report, they sign off on it, a supervisor then reviews it, signs off on it, and there's a command review, and that is the record that is maintained. . . . When this initially came up, we queried NexGen about the prospect of doing this. We were told that it's not possible, we are not allowed to do it, and there would be legal ramifications. But just in the interest of trying to find out what is possible, you know, we checked."

of the database and its records. . . . Finally, Deputy Chief Berry testified that attempting to run the nonstandard, previously unknown database commands to produce unauthorized previous versions of police reports and warrants was not 'in the best interest of the public.'[4] . . .

"Accordingly, it is clear that any responsive documents produced by executing the database commands would be preliminary drafts of police reports, warrants, and warrant applications associated with a particular alleged sexual assault investigation. It is also clear that the two police witnesses testified concerning real concerns about releasing preliminary drafts of the foregoing documents. Lastly, it is clear that the deputy chief

[4] Deputy Chief Berry testified generally about the public interest in accessing prior versions of department records during the following exchange with the plaintiffs' counsel:

"Q. You've heard some discussion about the public interest in accessing these prior versions. Did you consider that in weighing the request?

"A. I wouldn't say in the terms of the exact discussion of public interest but we had a discussion—I think the analogous or—you know, it's comparative to releasing a typewriter ribbon from a typewriter as officers prepared reports thirty or forty years ago, you know, there's different versions, an officer might have a spelling mistake or going to change it back. Calling those deletions I think is a very—it's not a good way to display what this really is talking about. As even the NexGen representative said, these are not documents we're talking about. They just—they're keystrokes. It's data. And again, I think that comparison to a typewriter ribbon is probably apropos.

"Q. And what is the concern about that becoming a public document?

"A. Well, I have several concerns and actually more as I sat here today listening to it. We do have and we did [an] investigation into this matter, we do believe that there has been a breach of our data, which . . . goes to why we're very interested and concerned about this.

"Q. Do you know what would [happen] if for some reason you were able to enter the keystrokes which were given to you. Do you know what would happen?

"A. Absolutely not. I heard testimony today about what it would do, but we do [not] have the expertise. We don't have the knowledge, we've never done this before. This is not something that we do. And again, the information that we've had from NexGen [is that] once the file is PDF, that's the record. That's the official record we have."

testified that he had determined that releasing such unauthorized preliminary drafts was not in the best interest of the public or, said another way, that the public's interest in withholding these preliminary drafts outweighed the public interest in disclosure. . . .

"[Section] 1-210 (b) (1) is absolutely clear that it is the province of the public agency, not the [commission], to make this determination. . . . See *Van Norstrand* v. *Freedom of Information Commission*, 211 Conn. 339, 345, 559 A.2d 200 (1989). Deputy Chief Berry was also clear in testifying that the . . . department had made this determination: 'And I guess that our statement on that is that we don't think it would be in the best interest of the public.' . . . Determining that releasing preliminary drafts is not in the best interest of the public is the same as determining that the public's interest in withholding them outweighs the public's interest in disclosure. Both Deputy Chief Berry and Officer Chan testified concerning the reasons for their determination, which were, as noted above, not surprising and reasonable. The agency's determination of the public interest in this regard is reviewed on an abuse of discretion standard, which standard is certainly not met here. . . .

"Overlaid on all of the foregoing, one must give consideration to the requirement that the . . . department run nonstandard, noncommercial, previously unknown database commands on its database. It must be noted that these commands were received from an individual, albeit the Chief Development Officer of NexGen, as a result of a subpoena. It is apparent that these commands are nonstandard, in that they are not provided to NexGen's customers in the ordinary course of business. It is also apparent that the . . . department had not previously received these commands in connection with its database and that, before [Braxton's] request was

received, the . . . department was unaware of the existence of the commands and of the very fact that the database retained preliminary drafts of documents. Accordingly, it was not unreasonable for Deputy Chief Berry to have legitimate concerns about running these commands. He clearly testified that the . . . department was concerned that running the commands, something it had never done before, might have unknown impacts on the security and integrity of the database and the information contained therein. . . . These commands came only with the assurance of a single individual as to their appropriateness, function and safety in relation to the system. Accordingly, it is not surprising and not unreasonable that the police department was hesitant to run such commands. The court does not believe that a public agency is required to put its computer system at risk by running nonstandard, noncommercial, previously unknown and never before run commands which have been provided by an individual in order to satisfy the agency's . . . search obligation." (Citations omitted; emphasis omitted; footnotes added; footnotes omitted.)

As to § 1-210 (b) (20), the court reasoned that "[t]he requested records are not records of standards, procedures, processes, software and codes. . . . [Braxton did not seek] disclosure of the database commands. . . . [T]he database commands were supplied pursuant [to] a subpoena in a proceeding that was separate from this administrative proceeding. The mere use of those commands by the . . . department would not potentially implicate the exemption in § 1-210 (b) (20) unless the records which were produced were records of standards, procedures, processes, software and codes. Such is clearly not the case here." Accordingly, the court sustained the plaintiffs' administrative appeal, and these appeals followed.[5]

[5] Braxton filed her appeal in this court on November 14, 2022, which was assigned docket number AC 46003, and, on December 5, 2022, the

As a preliminary matter, we note "the limited scope of judicial review afforded by the Uniform Administrative Procedure Act; General Statutes § 4-166 et seq.; to the determinations made by an administrative agency. [W]e must decide, in view of all of the evidence, whether the agency, in issuing its order, acted unreasonably, arbitrarily or illegally, or abused its discretion. . . . Even as to questions of law, [t]he court's ultimate duty is only to decide whether, in light of the evidence, the [agency] has acted unreasonably, arbitrarily, illegally, or in abuse of its discretion. . . . Conclusions of law reached by the administrative agency must stand if the court determines that they resulted from a correct application of the law to the facts found and could reasonably and logically follow from such facts. . . . Neither this court nor the trial court may retry the case or substitute its own judgment for that of the [administrative agency]." (Citation omitted; internal quotation marks omitted.) *Aronow* v. *Freedom of Information Commission*, 189 Conn. App. 842, 858, 209 A.3d 695, cert. denied, 332 Conn. 910, 210 A.3d 566 (2019).

I

On appeal, the defendants claim that the court improperly substituted its judgment for that of the commission in concluding that the requested records are preliminary drafts that are exempt from disclosure under § 1-210 (b) (1). Specifically, the defendants claim that the court improperly concluded that it was not necessary for the plaintiffs to review the requested records to determine, first, that those records are preliminary drafts and, second, that the public interest in withholding the records outweighed the public interest in disclosure pursuant to § 1-210 (b) (1). We will address each subclaim in turn.

commission filed its appeal, which was assigned docket number AC 46064. After both appeals were ready for argument, Braxton filed a motion to consolidate the two appeals, which this court denied.

The relevant legal principles regarding the preliminary drafts or notes exemption under the act are well settled. Section 1-210 (b) (1) provides: "Nothing in the Freedom of Information Act shall be construed to require disclosure of . . . Preliminary drafts or notes provided the public agency has determined that the public interest in withholding such documents clearly outweighs the public interest in disclosure . . . ."

Accordingly, "a party claiming that records are exempt from disclosure under § 1-210 (b) (1) must prove, first, that the records are preliminary drafts or notes and, second, that the public interest in withholding the documents clearly outweighs the public interest in disclosure. . . .

"With respect to § 1-210 (b) (1), *Wilson* v. *Freedom of Information Commission*, 181 Conn. 324, 332–33, 435 A.2d 353 (1980), defined preliminary drafts in a manner that our courts subsequently have uniformly applied. [T]he term preliminary drafts or notes relates to advisory opinions, recommendations and deliberations comprising part of the process by which government decisions and policies are formulated. . . . Such notes are predecisional. They do not in and of themselves affect agency policy, structure or function. They do not require particular conduct or forbearance on the part of the public. Instead, preliminary drafts or notes reflect that aspect of the agency's function that precedes formal and informed [decision-making]. . . .

"Preliminary is defined as something that precedes or is introductory or preparatory. As an adjective it describes something that is preceding the main discourse or business. A draft is defined as a preliminary outline of a plan, document or drawing . . . . By using the nearly synonymous words preliminary and draft, the legislation makes it very evident that preparatory materials are not required to be disclosed. . . .

"[T]he concept of preliminary [within the meaning of § 1-210 (b) (1)], as opposed to final, should [not] depend upon . . . whether the actual documents are subject to further alteration. . . . [P]reliminary drafts or notes reflect that aspect of the agency's function that precedes formal and informed [decision-making]. . . . It is records of this preliminary, deliberative and predecisional process that we conclude the exemption was meant to encompass." (Citations omitted; internal quotation marks omitted.) *Lindquist* v. *Freedom of Information Commission*, 203 Conn. App. 512, 526–27, 248 A.3d 711 (2021).

The statute, however, does not provide a categorical exemption for all preliminary drafts or notes, as the public agency claiming the exemption must determine "that the public interest in withholding such documents clearly outweighs the public interest in disclosure . . . ." General Statutes § 1-210 (b) (1). "Although the statute places the responsibility for making that determination on the public agency involved, the statute's language strongly suggests that the agency may not abuse its discretion in making the decision to withhold disclosure. The agency must, therefore, indicate the reasons for its determination to withhold disclosure and those reasons must not be frivolous or patently unfounded." (Internal quotation marks omitted.) *Van Norstrand* v. *Freedom of Information Commission*, supra, 211 Conn. 345.

In applying the exemptions set forth in the act, we are mindful "that the general rule under the [act] is disclosure, and any exception to that rule will be narrowly construed in light of the general policy of openness expressed in the [act]. . . . [Thus] [t]he burden of proving the applicability of an exception [to disclosure under the act] rests upon the party claiming it." (Internal quotation marks omitted.) *Lindquist* v. *Freedom of*

Information Commission, supra, 203 Conn. App. 525–26.

Because the defendants' claim involves the application of the well settled meaning of the preliminary drafts exemption to the underlying facts, "[t]he appropriate standard of judicial review . . . is whether the commission's factual determinations are reasonably supported by substantial evidence in the record taken as a whole." (Internal quotation marks omitted.) *Director, Dept. of Information Technology* v. *Freedom of Information Commission*, 274 Conn. 179, 187, 874 A.2d 785 (2005).

The defendants first claim that the court improperly determined that it was not necessary to review the requested records for the plaintiffs to conclude that those records are preliminary drafts or notes within the meaning of § 1-210 (b) (1). Braxton argues that "the case reports and arrest warrant application in this case are not part of a 'deliberative and predecisional process.' The plaintiffs presented no testimony at all indicating any discussion occurred or recommendations [were] made concerning the material recorded or that [the department] engaged in a 'free and candid exchange of ideas.' " The commission argues that, because "it is undisputed that the plaintiffs never determined whether the requested records exist, never reviewed the requested records, and never provided any testimony specific to the requested records or the process for finalizing the actual reports related to such records," "there is no evidence establishing that changes to such requested records were only made prior to the finalized report(s)." Both defendants also claim that the plaintiffs could not conduct the mandated public interest balancing test without first reviewing the records.

In response, the plaintiffs contend that, "[b]ecause of the nature of the request—insertions and deletions—

it is not necessary to review the prior documents, if any, to know that they constitute preliminary drafts." They argue that "the final police report is the decisional document. The insertions and deletions made to it in the drafting process are predecisional, and the decisions made after the police report is finalized into the operative version, are postdecisional. Officer Chan's testimony outlined the process of command reviewing the documents before the police report is locked, at which time the report is final . . . ." In its reply brief, the commission maintains that the generalized testimony as to the process typically followed by the department was insufficient to establish "that such processes and procedures were actually followed here." We agree with the commission and conclude that, without first conducting a search to determine whether the records requested by Braxton exist and, to the extent they exist, reviewing such records, the plaintiffs cannot satisfy their burden of establishing that those records are exempt from disclosure pursuant to § 1-210 (b) (1).

Our Supreme Court has recognized that, "[w]here the nature of the documents, and, hence, the applicability of an exemption, is in dispute it is not only within the commission's power to examine the documents themselves, it is contemplated by the act that the commission do so. . . . [T]he commission [has] a central role in resolving disputes administratively under the act. To fulfill this role effectively, the commission's determinations must be informed. It should not accept an agency's generalized and unsupported allegations relating to documents claimed to be exempt from disclosure. . . . Unless the character of the documents in question is conceded by the parties, an in camera inspection of the particular documents by the commission may be essential to the proper resolution of a dispute under the act. Where such an inspection would be burdensome on the commission . . . or ineffective because of the

absence of the adversarial process . . . other methods for ascertaining the character of the documents may be employed by the parties and the commission. The agency representative may testify concerning the content and use of the documents, or supply affidavits to the commission relating to their content and use. Any such testimony or affidavits must not be couched in conclusory language or generalized allegations, however, but should be sufficiently detailed, without compromising the asserted right to confidentiality, to present the commission with an informed factual basis for its decision in review under the act. . . . No matter what method is utilized before the commission, however, one thing is clear: It is the agency that bears the burden of proving the applicability of an exemption . . . .'' (Citations omitted; internal quotation marks omitted.) *Wilson* v. *Freedom of Information Commission*, supra, 181 Conn. 339–41.

In *Wilson*, our Supreme Court explained that it was not necessary for the commission to examine the requested records ''because the record disclose[d] that [the head of the agency] testified before the commission concerning their contents in sufficient detail and neither the commission nor [the requester] question[ed] the advisory and predecisional nature of those documents.'' Id., 341. In the present case, however, the plaintiffs never entered the database commands to search for responsive records and, therefore, could not offer any detailed testimony about the contents of any responsive records. Thus, although we recognize that the terms of the request itself suggest that the requested records are preliminary drafts or notes, as Braxton sought changes, insertions and deletions to the file and arrest warrant application, in concluding that the requested records *necessarily* are preliminary drafts or notes, the trial court relied on the plaintiffs' ''conclusory language [and] generalized allegations'' about the nature of

records that the plaintiffs neither accessed nor reviewed. Id.

The court reasoned that "there are only two possibilities. The documents in question may never have been changed at all, in which case there would be no 'changes made to (i.e., text inserted, changed or deleted from the file)' to be produced as responsive to [Braxton's] request. In the alternative, changes were made to the documents and these changes comprised preliminary drafts that are protected from disclosure pursuant to § 1-210 (b) (1)." There is, however, a third possibility, because, although Officer Chan testified that "[t]he official report is the command reviewed report on file," he also testified that a supervisor could "unsign" a report in NexGen for someone to make changes to the report. Because the plaintiffs did not run the database commands to determine whether any responsive records exist, much less review the contents of any such records, they do no not know if, when, or by whom any changes to any such records were made and, thus, whether the requested records are a part of a "preliminary, deliberative and predecisional process . . . ." (Internal quotation marks omitted.) *Lindquist* v. *Freedom of Information Commission*, supra, 203 Conn. App. 527. It follows, therefore, that there could be responsive records that are not part of the predecisional process but, rather, are part of a "postdecisional" process. Thus, the plaintiffs' presentation of testimony about the general process for finalizing reports was insufficient to establish that the proper process was followed as to the requested records. See *New Haven* v. *Freedom of Information Commission*, 4 Conn. App. 216, 220–21, 493 A.2d 283 (1985) ("The plaintiffs failed to submit the requested records before the [commission] for review and it is their burden to prove the applicability of the exemption. . . . Mere speculative

and conclusory statements as to the impact of disclosure do not satisfy the plaintiff's burden of establishing an adequate record to show why the records are exempt." (Citations omitted.)).

As the parties claiming the exemption, it was the plaintiffs' burden to "provide more than general or conclusory statements in support of [their] contention." *Director, Dept. of Information Technology* v. *Freedom of Information Commission*, supra, 274 Conn. 194. In the absence of "an informed factual basis for [the plaintiffs'] decision"; *Wilson* v. *Freedom of Information Commission*, supra, 181 Conn. 341; we conclude that the commission properly refused to "accept [the plaintiffs'] generalized and unsupported allegations relating to documents claimed to be exempt from disclosure." Id., 340.

Moreover, assuming arguendo that the requested records exist and are preliminary drafts, the plaintiff's failure to review the records also is fatal to their assertion that they conducted the required balancing test under § 1-210 (b) (1). Both defendants rely on our Supreme Court's decision in *Shew* v. *Freedom of Information Commission*, 245 Conn. 149, 151, 714 A.2d 664 (1998), in which the commission ordered the town manager of the town of Rocky Hill (Rocky Hill) "to provide the defendant, Edward A. Peruta, with access to certain interview reports created by [an] attorney . . . who had been hired by [Rocky Hill] to [investigate] its police chief, Philip Schnabel." (Footnote omitted.)

In *Shew*, the trial court sustained the town manager's appeal from the commission's order requiring disclosure of the documents, finding "that the commission's conclusion that the documents in question were not preliminary drafts or notes within the meaning of [the exemption] was improper. The trial court remanded the case to the commission to make findings . . . as to

whether the town manager properly determined that the public interest in withholding the documents outweighed the public interest in their disclosure." (Internal quotation marks omitted.) Id., 155. This court affirmed the judgment of the trial court, and our Supreme Court granted the commission's petition for certification to appeal. Id., 151. In that certified appeal, the commission claimed, in relevant part, that this court improperly determined that the documents were preliminary drafts within the meaning of the predecessor to § 1-210 (b) (1). Id., 163. Our Supreme Court disagreed, concluding that the records at issue were preliminary drafts within the meaning of the statute. Id., 165. Notwithstanding that conclusion, the court held that "the case must be remanded for a determination by the town as to whether the public interest in withholding such documents clearly outweighs the public interest in disclosure . . . . It is undisputed that the town manager never reviewed the documents; *consequently*, *he could not have conducted the balancing test mandated by the statute*." (Citation omitted; emphasis added; footnote omitted; internal quotation marks omitted.) Id., 167.

In the present case, just as in *Shew*, there is no dispute that the department never reviewed any responsive records. As a result, the plaintiffs could not have conducted the statutorily mandated balancing test, which requires that they determine whether the public interest in withholding such documents clearly outweighs the public interest in disclosure. It is axiomatic that the plaintiffs must know what is in the records in order to determine the public interest in disclosure, as that interest necessarily depends on the nature of the information contained in the records. The plaintiffs' arguments to the contrary are unavailing.

First, the plaintiffs argue that the trial court properly "found, based on the evidence presented to the commission, that Officer Chan and Deputy Chief Berry reasonably determined that they did not need to run the [database commands] in order to conclude that the public

interest in preserving the integrity of the police reports and in adhering to established protocols for data quality control outweighed the public interest in disclosure." The trial court, however, cannot simply substitute its judgment for that of the commission, which reasonably refused to accept the plaintiffs' "generalized and unsupported allegations relating to documents claimed to be exempt from disclosure." *Wilson* v. *Freedom of Information Commission*, supra, 181 Conn. 340. Moreover, by accepting the plaintiffs' invocation of general concerns to support its determination that it was unnecessary to review the requested records, the court effectively expanded the limited exception to disclosure set forth in § 1-210 (b) (1) into a broad categorical exemption for all preliminary drafts or notes, regardless of any public interest in the disclosure of a specific document. Not only does such reasoning contradict our Supreme Court's holding in *Shew*, but it also undermines the overarching "legislative policy of the [act] favoring the open conduct of government and free public access to government records," which policy requires that we "construe the provisions of the [act] to favor disclosure and to read narrowly that act's exceptions to disclosure." (Internal quotation marks omitted.) *Commissioner of Energy Services & Public Protection* v. *Freedom of Information Commission*, 330 Conn. 372, 383, 194 A.3d 759 (2018). Mindful of that policy and consistent with our Supreme Court's decision in *Shew* v. *Freedom of Information Commission*, supra, 245 Conn. 167, we conclude that § 1-210 (b) (1) requires an agency to conduct the public interest balancing test on a case-by-case basis *after* having reviewed the requested records. Put simply, we are not persuaded that the department's generalized interest in preserving the integrity of law enforcement records, as opposed to some particularized interest unique to a specific record, will in every instance clearly outweigh the public interest in disclosure.

Second, the plaintiffs argue that the request at issue in the present case is fundamentally different from the request in *Shew* because the request in *Shew* did not require that Rocky Hill "run a noncommercially available and untested computer program through [its] computer system to produce the documents." According to the plaintiffs, "[t]he commission erroneously decided that the plaintiffs would need to run the [database commands in] order to make a determination regarding the public interest" because "there is no court precedent that obligates a public agency to run unlicensed software provided by an individual to comply with a freedom of information request." We are not persuaded.

Contrary to the plaintiffs' assertion, our Supreme Court has held that the act requires an agency to conduct the type of search requested by Braxton. Braxton requested information stored on the department's computer database, provided the department with the database commands that the department needed to retrieve the requested records, and, in accordance with General Statutes § 1-212 (b),[6] agreed to pay the costs associated

[6] General Statutes § 1-212 (b) provides in relevant part: "The fee for any copy provided in accordance with subsection (a) of section 1-211 shall not exceed the cost thereof to the public agency. In determining such costs for a copy . . . an agency may include only: (1) An amount equal to the hourly salary attributed to all agency employees engaged in providing the requested computer-stored public record, including their time performing the formatting or programming functions necessary to provide the copy as requested, but not including search or retrieval costs except as provided in subdivision (4) of this subsection; (2) An amount equal to the cost to the agency of engaging an outside professional electronic copying service to provide such copying services, if such service is necessary to provide the copying as requested; (3) The actual cost of the storage devices or media provided to the person making the request in complying with such request; and (4) The computer time charges incurred by the agency in providing the requested computer-stored public record where another agency or contractor provides the agency with computer storage and retrieval services. . . . The Department of Administrative Services shall provide guidelines to agencies regarding the calculation of the fees charged for copies of computer-stored public records to ensure that such fees are reasonable and consistent among agencies."

with the request. Accordingly, her request is governed by General Statutes § 1-211 (a), which provides that "[a]ny public agency which maintains public records in a computer storage system shall provide, to any person making a request pursuant to the Freedom of Information Act, a copy of any nonexempt data contained in such records, properly identified, on paper, disk, tape or any other electronic storage device or medium requested by the person, including an electronic copy sent to the electronic mail address of the person making such request, if the agency can reasonably make any such copy or have any such copy made. Except as otherwise provided by state statute, the cost for providing a copy of such data shall be in accordance with the provisions of section 1-212."

Our Supreme Court previously has construed § 1-211 (a) in *Hartford Courant Co.* v. *Freedom of Information Commission*, 261 Conn. 86, 801 A.2d 759 (2002). In that case, the court reasoned that "[t]he flexibility and breadth of this statute is . . . illustrated by the language providing that a copy of such data shall be provided 'on paper, disk, tape or any other electronic storage device or medium requested by the person . . . .' " Id., 93. "There is no indication in the language of § 1-211 that the scope of that statute is restricted to document formats currently in existence. Indeed, such a conclusion is belied by the fee provisions contained in § 1-212 (b), which permits an agency to include in its fee for a request pursuant to § 1-211 (a) '[a]n amount equal to the hourly salary attributed to all agency employees engaged in providing the requested computer-stored public record, *including their time performing the formatting or programming functions necessary to provide the copy as requested*' . . . or '[a]n amount equal to the cost to the agency of engaging an outside professional electronic copying service to provide such copying services, if such service is necessary to provide

the copying as requested. . . .' " Id. "Section 1-212 (b) contemplates that an agency may be required to perform formatting or programming functions, or that the agency may contract with an outside entity to perform such functions, in order to comply with requests pursuant to the act.

* * *

"It is thus clear that the legislature envisioned . . . a situation in which an agency cannot comply with a request for information because it does not have the technological capability to separate exempt from nonexempt data. The legislative history of §§ 1-211 (a) and 1-212 (b) unequivocally indicates that such a request does not fall outside the scope of the act. Rather, pursuant to the act, the disclosing agency must comply with such a request either by developing a program or contracting with an outside entity to develop a program, provided that the requesting party is willing to bear the attendant costs." (Citations omitted; emphasis in original.) Id., 93–95.

Our Supreme Court found further support for its conclusion in its "interpretation of the act in *Maher* v. *Freedom of Information Commission*, 192 Conn. 310, 472 A.2d 321 (1984). In *Maher*, the defendant newspaper, pursuant to the act, requested from the plaintiff [D]epartment of [I]ncome [M]aintenance [(agency)] certain information regarding drugs prescribed by physicians pursuant to the [M]edicaid program. . . . The commission ordered the disclosure of the information requested by the [newspaper], and the trial court affirmed the decision of the commission. . . . In [our Supreme] [C]ourt, the [agency] argued that the act did not require disclosure of the information because, although the [agency] was in possession of the information requested, a new computer program would have

to be produced to enable the [agency] to comply with the [newspaper's] request. . . .

"The court in *Maher* rejected that argument as being inconsistent with the statutory predecessor of § 1-211 (a) then in effect, General Statutes [(Rev. to 1979)] § 1-19a.[7] . . . After noting that this argument was inconsistent with the broad language of that statute, the court stated: 'Where, as here, the information sought is presently stored in the agency's data base, and the cost of the new program is to be borne by the person seeking the information, an order compelling production of computer tapes is within the powers statutorily conferred upon the [commission].' " (Citations omitted; emphasis omitted; footnote in original.) *Hartford Courant Co.* v. *Freedom of Information Commission*, supra, 261 Conn. 95–96.

The present case is analogous to both *Hartford Courant Co.* and *Maher*. As in those cases, the plaintiffs may be in possession of records that are responsive to Braxton's request. Although the plaintiffs are not required to utilize the precise method provided by Braxton, they must comply with her request "either by developing a program or contracting with an outside entity to develop a program, provided that [Braxton] is willing to bear the attendant costs." Id., 95. Consequently, the alleged safety concerns expressed by the department provide no basis to distinguish the present case from *Shew*, which requires that they review the requested records in order to conduct the public interest balancing test under § 1-210 (b) (1).

In short, our Supreme Court has squarely addressed an agency's obligation to review the records that it

[7] "At the time of the request at issue in *Maher*, General Statutes (Rev. to 1979) § 1-19a provided: 'Any public agency which maintains its records in a computer storage system shall provide a printout of any data properly identified.' " *Hartford Courant Co.* v. *Freedom of Information Commission*, supra, 261 Conn. 95 n.7.

claims are exempt from disclosure because the public interest in withholding the records clearly outweighs the public interest in disclosing them. Because it is undisputed in the present case that the plaintiffs have not searched for or reviewed any responsive records, the commission properly determined that the plaintiffs failed to prove that the requested records are exempt from disclosure pursuant to § 1-210 (b) (1) on the basis of that balancing test.

As to the remedy, however, we conclude that the commission's order directing the plaintiffs to retrieve the requested records and to disclose them to Braxton "free of charge" constitutes an abuse of its discretion in two respects. First, the plaintiffs have not yet reviewed the requested records to determine whether those records are exempt from disclosure under the act. In the absence of any review of the requested records, which are part of a sexual assault investigation, requiring the plaintiffs to disclose those records could result in the disclosure of otherwise exempt information.[8] We also note that the commission specifically found that, "prior to receiving the database commands . . . the [plaintiffs] had no knowledge of such commands, were unaware that such commands could be used to produce the [RTF file] and did not have a staff member trained to execute such commands." It was only as of the date of the initial hearing before the commission, when the plaintiffs "had information, in the form of Wezenski's affidavit . . . that a file showing additions and deletions to the report and arrest warrant application, to the extent those records had been edited, would be maintained in the database and accessible by running the database commands . . . ." Given the nature of the requested records, and in light of the plaintiff's lack of

[8] During oral argument before this court, counsel for the commission acknowledged that this court's concern about the disclosure of otherwise exempt information was "well taken."

knowledge as to their existence, the commission's order requiring the plaintiffs to disclose unreviewed public records is unreasonable. Instead, the appropriate remedy in the present case is to have the plaintiffs conduct the search for the requested records and review any responsive records to determine whether any of the material is exempt from disclosure under the act. See, e.g., *Pictometry International Corp.* v. *Freedom of Information Commission*, 307 Conn. 648, 666, 59 A.3d 172 (2013) (concluding that "commission abused its discretion by ordering the [agency] to provide copies of the photographic images stripped of the associated metadata to [the complainant] without first providing the [agencies] with an opportunity to determine whether their disclosure would pose a safety risk [under § 1-210 (b) (19)]").

Second, requiring that the plaintiffs bear the cost of locating and producing the requested records when Braxton, pursuant to § 1-212 (b), agreed to pay those costs, also constitutes an abuse of the commission's discretion.[9] Because the existence of the requested records was confirmed only after Braxton filed her complaint with the commission, an order that contradicts the express terms of § 1-212 (b), thereby penalizing the plaintiffs, is unwarranted.

II

The plaintiffs contend, as an alternative ground for affirming the judgment of the trial court, that the commission improperly determined that the requested records are not exempt pursuant to § 1-210 (b) (20). We disagree.

[9] During oral argument before this court, although Braxton argued that requiring the plaintiffs to produce the records free of charge was within the commission's authority, she acknowledged that her client remains willing to pay the costs associated with retrieving and producing the requested records if ordered to do so.

Section 1-210 (b) (20) provides that "[n]othing in the Freedom of Information Act shall be construed to require disclosure of . . . [r]ecords of standards, procedures, processes, software and codes, not otherwise available to the public, the disclosure of which would compromise the security or integrity of an information technology system . . . ."

The commission found that, "because the requested records are not 'standards, procedures, processes, software or codes' but rather, are records that may be produced upon execution of certain database commands, it is found that such exemption is not applicable to the requested records." Likewise, the trial court concluded that § 1-210 (b) (20) did not apply because the requested records are not standards, procedures, processes, software and codes.

On appeal, the plaintiffs clarify that "[t]he argument is not that the records themselves constitute software and codes. The plaintiffs' concern is that production of preliminary police reports requires possession of software and codes by the public, or person(s) requesting the documents. These software or codes would clearly reveal information about the nature and qualities of software and codes used by the [department]." According to the plaintiffs, the trial court and the commission failed to recognize that "[h]ow computers respond to [database commands] will, necessarily, reveal information about the codes and software on that computer. . . . The execution of data commands and studying what is produced, whether it be the preliminary drafts sought or error messages, will reveal information about software and codes which the plaintiffs seek to protect." We are not persuaded.

The plaintiffs failed to present any evidence before the commission to substantiate their alleged safety concern involving the inadvertent disclosure of "information about software and codes which [they] seek to

protect." Indeed, neither of the plaintiffs' witnesses before the commission was qualified to testify about the ramifications of running the database commands, as Officer Chan testified that he "wouldn't even know what to do with" the database commands, and Deputy Chief Berry acknowledged that he is "not a computer expert" and that the department does "not have . . . the ability to do [that] type of . . . programming." In contrast, Wezenski, who wrote the relevant computer code, testified only that running the database commands would produce the data sought. Notably absent from Wezenski's testimony is any trepidation about running the commands or any indication that the information produced by doing so would allow Braxton, or anyone else, access to any of the department's software or codes.

Our Supreme Court's decision in *Director, Dept. of Information Technology* v. *Freedom of Information Commission*, supra, 274 Conn. 195–96, is instructive. In that case, the complainant "submitted a written request to the town's board of estimate and taxation, asking for a copy of all [geographic information system (GIS)] data concerning orthophotography, arc info coverages, structured query language server databases, and all documentation created to support and define coverages for the arc info data set." Id., 182. The director of the town's department of information technology (director) denied the complainant's request, claiming that the data was exempt from disclosure pursuant to, inter alia, § 1-210 (b) (20). Id., 182–83. The complainant appealed to the commission, which found that the information was not exempt because it was not "the type of information that would pose a threat to the security of the town's information technology system within the meaning of [the statute]." Id., 183. The trial court dismissed the director's administrative appeal, concluding that the director "had failed to provide any specific

evidence that would demonstrate that disclosure of the requested data would compromise the security or integrity of the town's information technology system." Id., 183–84.

The director appealed to this court, and our Supreme Court transferred the appeal to itself. Id., 184. Before our Supreme Court, the director claimed that "the trial court improperly found that the plaintiff did not meet his burden of proof that the records were exempt under § 1-210 (b) (20)." Id., 195. In rejecting that claim, our Supreme Court noted that "the [director] did not present any specific evidence to demonstrate how the disclosure of the requested GIS data would compromise the overall security of the town's information technology system. The [director] testified that he was concerned about the vulnerability of the town's network to a security breach should the network become available to the public. In support of this concern, the [director] stated that computer firewalls are not foolproof, and that the firewalls of '[m]any high security agencies' had been breached. The [director], however, did not provide specific examples of such security breaches, or evidence that any such breaches had been caused by the disclosure of GIS data." Id., 195–96. Given that evidentiary lacunae, our Supreme Court agreed with the trial court and concluded that "the evidence presented in [that] case was insufficient to establish that the requested GIS data were exempt from public disclosure under the act." Id., 196.

Here too, the plaintiffs assert a vague safety concern based on revealing information about the way that the NexGen database operates, but they failed to present any evidence as to specific software or codes that would be revealed by disclosure of the requested records. Consequently, we cannot conclude that the plaintiffs satisfied their burden of proving that the requested records are exempt from disclosure under § 1-210 (b) (20).

The plaintiffs' position also is untenable because, as previously noted in part I of this opinion, §§ 1-211 (a) and 1-212 (b) address this precise situation. That is, when, as in the present case, "an agency cannot comply with a request for information because it does not have the technological capability," the "agency must comply with such a request either by developing a program or contracting with an outside entity to develop a program, provided that the requesting party is willing to bear the attendant costs." *Hartford Courant Co.* v. *Freedom of Information Commission*, supra, 261 Conn. 94–95. Accordingly, as provided in the act, the plaintiffs are free to develop their own method of retrieving and producing the requested records and, thus, can avoid their concerns about potential disclosures regarding their software or codes.

In sum, we conclude that the commission properly found that the plaintiffs failed to meet their burden of proof with respect to the applicability of the exemptions set forth in §§ 1-210 (b) (1) and 1-210 (b) (20). Nonetheless, we conclude that the commission abused its discretion in ordering the plaintiffs to retrieve the requested records and provide them to Braxton "free of charge" without affording the plaintiffs an opportunity to review the records to determine whether any of the information contained therein is exempt from disclosure under the act. As a result, the matter must be remanded for further proceedings before the commission regarding Braxton's request.

The judgment is reversed and the case is remanded to the trial court with direction to remand the case to the commission for further proceedings consistent with this opinion.

In this opinion the other judges concurred.

OFFICE OF CHIEF DISCIPLINARY COUNSEL *v.* ENRICO VACCARO (AC 45766)

Elgo, Prescott and Keller, Js.

Syllabus

The respondent attorney appealed to this court from the judgment of the trial court suspending him from the practice of law for a period of ninety days as a result of his inaction while representing a client that led to the dismissal, with prejudice, of the client's personal injury lawsuit. The petitioner, the Office of Chief Disciplinary Counsel, filed a presentment complaint against the respondent, alleging the misconduct at issue after a reviewing committee of the Statewide Grievance Committee conducted a hearing and concluded that the respondent had violated the Rules of Professional Conduct. The respondent filed a motion to dismiss the grievance complaint, in which he claimed that he was denied his right to due process and prejudiced as a result of numerous, extensive delays in the adjudication of the complaint. The reviewing committee denied that motion and then proceeded with the remainder of the hearing on the misconduct complaint. The reviewing committee found that there was no evidence that the respondent had suffered any prejudice and concluded that his violation of the Rules of Professional Conduct warranted a reprimand. The reviewing committee further determined that it was required to direct the petitioner to file the presentment pursuant to the applicable rule of practice (§ 2-47 (d) (1)) because the respondent had received three disciplinary reprimands in the five years prior to the filing of the grievance complaint at issue. The Statewide Grievance Committee upheld the reviewing committee's decision. The respondent did not appeal from either of those rulings. At the presentment hearing, the trial court stated that it was bound by the findings of the reviewing committee and that, pursuant to Practice Book § 2-47 (d) (1), the hearing was limited to determining the penalty to be imposed. The court stated that it considered the totality of the circumstances in fashioning its penalty and noted the respondent's lack of a sense of responsibility for the behavior underlying the presentment and his lack of any expression of contrition. *Held*:

1. The respondent could not prevail on his claim that the trial court erred when it failed to consider his assertion that his due process rights were violated and that he was prejudiced as result of the delay in the underlying disciplinary proceedings: the respondent had sufficient process available to him by way of an appeal from the reviewing committee's denial of his motion to dismiss, but because he failed to appeal from that determination, he was precluded from raising his due process claim before the trial court; moreover, the respondent's assertion that

he could not have appealed from the reviewing committee's ruling because the reviewing committee ordered presentment rather than imposing sanctions or conditions was unavailing, as the applicable rule of practice (§ 2-38) provides thirty days to file an appeal to the court, and Practice Book § 2-47 (d) (2) makes clear that a reviewing committee's denial of a motion to dismiss is a final decision subject to appellate review; furthermore, any appeal from the denial of the respondent's motion to dismiss had to be taken before the matter was presented to the trial court, as Practice Book § 2-47 (d) (1) precludes the court from considering facts or evidence that do not directly address what action the court should take regarding the respondent's misconduct, which was the sole issue to be determined in the presentment hearing.

2. This court could not conclude that the trial court abused its discretion by suspending the respondent from the practice of law for a period of ninety days:

a. The respondent's claim that the trial court improperly refused to consider the delay in the underlying disciplinary proceedings as a mitigating factor in determining his punishment was not tenable: contrary to the respondent's assertion that the court's interruptions of his testimony indicated that it mistakenly believed it was precluded from considering his due process rights and the delay in the underlying proceedings as a mitigating factor, the court's statement that it was limited to determining the respondent's penalty was an attempt to redirect his testimony, as the respondent was attempting to make the very due process attack that the court had warned it would not entertain; moreover, the respondent was given ample time to testify about the delay as a mitigating factor, and both parties' counsel discussed aggravating and mitigating factors, some of which the court referenced in its written decision; furthermore, the court was free to credit or reject the respondent's testimony, and the absence of discussion of the delay as a mitigating factor in the court's decision was of no consequence, as the court was not required to set forth its express consideration of specific evidence.

b. This court found unavailing the respondent's claim that the ninety day suspension imposed against him was excessive and out of proportion to the offense he committed: the respondent failed to demonstrate that the trial court acted arbitrarily by ordering the ninety day suspension, as it was required under Practice Book § 2-47 (d) (1) to consider the nature of the respondent's misconduct and the prior disciplinary measures imposed against him during the five year period prior to the filing of the grievance complaint at issue; moreover, the record showed that the court heard evidence regarding relevant aggravating and mitigating factors, asked both parties questions regarding those factors and provided ample time for their responses, and made specific reference to several of those factors in its decision; accordingly, this court could not conclude that the trial court abused its discretion in determining the appropriate discipline for the respondent.

Argued October 11, 2023—officially released June 11, 2024

Procedural History

Presentment by the petitioner for the alleged professional misconduct of the respondent, brought to the Superior Court in the judicial district of New Haven and tried to the court, *Abrams*, *J.*; judgment suspending the respondent from the practice of law for ninety days, from which the respondent appealed to this court. *Affirmed.*

Alexander T. Taubes, for the appellant (respondent).

Leanne M. Larson, first assistant chief disciplinary counsel, for the appellee (petitioner).

Opinion

ELGO, J. In this presentment matter, the respondent attorney, Enrico Vaccaro, appeals from the judgment of the trial court disciplining him after the Statewide Grievance Committee (grievance committee) directed the petitioner, the Office of Chief Disciplinary Counsel (disciplinary counsel), to file a presentment pursuant to Practice Book § 2-47 (d) (1)[1] for the purpose of imposing

[1] Practice Book § 2-47 (d) (1) provides in relevant part: "If a determination is made by the Statewide Grievance Committee or a reviewing committee that a respondent is guilty of misconduct and such misconduct does not otherwise warrant a presentment to the Superior Court, but the respondent has been disciplined pursuant to these rules by the Statewide Grievance Committee, a reviewing committee or the court at least three times pursuant to complaints filed within the five year period preceding the date of the filing of the grievance complaint that gave rise to such finding of misconduct in the instant case, the Statewide Grievance Committee or the reviewing committee shall direct the disciplinary counsel to file a presentment against the respondent in the Superior Court. . . . The sole issue to be determined by the court upon the presentment shall be the appropriate action to take as a result of the nature of the misconduct in the instant case and the cumulative discipline issued concerning the respondent within such five year period. Such action shall be in the form of a judgment dismissing the complaint or imposing discipline as follows: reprimand, suspension for a period of time, disbarment or such other discipline as the court deems appropriate. This may include conditions to be fulfilled by the respondent before he or she may apply for readmission or reinstatement. . . ."

appropriate discipline. On appeal, the respondent claims that the court (1) erred by failing to consider that the delay in the underlying disciplinary proceedings violated his due process rights and (2) abused its discretion by suspending him from the practice of law for a period of ninety days. We affirm the judgment of the trial court.

The record reveals the following relevant facts and procedural history. The respondent was admitted to the Connecticut bar on October 5, 1976. Prior to the commencement of the present action, the respondent received three disciplinary reprimands between August 14, 2015, and May 19, 2017. Two of the reprimands were issued by the grievance committee, and the third was a court-issued reprimand.[2]

On September 26, 2018, the grievance committee received a letter of referral from an attorney retained by a prior client of the respondent. Following a preliminary investigation, the grievance committee, on or about November 6, 2018, charged the Litchfield Judicial District Grievance Panel (first grievance panel or complainant) with "determining whether to conduct an investigation into this matter pursuant to Practice Book [§] 2-29 (e) (1), or to initiate a complaint pursuant to [Practice Book §] 2-32 (a), or both." On December 27, 2018, the first grievance panel filed a grievance complaint (complaint) against the respondent with the statewide bar counsel (bar counsel) in accordance with Practice Book § 2-32 (a).[3] The first grievance panel will hereafter be referred to as the complainant.

[2] In its August 29, 2022 memorandum of decision, the court found by clear and convincing evidence that the respondent had "an extensive recent disciplinary history [that included] [1] [a] reprimand issued by the Statewide Grievance Committee on August 14, 2015, accompanied by an order to take two continuing legal education classes; [2] a reprimand issued by the Statewide Grievance Committee on February 10, 2016; [3] a court-issued reprimand by Judge Bellis on May 19, 2017; and [4] [an] October 24, 2018 order by Judge Arnold that he take two continuing legal education classes."

[3] The process that governs the procedural history of this case, which ultimately resulted in a determination that probable cause existed that the respondent was guilty of misconduct, can be found in Practice Book § 2-

In accordance with the procedure prescribed in Practice Book § 2-32 (a), the bar counsel reviewed and processed the complaint, which alleged that, in the course of representing a prior client, the respondent's inaction resulted in the dismissal, with prejudice, of that client's motor vehicle-personal injury lawsuit. The complaint was then reviewed by a second grievance panel (second grievance panel) in the New Haven judicial district, which sent notice to the complainant and the respondent in accordance with § 2-32 to allow the parties an opportunity to respond to the inquiry. Upon completion of its review, the second grievance panel determined that "the record supported a finding of probable cause that the [r]espondent engaged in misconduct." The second grievance panel sent a copy of its record to the grievance committee and disciplinary counsel for further proceedings, and provided notice to the parties as required by § 2-32 (i) and (k).

32, which provides in relevant part: "(a) Any person, including disciplinary counsel, or a grievance panel on its own motion, may file a written complaint . . . alleging attorney misconduct . . . . Complaints against attorneys shall be filed with the statewide bar counsel. . . . [T]he statewide bar counsel shall review the complaint and . . .

"(1) forward the complaint to a grievance panel in the judicial district in which the respondent maintains his or her principal office or residence . . . .

"(f) The grievance panel, with the assistance of the grievance counsel assigned to it, shall investigate each complaint to determine whether probable cause exists that the attorney is guilty of misconduct. . . .

"(i) . . . (1) If the panel determines that probable cause exists that the respondent is guilty of misconduct, it shall file the following with the Statewide Grievance Committee and with the disciplinary counsel: (A) its written determination that probable cause exists that the respondent is guilty of misconduct, (B) a copy of the complaint and response, (C) a transcript of any testimony heard by the panel, (D) a copy of any investigatory file and copies of any documents, transcripts or other written materials which were available to the panel. These materials shall constitute the panel's record in the case. . . .

"(k) The panel shall notify the complainant, the respondent, and the Statewide Grievance Committee of its determination. The determination shall be a matter of public record if the panel determines that probable cause exists that the respondent is guilty of misconduct."

The grievance committee received the determination of probable cause and the related records on or about April 17, 2019. It thereafter referred the matter to a reviewing committee of the Statewide Grievance Committee (reviewing committee) on April 29, 2019, to hold a hearing and render a decision regarding the complaint, in accordance with Practice Book § 2-35 (a) and (c).[4]

What followed was a series of continuances, postponements, and other occurrences that ultimately delayed the hearing for eight months.[5] Although that hearing commenced on the morning of February 13, 2020, the parties were not able to complete the hearing because the respondent's counsel had an afternoon scheduling conflict with another matter. The reviewing committee granted a recess and subsequently sent notice to the parties that the hearing was to continue on April 23, 2020. By mid-March, 2020, however, the Judicial Branch had reduced its operations to hear only top priority matters as a result of the COVID-19 pandemic. On June 11, 2021, the requirement for a reviewing committee to be physically present at a contested hearing was eliminated, and the matter was scheduled for a virtual hearing on July 13, 2021. A lack of quorum due to an emergency with a reviewing committee member caused

[4] Practice Book § 2-35 provides in relevant part: "(a) Upon receipt of the record from a grievance panel, the Statewide Grievance Committee may assign the case to a reviewing committee . . . .

"(c) If the grievance panel determined that probable cause exists that the respondent is guilty of misconduct, the Statewide Grievance Committee or the reviewing committee shall hold a hearing on the complaint. . . ."

[5] The reviewing committee's January 21, 2022 decision detailed that the matter initially was scheduled for June 13, 2019. Thereafter, disciplinary counsel requested two separate continuances, and the respondent requested one. Each party consented to the other party's requests for continuances. Separately, additional postponements were necessary to permit the respondent to appear via videoconference and because of technical difficulties that arose with the videoconferencing equipment. A final continuance was needed prior to scheduling the February 13, 2020 hearing because an interpreter was not available.

the matter to again be rescheduled, this time to September 28, 2021.

Approximately two weeks prior to the commencement of the September 28, 2021 hearing, the respondent filed a motion to dismiss the grievance complaint, arguing, inter alia, that he has been "irreparably harmed and prejudiced by . . . the prior delays, and his due process rights to a fair and expeditious hearing have been violated." Disciplinary counsel filed an objection to the respondent's motion to dismiss, arguing, inter alia, that the respondent had failed to demonstrate any prejudice due to the delays.

During the hearing on September 28, 2021, the reviewing committee heard oral arguments regarding the motion to dismiss. Disciplinary counsel argued that the respondent had alleged prejudice as a result of the delay in the proceedings but had not offered any proof of actual prejudice. The reviewing committee denied the motion to dismiss, then proceeded with the remainder of the hearing on the misconduct complaint.

The reviewing committee issued its written decision on January 21, 2022, as required by Practice Book § 2-35 (i). It stated that the respondent's motion to dismiss was denied because "[t]here was no evidence . . . that the [r]espondent [had] suffered any prejudice from the delay" and because "dismissal of the complaint solely for delay is expressly prohibited by . . . Practice Book [§ 2-35 (m)]."[6] The reviewing committee further concluded, "by clear and convincing evidence, that the [r]espondent [had] violated the Rules of Professional Conduct" and that the violation "warrants a reprimand." Finally, the reviewing committee stated that "[w]e

[6] Practice Book § 2-35 (m) provides in relevant part: "The failure of a reviewing committee to complete its action on a complaint within the period of time provided in this section shall not be cause for dismissal of the complaint. . . ."

would have ordered the respondent reprimanded for his conduct in this matter, but we are mandated to present him to the court based on his prior disciplinary history. Pursuant to Practice Book § 2-47 (d), because the [grievance committee] and the court have disciplined the respondent more than three times in complaints filed in the five year period prior to the filing of this grievance complaint . . . we direct the disciplinary counsel to file a presentment against the respondent in the Superior Court for the imposition of whatever discipline is deemed appropriate."

The respondent's counsel filed a request for review of that decision with the grievance committee, pursuant to Practice Book § 2-35 (k), arguing, inter alia, that "the extraordinary delay of almost three years in the adjudication of this grievance complaint, with the obvious prejudices to the respondent . . . is fundamentally unfair, has deprived the respondent of his right to the timely hearing compelled by due process, and has resulted in irreparable prejudice and harm to him." The respondent further alleged that the delay: resulted in damage to his professional and business reputation, income, and emotional and physical well-being; caused an increase in the cost of litigating the matter over an extended period of time; and caused the parties' and witnesses' memories to be diminished, which was prejudicial to him. The grievance committee affirmed the decision of the reviewing committee on March 18, 2022, and the respondent did not appeal from that decision.

On March 21, 2022, in compliance with the reviewing committee's direction contained in its January 21, 2022 decision, disciplinary counsel filed this presentment, noting that it was required to do so pursuant to Practice Book § 2-47 (d) because of the respondent's prior disciplinary history. The respondent filed a "motion to consider and adjudicate issues in appeal" on May 23, 2022, admitting that he did not file an appeal but nonetheless

requesting that the court adjudicate issues he wanted to raise from the committees' decisions. The court denied the motion as untimely.

During the presentment hearing on May 25, 2022, the court stated that the "level of inquiry is limited to the penalty to be imposed" and that the court is "bound by the findings" of the reviewing committee. The court heard testimony concerning both aggravating and mitigating factors. Disciplinary counsel discussed various aggravating factors, including, inter alia, the details of the current violation, multiple disciplinary offenses within a short time frame, the respondent's lack of remorse, his refusal to acknowledge the wrongful nature of his conduct, and his substantial experience in the practice of law. The respondent's counsel discussed several potential mitigating factors, including, inter alia, the respondent's history of good standing within his profession, the lack of a dishonest motive for the current violation, the declining health of the respondent's parents, and the respondent's own declining health. The respondent personally testified as to the delay in the disciplinary proceedings, personal problems involving his parents' health, and that restitution was made to his former client in the personal injury case that led to the presentment. Disciplinary counsel ultimately advocated for a thirty day suspension, and the respondent's counsel argued for dismissal, or, if the court believed discipline was necessary, a requirement that the respondent perform pro bono legal work.

The court issued its memorandum of decision on August 29, 2022, noting that its role in the proceeding was circumscribed by Practice Book § 2-47 (d), which provides, inter alia, that "[t]he sole issue to be determined by the court upon the presentment shall be the appropriate action to take as a result of the nature of the misconduct in the instant case and the cumulative discipline issued concerning the respondent within

such five year period." The court stated that the "current presentment involves the respondent's failure to communicate with and adequately pursue the interests of his clients. . . . To the extremely limited extent he was willing to recognize these failures during his testimony before this court, he attributed them to issues in his personal life, specifically the stresses and responsibility brought on by the deteriorating health of his aging parents." The court stated that "the Practice Book gives this court the power and responsibility to consider . . . the totality of the circumstances in fashioning a penalty. Unfortunately, based on the circumstances, particularly the respondent's lack of any real sense of responsibility for the behavior at issue or the expression of any level of contrition, the court is not convinced that any level of disciplinary action will serve to guarantee that these issues will not arise again." The court entered an order suspending the respondent from the practice of law for ninety days and, pursuant to Practice Book § 2-64, appointed a trustee to protect the interests of the respondent's clients. From that judgment, the respondent now appeals.

I

The respondent first claims that the court erred in failing to consider his claim that his due process rights were violated by the delay in the underlying disciplinary proceedings. More specifically, the respondent argues that the court's belief that it could not consider his due process claims flowing from that delay and the resulting prejudice was an error of law that warrants dismissal of the case. In response, disciplinary counsel argues that the respondent's underlying claim that his due process rights were violated is unreviewable because the respondent failed to appeal from the reviewing committee's denial of his motion to dismiss based on the same argument, as required by Practice Book § 2-47 (d) (2). As such, disciplinary counsel contends that the court

properly refused to consider the respondent's due process claim in the presentment hearing. We agree with disciplinary counsel.

Whether a court correctly determines that reviewing a due process violation is outside its scope of authority is a question of law over which we exercise plenary review. See *AvalonBay Communities, Inc.* v. *Plan & Zoning Commission*, 260 Conn. 232, 239–40, 796 A.2d 1164 (2002).

The respondent first raised the due process claim in his September 15, 2021 motion to dismiss before the reviewing committee, asserting that "his due process rights to a fair and expeditious hearing have been violated," and that, as a result, he was "irreparably harmed and prejudiced by this and the prior delays . . . ." The reviewing committee denied the motion after finding that "[t]here was no evidence that . . . the respondent suffered any prejudice from the delay." The reviewing committee additionally concluded that the respondent had violated the Rules of Professional Conduct, the violation warranted a reprimand and, because it was his fourth violation in less than five years, directed disciplinary counsel to file a presentment against the respondent in accordance with Practice Book § 2-47 (d). The grievance committee affirmed the decision of the reviewing committee on March 18, 2022, over the respondent's objections that his due process rights were violated and that he suffered prejudice as a result of the delays in the proceedings. The respondent did not appeal from that decision.

In resolving this claim, we note that an appeal challenging the adjudication of issues arising from a disciplinary hearing must be reviewed in accordance with Practice Book § 2-38 (a) through (f), which provides thirty days for a respondent to file an appeal with the court. Moreover, Practice Book § 2-47 (d) (2) provides:

"If the respondent has appealed the issuance of a finding of misconduct made by the Statewide Grievance Committee or the reviewing committee, the court shall first adjudicate and decide that appeal in accordance with the procedures set forth in subsections (d) through (f) of Section 2-38. In the event the court denies the respondent's appeal of the finding of misconduct, the court shall then adjudicate the presentment brought under this section. *In no event* shall the court review the merits of the matters for which the prior reprimands were issued against the respondent." (Emphasis added.)

The respondent does not dispute that he failed to appeal from the denial of his motion to dismiss. Instead, he argues that he could not have taken an appeal at that juncture because Practice Book § 2-38 only allows for an appeal from a decision "imposing sanctions or conditions against the respondent, in accordance with [Practice Book §] 2-37 (a)," and the reviewing committee ordered presentment as opposed to imposing sanctions or conditions. We are unpersuaded.

First, in his motion filed on May 23, 2022, the respondent moved the court to "consider and adjudicate" issues he wanted to raise on appeal "pursuant to Practice Book § 2-47 (d) (2)," acknowledging that he had failed to timely appeal from the underlying disciplinary proceedings in accordance with subsections (d) through (f) of Practice Book § 2-38, as required by Practice Book § 2-47 (d) (2).[7] Second, subsections (d)

[7] Instead of filing an appeal, on May 23, 2022, the respondent filed a motion that he titled, "Motion to Consider and Adjudicate Issues in Appeal from Statewide Grievance Committee/Reviewing Committee." In this motion, the respondent moved that the court consider an unfiled, untimely appeal pursuant to Practice Book § 2-47 (d) (2) because "substantial rights of the [r]espondent have been prejudiced" by the decision of the grievance committee and subcommittees. The motion contained an accompanying affidavit from the respondent's counsel, stating, inter alia: "It was my intention and the intention of the [r]espondent . . . to appeal under Practice Book [§] 2-38 the aforementioned decision of the Statewide Grievance Committee/Reviewing Committee . . . . Due to a miscommunication within my office, the [a]ppeal

through (f) of § 2-38 provide in relevant part: "(d) The appeal shall be conducted by the court without a jury and shall be confined to the record. . . . (e) The respondent shall file a brief within thirty days after the filing of the record by the statewide bar counsel. . . . (f) Upon appeal, the court shall not substitute its judgment for that of the Statewide Grievance Committee or reviewing committee as to the weight of the evidence on questions of fact. The court shall affirm the decision of the committee unless the court finds that substantial rights of the respondent have been prejudiced because the committee's findings, inferences, conclusions, or decisions are: (1) in violation of constitutional provisions . . . ." The plain import of these provisions makes clear that the reviewing committee's denial of the respondent's motion to dismiss based on its conclusion that he had failed to demonstrate prejudice was a determination that was subject to appellate review as outlined therein. Put differently, the respondent attempts to assign error to the court when he simply failed to exercise fully the appellate rights available to him.

"[T]he law has established appropriate proceedings to which a judgment party may always resort when he deems himself wronged by the court's decision. . . . If he omits or neglects to test the soundness of the judgment by these or other direct methods available for that purpose, he is in no position to urge its defective or erroneous character when it is pleaded or produced in evidence against him in subsequent proceedings." (Internal quotation marks omitted.) *Sousa* v. *Sousa*, 322 Conn. 757, 771, 143 A.3d 578 (2016). "Consequently, a party who fails to appeal from an agency decision may not use a different action as a substitute for that appeal to achieve a de novo determination of a matter upon which they failed to take a timely appeal." (Internal

. . . was not filed . . . within the thirty . . . day time limit specified in Practice Book [§] 2-38."

quotation marks omitted.) *Peck* v. *Statewide Grievance Committee*, 198 Conn. App. 233, 248, 232 A.3d 1279 (2020).

We reiterate that, when a presentment is ordered under Practice Book § 2-47 (d) (1), "[t]he *sole issue* to be determined by the court upon the presentment shall be the appropriate action to take as a result of the nature of the misconduct . . . ." (Emphasis added.) Practice Book § 2-47 (d) (1). Although the court is bound by the reviewing committee's and grievance committee's findings of fact from the underlying hearing, the court may consider aggravating and mitigating factors when determining what action to take as a result of the misconduct. Importantly, consideration of aggravating and mitigating factors to inform a decision regarding discipline is a completely different inquiry than considering arguments that attack the underlying findings of fact by the reviewing or grievance committees. The latter is not permitted under Practice Book § 2-47 (d) (1). Consequently, any appeal from a finding of misconduct or the denial of a motion to dismiss must be taken before the matter is presented to the Superior Court.

In the present matter, the reviewing committee considered the merits of the respondent's motion to dismiss, which raised a due process argument based on purported prejudice caused by the excessive delay in the underlying disciplinary proceedings. In denying his motion, the reviewing committee concluded that "[t]here was no evidence that . . . the [r]espondent [had] suffered any prejudice from the delay." The respondent made identical due process arguments to the grievance committee in his request for review of the reviewing committee's decision but did not thereafter file an appeal challenging either the reviewing committee's decision or the grievance committee's affirmance of that decision. As a result, the finding that there was not sufficient evidence to demonstrate that

the respondent had suffered prejudice from the delayed proceedings is a final decision from which he failed to take an appeal. It follows that the respondent "may not use a different action as a substitute for [an] appeal to achieve a de novo determination of a matter upon which [he] failed to take a timely appeal." (Internal quotation marks omitted.) *Peck* v. *Statewide Grievance Committee*, supra, 198 Conn. App. 248. The respondent's failure to test the soundness of the reviewing committee's findings regarding his due process argument via a direct appeal is fatal, as he may not attempt to litigate the same issue in subsequent proceedings. See *Sousa* v. *Sousa*, supra, 322 Conn. 771.

In the same memorandum of decision, the reviewing committee found, "by clear and convincing evidence, that the [r]espondent [had] violated the Rules of Professional Conduct" and directed disciplinary counsel to file a presentment against the respondent in accordance with Practice Book § 2-47 (d). The respondent has not contested the underlying findings made by the reviewing committee that he did, in fact, engage in misconduct. Specifically, he did not take an appeal pursuant to § 2-47 (d) (2).

In sum, the reviewing committee determined that the delay in the disciplinary proceedings did not cause prejudice to the respondent. Having failed to test that finding by appeal, the respondent may not continue to argue—as a factual matter—that the delay prejudiced him. Although the respondent argues that he was deprived of due process during the disciplinary proceedings, he had sufficient process available to him by way of an appeal. As a result, the court did not err by failing to consider whether the delay in the disciplinary proceedings caused prejudice, both because the respondent had failed to appeal from that determination made by the reviewing committee, and because, pursuant to Practice Book § 2-47 (d) (1), the court was precluded

from considering any facts or evidence that did not directly address what action the court should take regarding the misconduct.

II

The respondent next claims that the court abused its discretion in suspending him from the practice of law for a period of ninety days. Specifically, the respondent argues that (1) the court expressly refused to consider the delay in the underlying disciplinary proceedings as a mitigating factor, and (2) under the circumstances, the ninety day suspension "was an excessive abuse of [the court's] discretion." We disagree with both arguments.

As an initial matter, we note that "[t]he trial court possesses inherent judicial power, derived from judicial responsibility for the administration of justice, to exercise sound discretion to determine what sanction to impose in light of the entire record before it. . . . It is well established that in sanctioning an attorney for violations of the Rules of Professional Conduct, courts are, as they should be, left free to act as may in each case seem best in this matter of most important concern to them and to the administration of justice. . . . Whether this court would have imposed a different sanction is not relevant. Rather, we must determine whether the trial court abused its discretion in determining the nature of the sanction. . . . We may reverse the court's decision [in sanctioning an attorney] only if that decision was unreasonable, unconscionable or arbitrary, and was made without proper consideration of the facts and law pertaining to the matter submitted." (Citations omitted; internal quotation marks omitted.) *Statewide Grievance Committee* v. *Egbarin*, 61 Conn. App. 445, 459–60, 767 A.2d 732, cert. denied, 255 Conn. 949, 769 A.2d 64 (2001).

A

The respondent first argues that the court committed legal error by operating under the mistaken belief that it was precluded from considering his due process rights and the effect of the delay in the underlying disciplinary proceedings as a mitigating factor when meting out the appropriate discipline. The respondent thus argues that the court's purported express refusal to consider the impact of the delay as a mitigating factor was an abuse of discretion based on an error of law.

Because the respondent alleges that the court's order imposing discipline was informed by an improper legal conclusion that it was precluded from considering a permissible mitigating factor, our review of that issue is plenary. "This court affords plenary review to conclusions of law reached by the trial court. . . . Under plenary review, we must decide whether the trial court's conclusions of law are legally and logically correct and find support in the record." (Internal quotation marks omitted.) *Weinshel, Wynnick & Associates, LLC* v. *Bongiorno*, 192 Conn. App. 768, 777, 218 A.3d 626 (2019).

A court presiding over a presentment hearing under Practice Book § 2-47 (d) (1) is not permitted to consider arguments that would attack the facts previously determined by the reviewing committee because "[t]he *sole issue* to be determined . . . shall be the appropriate action to take as a result of the nature of the misconduct . . . ." (Emphasis added.) The court *is* permitted, however, to consider aggravating and mitigating factors when determining the appropriate action or discipline to impose on the attorney. "Courts considering sanctions against attorneys measure the defendant's conduct against the [Rules of Professional Conduct (rules)]. Although the rules define misconduct, they do not provide guidance for determining what sanctions are

appropriate. . . . Connecticut courts reviewing attorney misconduct, therefore, have consulted the American Bar Association's Standards for Imposing Lawyer Sanctions [ABA standards] . . . . Although the [ABA] standards have not been officially adopted in Connecticut, they are used frequently by the Superior Court in evaluating attorney misconduct and in determining discipline . . . . [A]fter a finding of misconduct, a court should consider: (1) the nature of the duty violated; (2) the attorney's mental state; (3) the potential or actual injury stemming from the attorney's misconduct; and (4) the existence of aggravating or mitigation factors." (Citation omitted; internal quotation marks omitted.) *Disciplinary Counsel* v. *Serafinowicz*, 160 Conn. App. 92, 99, 123 A.3d 1279, cert. denied, 319 Conn. 953, 125 A.3d 531 (2015).

The ABA Standards list aggravating factors as follows. "Aggravating factors include: (a) prior disciplinary offenses; (b) dishonest or selfish motive; (c) a pattern of misconduct; (d) multiple offenses; (e) bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency; (f) submission of false evidence, false statements, or other deceptive practices during the disciplinary process; (g) refusal to acknowledge wrongful nature of conduct; (h) vulnerability of victim; (i) substantial experience in the practice of law; (j) indifference to making restitution; [and] (k) illegal conduct, including that involving the use of controlled substances." A.B.A., Annotated Standards for Imposing Lawyer Sanctions (2019) standard 9.22, p. 451. The standards also list the following as mitigating factors: "(a) absence of a prior disciplinary record; (b) absence of a dishonest or selfish motive; (c) personal or emotional problems; (d) timely good faith effort to make restitution or to rectify consequences of misconduct; (e) full and free disclosure to disciplinary board or cooperative

attitude toward proceedings; (f) inexperience in the practice of law; (g) character or reputation; (h) physical disability; (i) mental disability or chemical dependency . . . (j) *delay in disciplinary proceedings*; (k) imposition of other penalties or sanctions; (l) remorse; [and] (m) remoteness of prior offenses." (Emphasis added.) A.B.A., Annotated Standards for Imposing Lawyer Sanctions (2019) standard 9.32, p. 487.

Although the ABA Standards are frequently used as a guide for courts in determining appropriate discipline, "[t]he Standards, originally promulgated in 1986, have not formally been adopted by the judges of this state." (Internal quotation marks omitted.) *Burton* v. *Mottolese*, 267 Conn. 1, 55 n.50, 835 A.2d 998 (2003), cert. denied, 541 U.S. 1073, 124 S. Ct. 2422, 158 L. Ed. 2d 983 (2004). Accordingly, although "a court *should* consider . . . the existence of aggravating or mitigating factors"; (emphasis added); id., 55; there is no express requirement that it do so. Further, even when a court is provided with relevant mitigating evidence, it is free to reject that evidence. See *Disciplinary Counsel* v. *Serafinowicz*, supra, 160 Conn. App. 101.

The record reveals that, during the presentment hearing, disciplinary counsel discussed the aggravating factors relevant to this case, which included the respondent's prior disciplinary offenses, his refusal to acknowledge the wrongfulness of his actions or to express remorse, and his substantial experience in the practice of law. The respondent's counsel discussed the mitigating factors relevant to this case, which included the absence of a disciplinary record prior to the more recent history of violations, the absence of a dishonest or selfish motive, the respondent's personal problems, and his physical impairment. The respondent testified about the delay in the disciplinary proceedings, family health issues involving his parents, and stated that restitution had been made to his former client in the personal

injury case at issue. In its memorandum of decision, the court specifically referenced some of these aggravating and mitigating factors, including that the respondent "became overwhelmed by family health issues" as a result of "the deteriorating health of his aging parents," and that he had "an extensive recent disciplinary history" but demonstrated a "lack of any real sense of responsibility . . . or the expression of any level of contrition . . . ."

The crux of the respondent's claim of legal error centers on an exchange he had with the court during the presentment hearing. Prior to the respondent's testimony, the court made the following statement:

"I think this inquiry is limited because of my ruling. It is limited to the penalty. I certainly want to hear from [the respondent], I want to hear how he feels about things, but I'm not going to entertain a due process attack. I have already ruled on that . . . ." The respondent began his testimony by stating that "one of the mitigating factors is the delay in the disciplinary proceeding. . . . [T]his delay . . . has resulted in severe prejudice to me. . . . [It] denies me . . . due process of law, and it warrants a dismissal."

Then, instead of testifying as to the effect of the delays, the respondent provided exhaustive testimony detailing the factual timeline of the disciplinary proceeding—which included details about the changes to the reviewing committee, the extensions or continuances that were granted, and alleging that the grievance committee was "not following [its] own rules" or adhering to timelines regarding hearings. The record shows that the respondent's monologue extended well over four pages of the transcript before the court ultimately stated, "[t]ime," after which the following colloquy occurred:

"The Court: I've made clear the parameters of the hearing. I'm not considering this in my decision. I have a question for you.

"The Respondent: Yes, sir.

"The Court: Did you mess up and how do you feel about it?

"The Respondent: Did I mess up?

"The Court: Yep.

"The Respondent: I would say, under the facts, no, I didn't mess up . . . ."

Thereafter, the respondent testified more directly about the effect of the delayed proceedings, stating that he had been required to participate in multiple hearings, file motions, and incur additional costs as a result of the delays. The record further reveals that the respondent provided what amounted to an additional six pages of transcribed testimony before ultimately concluding by stating, "that's all I could really say, Your Honor."

The respondent construes the court's statements—"I think this inquiry is limited because of my ruling," and, "I'm not considering this in my decision"—to be an express refusal to consider the delay as a mitigating factor when meting out discipline that was informed by an incorrect conclusion of law that it was precluded from doing so. After a close review of the record, however, it is clear that the court interrupted and redirected the respondent because he was attempting to make the very due process attack the court expressly had warned it would not entertain. Further, the record reflects that, after the court's interruption and redirection, the respondent provided what amounted to an additional six pages of testimony regarding mitigating factors before concluding of his own accord.

Given this context, the respondent's assertion that the court improperly refused to consider the delay as a mitigating factor, as distinct from an improper reassertion of his due process claim, is not tenable. Evidence in the record suggests that the court provided the respondent ample time to testify as to the delay being a mitigating factor, heard this testimony, and only interrupted after he provided an extensive recitation of the timeline of the underlying disciplinary proceedings. The court was free to credit or reject this testimony as well as to exercise its discretion in considering evidence that might be irrelevant or cumulative. See *Disciplinary Counsel* v. *Serafinowicz*, supra, 160 Conn. App. 101. Further, "there is no requirement that the court set forth its express consideration of [specific] evidence in its memorandum of decision"; id.; thus, the absence of discussion of the delay as a mitigating factor in the court's decision is of no consequence. On the basis of our plenary review of the record before us, we cannot conclude that the trial court committed legal error in its determination of the appropriate discipline. Accordingly, the respondent's first argument fails.

B

The respondent's second and final argument is that, under the circumstances of this case, the ninety day suspension constituted an abuse of discretion. Specifically, the respondent argues that a ninety day suspension was excessive given that disciplinary counsel asked for only thirty days and that the discipline imposed is out of proportion to the offense committed in light of other cases that involved more egregious conduct. We disagree.

When a court is tasked with imposing discipline pursuant to Practice Book § 2-47 (d) (1), it must determine "the appropriate action to take as a result of the nature of the misconduct in the instant case *and* the cumulative

discipline issued concerning the respondent within such five year period." (Emphasis added.) As a result, the appropriate action is not fashioned solely in response to the nature of the misconduct in the present case, as it is under § 2-47 (a) but, rather, includes consideration of prior disciplinary measures imposed over the five year lookback period. The court has discretion to view the totality of the circumstances when determining the appropriate discipline. Further, under the abuse of discretion standard of review, "[e]very reasonable presumption should be given in favor of the correctness of the court's ruling." (Internal quotation marks omitted.) *Statewide Grievance Committee* v. *Spirer*, 247 Conn. 762, 781, 725 A.2d 948 (1999). "Absent a showing that the trial court has acted arbitrarily, we defer to the trial court's determination of the appropriate discipline." *Disciplinary Counsel* v. *Serafinowicz*, supra, 160 Conn. App. 102.

Here, as previously stated, the record reveals that the court heard evidence regarding relevant aggravating and mitigating factors. During the presentment hearing, the court asked both parties questions regarding those factors and provided ample time for their responses. In its memorandum of decision, the court made specific reference to several of the aggravating and mitigating factors, including the respondent's inability to meet his obligations due to becoming "overwhelmed by family health issues" relating to the "deteriorating health of his aging parents," the respondent's "extensive recent disciplinary history," his "refus[al] to communicate and/or cooperate with . . . a former client, a prospective client, or the grievance authorities" and "the extremely limited extent he was willing to recognize these failures . . . ." Ultimately, the court determined that, "based on the circumstances, particularly the respondent's lack of any real sense of responsibility for the behavior at issue or the expression of any level of contrition, the

court is not convinced that any level of disciplinary action will serve to guarantee that these issues will not arise again."

The respondent has not met his burden of demonstrating that the court acted arbitrarily by ordering a ninety day suspension. On the basis of the record before us, we cannot conclude that the discipline imposed was a clear abuse of discretion.

The judgment is affirmed.

In this opinion the other judges concurred.

SEAN MICHEL *v.* CITY OF HARTFORD
(AC 45563)

Elgo, Prescott and Keller, Js.

Syllabus

Pursuant to statute ((Rev. to 2019) § 31-51q), "[a]ny employer . . . who subjects any employee to discipline or discharge on account of the exercise by such employee of rights guaranteed by the first amendment to the United States Constitution or section 3, 4 or 14 of article first of the Constitution of the state, provided such activity does not substantially or materially interfere with the employee's bona fide job performance or the working relationship between the employee and the employer, shall be liable to such employee for damages caused by such discipline or discharge . . . ."

The plaintiff appealed to this court from the judgment rendered for the defendant city on his claims for free speech retaliation under § 31-51q and the federal statute (42 U.S.C. § 1983). The plaintiff, an employee of the defendant's police department, reported to his commander that C, a fellow employee, had complained to him that he was being subjected to discriminatory treatment on the basis of his race. The commander ordered the plaintiff not to get involved and assured the plaintiff that he would take care of C's complaint. C subsequently told the plaintiff that the commander stated that he was unable to help with C's complaint. C, on the advice of the plaintiff, reported his complaint to the police union and to the department's internal affairs division and openly acknowledged that the plaintiff had suggested that he do so. C also filed a complaint with the Commission on Human Rights and Opportunities (CHRO) alleging that he was the subject of unlawful racial discrimination. The plaintiff supported C's filing of the complaint and attempted

to protect him from further discrimination and retaliation within the department. Subsequently, the plaintiff was, inter alia, removed from certain supervisory positions, removed from certain assignments that would result in the receipt of overtime compensation, and assigned to allegedly inconvenient shifts after he returned from paternity leave. The plaintiff testified in support of C at a deposition in connection with C's CHRO complaint, and, after providing such testimony, the plaintiff was not selected to become the new commander of his unit. The plaintiff later testified favorably for C and against the defendant at a second deposition. Thereafter, the plaintiff was, inter alia, assigned to unfavorable shifts and was not selected for certain new positions. The trial court granted the defendant's motion to strike the plaintiff's operative complaint on the ground that the plaintiff had not sufficiently pleaded the claims of retaliation. *Held*:

1. The plaintiff could not prevail on his claim that the trial court improperly granted the defendant's motion to strike with regard to his claim under § 1983; the plaintiff failed to sufficiently plead facts that, if proven, would establish retaliation pursuant to an official policy, practice or custom, such that the defendant, as a municipality, could be held liable pursuant to § 1983 for the actions of its employees, as the plaintiff acknowledged that the conduct at issue did not involve a formal or official policy, he failed to allege any facts to demonstrate that the officers who engaged in the alleged retaliatory conduct were responsible for establishing final policy with respect to the subject matter in question, in order to be characterized as municipal policymakers, the pattern of misconduct alleged by the plaintiff was directed only at the plaintiff himself, and the plaintiff did not allege other constitutional violations, or that the officers' conduct was directed at anyone else, in order to establish that the defendant had a custom or practice of infringing on constitutional rights.

2. The trial court improperly granted the defendant's motion to strike the counts of the operative complaint asserting claims of retaliation in violation of § 31-51q:

   a. The defendant's argument that the operative complaint was devoid of any allegations as to what the plaintiff "actually said" in his deposition testimony and, therefore, that the allegations were insufficient to establish that his speech was on a matter of public concern was unavailing: the allegations set forth in the operative complaint, when construed in the manner most favorable to sustaining its legal sufficiency, were sufficient to demonstrate that the plaintiff was not making a statement pursuant to his official duties and, although testifying in criminal proceedings and certain civil proceedings may have been a part of the tasks that the plaintiff was paid to perform, there were no factual allegations to indicate that providing deposition testimony in the context of a fellow employee's discrimination proceeding was part of what the plaintiff, as a police officer, was employed to do; moreover, the allegations set forth

in the operative complaint were sufficient to establish that the plaintiff's speech was on the topic of racial discrimination against a fellow employee, which is a matter of public concern, and the allegations in the operative complaint, taken together, necessarily implied that the plaintiff's deposition testimony supported C's discrimination claim; furthermore, although the plaintiff failed to include allegations concerning the precise content of his testimony, it could reasonably be inferred from the allegations set forth in the operative complaint that the plaintiff in the present case was speaking out against discrimination in his testimony or that his testimony regarded the existence of discrimination in the workplace and, accordingly, the trial court improperly determined that the plaintiff failed to sufficiently allege that his speech addressed a matter of public concern.

b. The trial court erroneously concluded that the plaintiff was required to plead that his speech did not substantially or materially interfere with his job performance or the working relationship between him and his employer pursuant to § 31-51q; although the issue of whether a plaintiff making a § 31-51q claim must affirmatively plead noninterference was an open question that neither this court nor the Supreme Court had previously addressed, this court concluded that a plaintiff making a claim pursuant to § 31-51q does not have an affirmative burden to plead noninterference but, rather, a defendant may raise the issue of interference in a special defense.

Argued October 11, 2023—officially released June 11, 2024

Procedural History

Action to recover damages for, inter alia, retaliation, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Sheridan, J.*, granted in part the defendant's motion to strike; thereafter, the plaintiff withdrew the remaining count of his complaint; subsequently, the court, *Sheridan, J.*, granted the defendant's motion for judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Reversed in part*; *further proceedings*.

Christopher T. DeMatteo, for the appellant (plaintiff).

Nathalie Feola-Guerrieri, senior assistant corporation counsel, for the appellee (defendant).

Opinion

KELLER, J. The plaintiff, Sean Michel, appeals from the judgment rendered in favor of the defendant, the city of Hartford, following the partial granting of its motion to strike and the subsequent withdrawal of the remaining count set forth in the plaintiff's operative complaint. On appeal, the plaintiff contends that the court improperly granted the defendant's motion to strike as to counts one, two, and three of that complaint, which alleged free speech retaliation claims pursuant to General Statutes (Rev. to 2019) § 31-51q[1] and 42 U.S.C. § 1983. We agree with the plaintiff as to counts two and three of the operative complaint, which set forth the plaintiff's claims under § 31-51q, and, accordingly, reverse in part the judgment of the trial court.

We begin by setting forth the facts, as alleged in the plaintiff's operative complaint,[2] and the procedural history of this case. The plaintiff is employed by the Hartford Police Department (department). In February, 2016, a fellow employee, Detective Samuel Cruz, complained to the plaintiff that he was being subjected to discriminatory treatment by his supervisor, Sergeant Shawn St. John, on the basis of his race. Cruz told the plaintiff that St. John was declining to enter Cruz' overtime into the department's payroll system.

The plaintiff immediately reported Cruz' complaint to Lieutenant Brandon O'Brien, the commander of the vice, intelligence, and narcotics unit of the department, in which the plaintiff was a sergeant at that time. O'Brien ordered the plaintiff not to get involved and assured the plaintiff that he would take care of Cruz' complaint.

[1] Hereinafter, all references to § 31-51q in this opinion are to the 2019 revision of the statute.

[2] "[I]n ruling on a motion to strike, we take the facts alleged in the complaint as true." (Internal quotation marks omitted.) *Ring* v. *Litchfield Bancorp*, 174 Conn. App. 813, 815, 167 A.3d 462 (2017).

Cruz subsequently told the plaintiff that O'Brien stated that he was unable to help with his complaint. The plaintiff told Cruz that O'Brien's response was "unacceptable" and suggested that Cruz contact their union or the department's investigative services bureau for further assistance. Cruz followed the plaintiff's advice and reported his complaint to the union and the department's internal affairs division, and he openly acknowledged that the plaintiff had suggested that he do so.

In September, 2017, Cruz filed a complaint with the Commission on Human Rights and Opportunities (CHRO) alleging that he was the subject of unlawful racial discrimination. The plaintiff supported Cruz' filing of the complaint and "attempted to protect him" from further discrimination and retaliation within the department.

Subsequently, the plaintiff was, among other things, removed from certain supervisory positions; removed from certain assignments that would result in the receipt of overtime compensation; assigned to "the most inconvenient shift possible for his family needs" after he returned from paternity leave, despite a previous agreement that he could work a shift that would enable him to assist his wife with childcare; and, even though he was promoted from the rank of sergeant to lieutenant, assigned to "a punishment position in patrol, which did not carry the same benefits as other lieutenant positions . . . ."

On October 23, 2018, the plaintiff testified at a deposition in connection with Cruz' CHRO complaint, and his testimony supported Cruz' allegations. When the deposition ended, an attorney for the defendant apologized to the plaintiff for the retaliation he already had endured and encouraged him to continue telling the truth. After providing this testimony, the plaintiff was not selected to become the new commander of the vice, intelligence, and narcotics unit, despite "his experience

and his background [making] him indisputably the best candidate for the position."

On December 20, 2019, the plaintiff testified at a second deposition on behalf of Cruz,[3] "testifying favorably for [Cruz] and against the defendant." Thereafter, the plaintiff was, among other things, assigned to unfavorable shifts that resulted in significant hardship for his family; was not selected for certain new positions, including one that would have accommodated his family's needs; and, when he followed his doctor's advice to take a stress leave and to obtain treatment, was threatened with discipline.

In October, 2020, the plaintiff commenced the present action against the defendant. On October 13, 2021, the plaintiff filed the operative complaint[4] consisting of six

[3] The trial court's memorandum of decision states that, on October 23, 2018, "the plaintiff testified on behalf of [Cruz] at a fact-finding hearing before the [CHRO]" and then, on December 20, 2019, the plaintiff provided deposition testimony in connection with a federal discrimination lawsuit that Cruz had filed. The court appears to have obtained these facts from the plaintiff's opposition to the defendant's motion to strike. The plaintiff's operative complaint, however, alleges that the plaintiff's October 23, 2018 testimony was provided in the context of a deposition for Cruz' CHRO complaint, not at a fact-finding hearing, and that his December 20, 2019 testimony was provided at a second deposition, without specifying that the deposition testimony was provided in connection with a separate federal discrimination action that Cruz had filed. On appeal, the parties do not address these discrepancies. For purposes of reviewing the decision on the motion to strike, we focus our analysis on the allegations set forth in the plaintiff's complaint. See *A.C. Consulting, LLC* v. *Alexion Pharmaceuticals, Inc.*, 194 Conn. App. 316, 325, 220 A.3d 890 (2019) (purpose of motion to strike is to challenge legal sufficiency of allegations in complaint); see also Practice Book § 10-39 (a).

[4] In the original complaint, the plaintiff alleged retaliation in violation of § 31-51q for the exercise of his rights guaranteed by article first, §§ 3, 4, and 14, of the Connecticut constitution. The defendant filed a request to revise the original complaint, requesting that the plaintiff set forth the particular statements that he alleged he made that were protected under the state constitution. The plaintiff filed an objection to the request to revise, arguing that the information requested by the defendant should be obtained through discovery, and the court sustained that objection. The defendant subsequently filed a motion to strike the original complaint, which the court

counts: retaliation in violation of § 1983 for the exercise of his rights guaranteed by the first amendment to the United States constitution (count one); retaliation in violation of § 31-51q for the exercise of his first amendment rights (count two); retaliation in violation of § 31-51q for the exercise of his rights guaranteed by article first, §§ 4 and 5, of the Connecticut constitution (count three); breach of contract (count four); breach of the implied covenant of good faith and fair dealing (count five); and intentional infliction of emotional distress (count six). All counts related to his allegations that he had been subjected to retaliation for "opposing racial discrimination" and providing truthful testimony in Cruz' legal matters.

On November 12, 2021, the defendant filed a motion to strike on the ground that the plaintiff had not sufficiently pleaded the claims set forth in his operative complaint[5] and argued that the plaintiff's claim for punitive damages failed because the defendant, as a matter of law, could not be liable for such damages. The plaintiff filed a memorandum in opposition to the defendant's motion to strike on January 18, 2022. On that same date, the trial court, *Sheridan*, *J.*, held a hearing on the motion. At the beginning of the hearing, the plaintiff's counsel conceded, as he had in his memorandum, that

marked off because the plaintiff indicated that he would file an amended complaint.

[5] The defendant also argued that the § 1983 claim set forth in count one of the operative complaint was barred by the statute of limitations. The court did not resolve the motion to strike as to count one on this ground, reasoning that the issue of the statute of limitations typically must be pleaded as a special defense, rather than by a motion to strike. See *Greco* v. *United Technologies Corp.*, 277 Conn. 337, 344 n.12, 890 A.2d 1269 (2006) ("[O]rdinarily, [a] claim that an action is barred by the lapse of the statute of limitations must be pleaded as a special defense, not raised by a motion to strike. . . . This is because a motion to strike challenges only the legal sufficiency of the complaint and might . . . deprive a plaintiff of an opportunity to plead matters in avoidance of the statute of limitations defense." (Citations omitted; internal quotation marks omitted.)).

count six and the part of count three relying on article first, § 5, of the Connecticut constitution should be stricken. Nevertheless, he maintained that the plaintiff adequately pleaded facts sufficient to state causes of action in the remaining counts, including the part of count three relying on article first, § 4, of the Connecticut constitution, and argued that § 31-51q expressly authorizes punitive damages.

On May 17, 2022, the court issued a memorandum of decision granting the motion to strike as to counts one, two, three, four, and five but denying the motion to strike as to the prayer for relief regarding punitive damages. The court took no action as to count six given the plaintiff's representation in his memorandum in opposition to the motion to strike that he would withdraw that count.

As to count one of the plaintiff's complaint, alleging a violation of § 1983,[6] the court concluded that the plaintiff failed to allege sufficient facts to establish that (1) the defendant's policies, practices, or customs led to a violation of his constitutional rights, as required for municipal liability, and (2) his deposition testimony was speech on a matter of public concern, as required for protection under the first amendment.[7] As to counts

[6] "A first amendment retaliation claim under § 1983 requires that a [plaintiff] establish three elements: (1) that the speech or conduct at issue was protected, (2) that the defendant took adverse action against the plaintiff, and (3) that there was a causal connection between the protected speech and the adverse action." (Internal quotation marks omitted.) *Jolley* v. *Vinton*, 196 Conn. App. 379, 384, 229 A.3d 1198 (2020). In addition, "[p]laintiffs who seek to impose liability on local governments under § 1983 must prove that action pursuant to official municipal policy caused their injury." (Internal quotation marks omitted.) *Edgewood Street Garden Apartments, LLC* v. *Hartford*, 163 Conn. App. 219, 231, 135 A.3d 54, cert. denied, 321 Conn. 903, 136 A.3d 642 (2016).

[7] In its memorandum of decision, the court set forth two ways in which the plaintiff failed to sufficiently allege that his speech was constitutionally protected under the federal constitution. The court first explained that, although the plaintiff relied on *Lane* v. *Franks*, 573 U.S. 228, 134 S. Ct. 2369, 189 L. Ed. 2d 312 (2014), which held that the first amendment protects

two and three of the plaintiff's complaint, alleging violations of § 31-51q,[8] the court concluded that the plaintiff failed to allege sufficient facts to establish that (1) his deposition testimony was speech on a matter of public concern, as required for protection under both the federal and state constitutions,[9] and (2) his speech did not substantially or materially interfere with his job performance or the working relationship between him and his employer.

The plaintiff did not replead, and the defendant filed a motion for judgment on June 6, 2022. The following day, on June 7, 2022, while the motion for judgment was still pending, the plaintiff filed an appeal from the court's May 17, 2022 decision granting the defendant's motion to strike. This court subsequently ordered the parties to file memoranda addressing whether the original appeal should be dismissed for lack of jurisdiction

a public employee who provides truthful sworn testimony, compelled by subpoena, outside the scope of his ordinary job responsibilities; id., 238; the plaintiff failed to allege that his deposition testimony was compelled by subpoena. The court also reasoned that the plaintiff failed to allege that he provided testimony on a matter of public concern rather than the personal grievance of another employee, such as evidence necessary for the administration of justice or a complaint of discrimination connected to a broader policy or practice of systemic discrimination.

[8] General Statutes (Rev. to 2019) § 31-51q provides in relevant part: "Any employer . . . who subjects any employee to discipline or discharge on account of the exercise by such employee of rights guaranteed by the first amendment to the United States Constitution or section 3, 4 or 14 of article first of the Constitution of the state, provided such activity does not substantially or materially interfere with the employee's bona fide job performance or the working relationship between the employee and the employer, shall be liable to such employee for damages caused by such discipline or discharge, including punitive damages, and for reasonable attorney's fees as part of the costs of any such action for damages. . . ."

[9] In the context of the plaintiff's § 31-51q claim under the federal constitution, as set forth in count two, the court explained: "As discussed in connection with the plaintiff's § 1983 claim in count one, the plaintiff's speech did not address a matter of public concern, but rather was intended to support and corroborate the personal grievances of another employee." See footnote 7 of this opinion. The court ruled that the plaintiff's § 31-51q claim under the state constitution, as set forth in count three, failed for the same reason.

because judgment had not been rendered on the stricken counts of the operative complaint and because count six of the complaint, which the plaintiff had represented that he would withdraw, had not been withdrawn and therefore remained pending. On August 9, 2022, the plaintiff filed with the trial court a withdrawal of count six of the operative complaint and, on August 17, 2022, the trial court granted the defendant's motion for judgment. This amended appeal followed.[10]

At the outset, we note the standard of review and legal principles that apply to the plaintiff's claims. "A motion to strike shall be used whenever any party wishes to contest . . . the legal sufficiency of the allegations of any complaint . . . or of any one or more counts thereof, to state a claim upon which relief can be granted . . . ." Practice Book § 10-39 (a). "Appellate review of a trial court's decision to grant a motion to strike is plenary. . . . We take the facts to be those alleged in the complaint that has been stricken and we construe the complaint in the manner most favorable to sustaining its legal sufficiency. . . . It is fundamental that in determining the sufficiency of a complaint challenged by a defendant's motion to strike, all well-pleaded facts and those facts necessarily implied from the allegations are taken as admitted." (Citation omitted; internal quotation marks omitted.) *A.C. Consulting, LLC* v. *Alexion Pharmaceuticals, Inc.*, 194 Conn. App. 316, 325, 220 A.3d 890 (2019); see also *Doe* v. *Cochran*, 332 Conn. 325, 333, 210 A.3d 469 (2019) ("we note that [w]hat is necessarily implied [in an allegation] need not be expressly alleged" (internal quotation marks omitted)). "Indeed, pleadings must be construed broadly and realistically, rather than narrowly and technically." (Internal quotation marks omitted.) *Sepega* v.

[10] This court subsequently denied a motion to dismiss the original appeal that it had sua sponte filed on the same date as its order for supplemental memoranda. This court ordered that "the appeal as amended may proceed."

DeLaura, 326 Conn. 788, 791, 167 A.3d 916 (2017). We now address the plaintiff's claims in turn.

I

First, the plaintiff claims that the court improperly granted the defendant's motion to strike count one of his operative complaint alleging retaliation in violation of § 1983 for the exercise of his rights guaranteed by the first amendment to the federal constitution. Specifically, he contends that, contrary to the court's conclusion, he adequately pleaded facts to establish that the defendant's policies, practices, or customs led to a violation of his constitutional rights, as required for municipal liability. We are not persuaded.[11]

"A municipality or other local government may be liable under [§ 1983] if the governmental body itself subjects a person to a deprivation of rights or causes a person to be subjected to such deprivation. See *Monell* v. *New York City Dept. of Social* [*Services*], 436 U.S. 658, 692 [98 S. Ct. 2018, 56 L. Ed. 2d 611] (1978) [quoting 42 U.S.C. § 1983]. But, under § 1983, local governments are responsible only for their own illegal acts. . . . They are not vicariously liable under § 1983 for their employees' actions. . . . Plaintiffs who seek to impose liability on local governments under § 1983 must prove that action pursuant to official municipal policy caused their injury. . . .

"[I]t is not enough for a § 1983 plaintiff merely to identify conduct properly attributable to the municipality. The plaintiff must also demonstrate that, through

[11] The plaintiff also contends that the court improperly concluded that he failed to sufficiently allege that his speech was on a matter of public concern, as required for protection under the first amendment. As set forth in part II of this opinion, we agree with that contention. Nevertheless, the plaintiff's failure to plead sufficient facts to establish municipal liability is fatal to his § 1983 claim.

Moreover, in light of our conclusion as to municipal liability, we need not reach the defendant's alternative ground for affirmance that the plaintiff's § 1983 claim is time barred by the statute of limitations.

its deliberate conduct, the municipality was the moving force behind the injury alleged. That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights. Where a plaintiff claims that a particular municipal action itself violates federal law, or directs an employee to do so, resolving these issues of fault and causation is straightforward. . . . Where [however] a plaintiff claims that the municipality has not directly inflicted an injury, but nonetheless has caused an employee to do so, rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employee." (Citation omitted; internal quotation marks omitted.) *Edgewood Street Garden Apartments, LLC* v. *Hartford*, 163 Conn. App. 219, 231–32, 135 A.3d 54, cert. denied, 321 Conn. 903, 136 A.3d 642 (2016).

In the present case, the plaintiff failed to sufficiently plead facts that, if proven, would establish retaliation pursuant to an official policy, practice or custom, such that the defendant, as a municipality, could be held liable pursuant to § 1983 for the actions of its employees. The plaintiff acknowledges that the conduct at issue does not involve a formal or official policy. Nevertheless, he contends that he alleged a pattern of adverse employment actions taken against him by his superiors, who were "effectively the policymakers of the department," which was sufficient to constitute a policy or custom required for municipal liability. "[M]unicipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances." *Pembaur* v. *Cincinnati*, 475 U.S. 469, 480, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986). In addition, "*Monell*'s policy or custom requirement is satisfied where a local government is faced with a pattern of misconduct and does

nothing, compelling the conclusion that the local government has acquiesced in or tacitly authorized its subordinates' unlawful actions. . . . Such a pattern, if sufficiently persistent or widespread as to acquire the force of law, may constitute a policy or custom within the meaning of *Monell*." (Citations omitted.) *Reynolds* v. *Giuliani*, 506 F.3d 183, 192 (2d Cir. 2007).

The plaintiff failed to allege any facts to demonstrate that the officers who engaged in the alleged retaliatory conduct were "responsible for establishing final policy with respect to the subject matter in question," in order to be characterized as municipal policymakers. *Pembaur* v. *Cincinnati*, supra, 475 U.S. 483–84. Moreover, the "pattern" of misconduct alleged by the plaintiff was directed only at the plaintiff himself. The plaintiff did not allege other constitutional violations, or that the officers' conduct was directed at anyone else, in order to establish that the defendant had a custom or practice of infringing on constitutional rights. See *Reynolds* v. *Giuliani*, supra, 506 F.3d 192 (misconduct by subordinate municipal employee other than policymaker must be "sufficiently persistent or widespread" as to indicate pattern "acquir[ing] the force of law"); see also *St. Louis* v. *Praprotnik*, 485 U.S. 112, 128, 108 S. Ct. 915, 99 L. Ed. 2d 107 (1988) (plaintiff's failure to allege that relevant conduct "was ever directed against anyone other than himself" supported conclusion that city could not be held liable under *Monell*); *Dean* v. *Wexford Health Sources, Inc.*, 18 F.4th 214, 240 (7th Cir. 2021) ("[c]onsistent with the Supreme Court's guidance, we have repeatedly rejected *Monell* claims that rest on the plaintiff's individualized experience without evidence of other constitutional violations"); *Jones* v. *East Haven*, 691 F.3d 72, 82 (2d Cir. 2012) (there must be "sufficient instances of tolerant awareness" by supervisors of abusive conduct to support inference that they had policy, custom or usage of acquiescence in such abuse), cert.

denied, 571 U.S. 940, 134 S. Ct. 125, 187 L. Ed. 2d 255 (2013). Accordingly, the plaintiff failed to sufficiently allege an official policy, practice or custom as required for municipal liability under § 1983. Therefore, we conclude that the plaintiff's § 1983 claim was properly stricken.

II

The plaintiff also claims that the court improperly granted the defendant's motion to strike counts two and three of his operative complaint asserting claims of retaliation in violation of § 31-51q for the exercise of his free speech rights pursuant to the first amendment to the United States constitution and article first, § 4, of the Connecticut constitution. Specifically, he contends that (1) he sufficiently pleaded facts that, if proven, would establish that his deposition testimony was constitutionally protected as speech on a matter of public concern, and (2) he was not required to allege facts to establish that his speech did not substantially or materially interfere with his job performance or the working relationship between him and his employer. We agree.

A

The plaintiff first contends that the allegations in the operative complaint were sufficient to establish that he provided testimony in support of a fellow employee's race discrimination claim, which, he argues, is speech on a matter of public concern. The defendant responds that the operative complaint was devoid of any allegations as to what the plaintiff "actually said" in his deposition testimony and, therefore, the allegations were insufficient to establish speech on a matter of public concern. We agree with the plaintiff.

"[Section] 31-51q provides a cause of action for damages for an employee who has been disciplined or discharged on account of the exercise by such employee

of various constitutional rights including the freedom of speech." (Footnote omitted.) *D'Angelo* v. *McGoldrick*, 239 Conn. 356, 357, 685 A.2d 319 (1996). Specifically, General Statutes (Rev. to 2019) § 31-51q provides in relevant part: "Any employer . . . who subjects any employee to discipline or discharge on account of the exercise by such employee of rights guaranteed by the first amendment to the United States Constitution or section 3, 4 or 14 of article first of the Constitution of the state, provided such activity does not substantially or materially interfere with the employee's bona fide job performance or the working relationship between the employee and the employer, shall be liable to such employee for damages caused by such discipline or discharge, including punitive damages, and for reasonable attorney's fees as part of the costs of any such action for damages. . . ."

To determine whether the plaintiff sufficiently alleged that his deposition testimony was constitutionally protected, which is "[a] clear prerequisite to the application of § 31-51q"; *Schumann* v. *Dianon Systems, Inc.*, 304 Conn. 585, 600, 43 A.3d 111 (2012); we first turn to the applicable constitutional principles governing the protected status of employee speech under the federal constitution. In the public employment setting, "employees must generally by necessity . . . accept certain limitations on their [f]irst [a]mendment freedoms because, as government insiders, their speech can contravene governmental policies or impair the proper performance of governmental functions. . . . Still, a public employee does not relinquish all [f]irst [a]mendment rights otherwise enjoyed by citizens just by reason of his or her employment." (Citations omitted; internal quotation marks omitted.) *Heim* v. *Daniel*, 81 F.4th 212, 223 (2d Cir. 2023); see also *Schumann* v. *Dianon Systems, Inc.*, supra, 601 ("it is well established that a

. . . government may not compel individuals to relinquish their first amendment rights as a condition to obtaining government employment" (internal quotation marks omitted)).

"In *Pickering* v. *Board of Education*, [391 U.S. 563, 568, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968)] . . . the [United States Supreme Court] . . . set forth a general principle governing the constitutionality of government restrictions on the speech of its employees: in evaluating the constitutionality of government restrictions on an employee's speech, a court must arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the [s]tate, as an employer, in promoting the efficiency of the public services it performs . . . .

"In *Connick* v. *Myers*, [461 U.S. 138, 150, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983)] the court added a modification to the general balancing test promulgated in *Pickering*. Under *Connick*, if a government employee's speech cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary . . . to scrutinize the reasons for [his or] her discharge. . . . The court reasoned that if an employee's speech addresses matters of exclusively private concern, the government interest in latitude [to manage] their offices, without intrusive oversight by the judiciary . . . would outweigh the first amendment interests in the speech, absent the most unusual circumstances . . . ." (Citation omitted; internal quotation marks omitted.) *Schumann* v. *Dianon Systems, Inc.*, supra, 304 Conn. 601–602.

Subsequently, in *Garcetti* v. *Ceballos*, 547 U.S. 410, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006), the court emphasized that "[u]nderlying [its] cases has been the premise that while the [f]irst [a]mendment invests public employees with certain rights, it does not empower

them to 'constitutionalize the employee grievance.' " Id., 420. Thus, the court concluded that, "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for [f]irst [a]mendment purposes, and the [c]onstitution does not insulate their communications from employer discipline." Id., 421. Our Supreme Court has explained that "*Garcetti* adds a threshold layer of analysis, requiring courts to first determine whether an employee is speaking pursuant to his official duties before turning to the remainder of the first amendment analysis set forth in *Pickering* and *Connick*." *Schumann* v. *Dianon Systems, Inc.*, supra, 304 Conn. 604.

Our state constitution, however, provides broader protection than its federal counterpart in this context. See *Trusz* v. *UBS Realty Investors, LLC*, 319 Conn. 175, 191–210, 123 A.3d 1212 (2015). In *Trusz*, our Supreme Court concluded that the state constitution "incorporates a slightly modified form of the *Pickering/Connick* test"; id., 191; and that the *Garcetti* standard does not apply to claims arising under the state constitution. Id., 210. The court determined that "[the] modified *Pickering/Connick* balancing test [set forth in Justice Souter's dissenting opinion in *Garcetti*], which recognizes both the state constitutional principle that speech on *all* subjects should be protected to the maximum extent possible and the important interests of an employer in controlling its own message and preserving workplace discipline, harmony and efficiency, provides the proper test for determining the scope of a public employee's rights under the free speech provisions of the state constitution when the employee is speaking pursuant to his or her official duties." (Emphasis in original.) Id. Under this standard, "if an employee's job related speech reflects a mere policy difference with the

employer, it is not protected. It is only when the employee's speech is on a matter of public concern and implicates an employer's official dishonesty . . . other serious wrongdoing, or threats to health and safety . . . that the speech trumps the employer's right to control its own employees and policies." (Citation omitted; internal quotation marks omitted.) Id., 212.

In the present case, we initially note that the allegations set forth in the operative complaint, when construed in the manner most favorable to sustaining its legal sufficiency, were sufficient to demonstrate that the plaintiff was not making a statement pursuant to his official duties. Accordingly, the differing legal standards set forth in *Garcetti* and *Trusz* are not implicated in the present case. See *Garcetti* v. *Ceballos*, supra, 547 U.S. 421 (when public employees "make statements pursuant to their official duties," employees are not "speaking as citizens" as required for protection under first amendment); *Trusz* v. *UBS Realty Investors, LLC*, supra, 319 Conn. 210 (modified *Pickering/Connick* test applies under speech provisions of Connecticut constitution "when the employee is speaking pursuant to his or her official duties").

The defendant suggests, to the contrary, that the plaintiff failed to allege that he was testifying outside the scope of his ordinary job responsibilities, and, therefore, (1) the allegations were legally insufficient to demonstrate that the plaintiff was "speak[ing] as a citizen" pursuant to *Garcetti* v. *Ceballos*, supra, 547 U.S. 423, and (2) the plaintiff was required to further allege that his testimony "implicate[d] [his] employer's official dishonesty . . . other serious wrongdoing, or threats to health and safety" pursuant to *Trusz* v. *UBS Realty Investors, LLC*, supra, 319 Conn. 212, which he also failed to do. The defendant specifically contends that "[i]t is reasonable to infer from the pleadings that as a police lieutenant, a routine and ordinary part of [the

plaintiff's] job responsibilities include providing truthful sworn testimony in judicial proceedings." We disagree.

Although testifying in criminal proceedings and certain civil proceedings may be a part of the tasks that the plaintiff was paid to perform, there are no factual allegations to indicate that providing deposition testimony *in the context of a fellow employee's discrimination proceeding* was part of what the plaintiff, as a police officer, was employed to do. See *Garcetti* v. *Ceballos*, supra, 547 U.S. 421–22. Indeed, even if the plaintiff's allegations suggest that his speech related to information he had obtained during the course of his employment, the concerns addressed in *Garcetti* and *Trusz* do not arise. See *Trusz* v. *UBS Realty Investors, LLC*, supra, 319 Conn. 212 ("even under *Garcetti*, an employee's speech outside the workplace about the employee's job related duties . . . is protected, as long as the speech involves a matter of public concern" (emphasis omitted)); see also *Lane* v. *Franks*, 573 U.S. 228, 238, 134 S. Ct. 2369, 189 L. Ed. 2d 312 (2014) ("Truthful testimony under oath by a public employee outside the scope of his ordinary job duties is speech as a citizen for [f]irst [a]mendment purposes. That is so even when the testimony relates to his public employment or concerns information learned during that employment.").[12]

Nevertheless, as set forth previously, the plaintiff's speech must have addressed a matter of public concern to be entitled to protection under both the federal and state constitutions. See *Trusz* v. *UBS Realty Investors*,

[12] In *Lane*, it was undisputed that the plaintiff's ordinary job responsibilities did not include testifying in court proceedings, and, therefore, the United States Supreme Court did not need to address whether truthful sworn testimony would constitute citizen speech under *Garcetti* when given as part of a public employee's ordinary job duties. See *Lane* v. *Franks*, supra, 573 U.S. 238 n.4.

LLC, supra, 319 Conn. 212; *Schumann* v. *Dianon Systems, Inc.*, supra, 304 Conn. 602. "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Connick* v. *Myers*, supra, 461 U.S. 147–48. "An employee's speech addresses a matter of public concern when the speech can be fairly considered as relating to any matter of political, social, or other concern to the community . . . ." (Internal quotation marks omitted.) *Schumann* v. *Dianon Systems, Inc.*, supra, 602.

We conclude that the allegations set forth in the operative complaint in the present case were sufficient to establish that the plaintiff's speech was on the topic of racial discrimination against a fellow employee, which is a matter of public concern.

Specifically, the plaintiff alleged in relevant part that Cruz complained to the plaintiff that his supervisor "was racially discriminating against him by declining to enter his overtime into the department's payroll system." The plaintiff alleged that he "immediately reported the complaint" to his supervisor and provided Cruz with advice regarding who to contact for further assistance. The plaintiff also alleged that, "[i]n September, 2017, [Cruz] filed an administrative complaint with the [CHRO] relating to his belief that he was the victim of unlawful racial discrimination," and the plaintiff "supported [Cruz'] filing of the complaint and attempted to protect him from further discrimination . . . ."

As to his testimony, the plaintiff alleged that, on October 23, 2018, "[*he*] *testified in a deposition for* [*Cruz'*] *CHRO complaint against the defendant. His testimony supported* [*Cruz'*] *allegations*," and, on December 20, 2019, he "completed a second deposition on behalf of [Cruz], testifying favorably for him and against the defendant." (Emphasis added.) In the relevant counts

of the plaintiff's complaint, the plaintiff also specifically alleged that the defendant actively discouraged him from complying with his obligation "to report and prevent racial discrimination."

We conclude that these allegations, taken together, necessarily imply that the plaintiff's deposition testimony supported Cruz' discrimination claim. See *Doe* v. *Cochran*, supra, 332 Conn. 333 (considering facts "necessarily implied" from allegations); see also *Mercer* v. *Champion*, 139 Conn. App. 216, 232, 55 A.3d 772 (2012) (when taken together, facts necessarily implied from plaintiff's allegations were sufficient to satisfy statutory requirement). We emphasize that we must construe the allegations "broadly and realistically, rather than narrowly and technically"; (internal quotation marks omitted) *Sepega* v. *DeLaura*, supra, 326 Conn. 791; and that we must construe them in the manner most favorable to sustaining the legal sufficiency of the complaint. See *A.C. Consulting, LLC* v. *Alexion Pharmaceuticals, Inc.*, supra, 194 Conn. App. 325.[13] In addition, in the context of our review of the plaintiff's § 31-51q claim under the state constitution, as set forth in count three of the operative complaint, we are also cognizant of "the state constitutional principle that speech on *all* subjects should be protected to the maximum extent possible . . . ." (Emphasis in original.) *Trusz* v. *UBS Realty Investors, LLC*, supra, 319 Conn. 210.

[13] As noted previously, we also must take the facts alleged in the complaint as true, given that the issue was raised in the context of a motion to strike. See footnote 2 of this opinion. If the evidence ultimately produced by the plaintiff demonstrates that his deposition testimony did not support the discrimination claims made by Cruz, the defendant will have the opportunity to file a motion for summary judgment, which is often the procedural vehicle by which parties challenge whether speech is constitutionally protected in this context. See, e.g., *Lane* v. *Franks*, supra, 573 U.S. 234; *Garcetti* v. *Ceballos*, supra, 547 U.S. 415; *Konits* v. *Valley Stream Central High School District*, 394 F.3d 121, 124 (2d Cir. 2005).

In reaching our conclusion, we are guided by the decision of the United States Court of Appeals for the Second Circuit in *Konits* v. *Valley Stream Central High School District*, 394 F.3d 121 (2d Cir. 2005), on which the plaintiff relies.[14] In *Konits*, the Second Circuit held that "any use of state authority to retaliate against those who speak out against discrimination suffered by others, including witnesses or potential witnesses in proceedings addressing discrimination claims, can give rise to a cause of action under . . . the [f]irst [a]mendment." Id., 125. The plaintiff in that case, a public school teacher, alleged that she suffered ongoing retaliation as a result of her assistance to a fellow employee regarding a gender discrimination claim. Id., 123–24. The plaintiff alleged that she provided assistance by, among other things, being listed as a witness for the fellow employee in her discrimination lawsuit against the school district. Id., 123. The plaintiff alleged that she subsequently was subjected to a series of adverse personnel actions by the school district, its board of education, and certain administrators and, therefore, filed her first retaliation action (1996 lawsuit), which ultimately settled. Id. The plaintiff filed a second retaliation action, the lawsuit at issue in *Konits*, based on her claim that she was retaliated against for filing the 1996 lawsuit. Id., 124. The United States District Court rendered summary judgment in favor of the defendants after concluding that

[14] The plaintiff also relies on the decision of the Superior Court in *Thomas* v. *Guyette*, Docket No. CV-03-0081427-S, 2006 WL 2556506 (Conn. Super. August 11, 2006), vacated in part on other grounds, Docket No. CV-03-0081427-S, 2006 WL 3042074 (Conn. Super. October 13, 2006). *Thomas* is distinguishable from the present case insofar as the parties in *Thomas* did not dispute the content of the plaintiff's speech, and the court, considering a motion for summary judgment, had before it evidence of the plaintiff's specific statements. Id., *3–4. Nevertheless, the decision in *Thomas* supports the general proposition underlying the plaintiff's argument, that speech "directed at the ethnically discriminatory treatment of another employee" addresses a matter of public concern. Id., *4.

the plaintiff's 1996 lawsuit was not speech on a matter of public concern.[15] Id.

The Second Circuit vacated the judgment of the District Court and remanded the case for further proceedings on the plaintiff's retaliation claim. Id., 126. The Second Circuit explained that, "[b]ecause [the plaintiff's] 1996 lawsuit was predicated on speech about gender discrimination against a fellow employee that directly implicated the access of the courts to truthful testimony," it disagreed with the District Court's assessment that the lawsuit centered around the plaintiff's dissatisfaction with the terms and conditions of her employment. Id., 125–26. The Second Circuit opined that the plaintiff's motive in speaking out had the " 'broader public purpose' " of assisting the fellow employee to redress her claim of gender discrimination; id., 126; and explained that "[g]ender discrimination in employment is without doubt a matter of public concern. . . . Indeed, we have held repeatedly that when a public employee's speech regards the existence of discrimination in the workplace, such speech is a matter of public concern. . . . [S]peech is of particular public concern when it involves actual or potential testimony in court or in administrative procedures. *Protection of the courts' interest in candid and truthful testimony, coupled with the rights of discrimination victims to seek protection in legal action, makes testimony or prospective testimony in discrimination suits a matter of particular public interest.*" (Citations omitted; emphasis added.) Id., 125. The court therefore determined that, if the plaintiff could prove that being identified as a witness in the fellow employee's lawsuit was a partial motivation for the retaliation she allegedly

[15] The Second Circuit explained that, "if [the plaintiff's] 1996 lawsuit addressed a matter of public concern, the public concern requirement would be met for her current lawsuit as well." *Konits* v. *Valley Stream Central High School District*, supra, 394 F.3d 124.

suffered, "then her [f]irst [a]mendment claim would certainly lie." Id.

In the present case, it may reasonably be inferred from the allegations set forth in the operative complaint that the plaintiff here, like the plaintiff in *Konits*, was "speak[ing] out against" discrimination in his testimony, or that his testimony "regard[ed] the existence of discrimination in the workplace . . . ." Id. Although the plaintiff failed to include allegations concerning the precise content of his testimony, or what he "actually said," as the defendant argues, the holding in *Konits* did not turn on the specifics of the plaintiff's proposed testimony. See id., 125–26. Instead, the general content of the plaintiff's proposed testimony in *Konits*—and its " 'broader public purpose' " of assisting a fellow employee to redress her claim of gender discrimination—was inferred from the plaintiff simply being identified as a witness in the discrimination action. See id.

The defendant argues that the plaintiff's reliance on *Konits* is misplaced given that it predated *Garcetti* and *Garcetti*'s requirement that public employees must be speaking "as citizens," rather than as employees in the course of performing their job duties, to be entitled to protection under the federal constitution. *Garcetti* v. *Ceballos*, supra, 547 U.S. 421. We are not persuaded.[16] Unlike the plaintiff in *Garcetti*, whose speech was made in the context of a memorandum that he had written because it was "part of what he . . . was employed to do," there is nothing to indicate that the plaintiff in *Konits*, a public school teacher, would have been "mak[ing] statements pursuant to [her] official duties"; id.,

[16] We also note that the defendant has failed to explain why the holding in *Konits* would not continue to provide helpful guidance in our consideration of the plaintiff's claim under the state constitution, regardless of the decision in *Garcetti*, given that our Supreme Court rejected the standard set forth in *Garcetti*. See *Trusz* v. *UBS Realty Investors, LLC*, supra, 319 Conn. 191, 210.

421; by providing testimony in a fellow employee's discrimination action. See *Konits* v. *Valley Stream Central High School District*, supra, 394 F.3d 124–25. Thus, there is nothing to suggest that the holding in *Garcetti* would have affected the outcome of *Konits*. Indeed, even after the Supreme Court's decision in *Garcetti*, the Second Circuit has continued to cite *Konits* without indicating that *Garcetti* overruled that decision or otherwise affected its holding. See *Quinones* v. *Binghamton*, 997 F.3d 461, 467 n.3 (2d Cir. 2021) (citing *Konits* for proposition that "[t]here is law that any use of state authority to retaliate against those who speak out against discrimination suffered by others, including witnesses or potential witnesses in proceedings addressing discrimination claims, can give rise to a cause of action under [§ 1983] and the [f]irst [a]mendment" (internal quotation marks omitted)); see also *Colvin* v. *Keen*, 900 F.3d 63, 76 (2d Cir. 2018) (distinguishing *Konits* on basis that plaintiff was advising coworker of her constitutional rights, not speaking out against any perceived discrimination or official misconduct); *Kercado-Clymer* v. *Amsterdam*, 370 Fed. Appx. 238, 243 (2d Cir. 2010) (citing *Konits* in support of conclusion that plaintiff's conversation with city attorney about her own and others' complaints of sex discrimination was speech addressing matter of public concern). The federal district courts within the Second Circuit, including the United States District Court for the District of Connecticut, also have continued to rely on *Konits*. See, e.g., *Barone* v. *Judicial Branch Connecticut*, Docket No. 3:17-cv-00644 (VAB), 2018 WL 1368906, *9 (D. Conn. March 16, 2018); *Fairchild* v. *Quinnipiac University*, 16 F. Supp. 3d 89, 94 (D. Conn. 2014). Accordingly, we are not convinced that *Garcetti* overruled *Konits* or that it called into question the holding in *Konits*, and, therefore, we conclude that *Konits* remains good law and that it is persuasive in the present case.

Moreover, the court's observation in *Konits* that "speech is of particular public concern when it involves actual or potential testimony in court or in administrative procedures"; *Konits* v. *Valley Stream Central High School District*, supra, 394 F.3d 125; was subsequently confirmed by the United States Supreme Court in *Lane* v. *Franks*, supra, 573 U.S. 228. In *Lane*, the court held that "the [f]irst [a]mendment protects a public employee who provides truthful sworn testimony, compelled by subpoena, outside the scope of his ordinary job responsibilities." Id., 238. The court concluded that the testimony at issue in that case was speech on a matter of public concern because "[t]he content of [the plaintiff's] testimony—corruption in a public program and misuse of state funds—obviously involves a matter of significant public concern," and "the form and context of the speech—sworn testimony in a judicial proceeding—fortify that conclusion." Id., 241. Although *Lane* is not directly on point,[17] it lends support to our conclusion that the plaintiff's speech in the present

[17] *Lane* did not involve testimony in support of a fellow employee's discrimination claim. Instead, the plaintiff's testimony in that case took place in the context of criminal trials and, as already noted, it concerned corruption in a public program and misuse of state funds, which the court concluded "obviously" involved a matter of public concern. *Lane* v. *Franks*, supra, 573 U.S. 241.

In addition, the plaintiff in *Lane* had been compelled by subpoena to testify. Id., 238. Despite this distinction, the plaintiff in the present case argues that his testimony was constitutionally protected even though he provided it voluntarily. Our research reveals that the plaintiff's argument has at least some support from certain federal courts of appeal, which have focused on the broader policy considerations of *Lane* rather than whether the speech at issue was compelled testimony. See *Bevill* v. *Fletcher*, 26 F.4th 270, 277 n.3 (5th Cir. 2022) ("[w]hether [the plaintiff] submitted [a sworn] statement voluntarily or under pain of punishment is not decisive, given that the policy rationale underlying *Lane* is to incentivize public employees to come forward with truthful information about corruption among public officials"); see also *Dougherty* v. *School District of Philadelphia*, 772 F.3d 979, 990 (3d Cir. 2014) (rejecting argument that holding of *Lane* was limited to context of compelled testimony).

case, given its form and context, involved a matter of public concern.

Accordingly, we conclude that the court improperly determined that the plaintiff failed to sufficiently allege that his speech addressed a matter of public concern. Therefore, we conclude that the court improperly granted the defendant's motion to strike the plaintiff's § 31-51q claims set forth in count two and count three of the operative complaint on this ground.

B

The plaintiff also argues that, contrary to the court's conclusion, he was not required to plead that his speech did not substantially or materially interfere with his job performance or the working relationship between him and his employer and that "[i]t makes far more sense for the burden to fall on the defendant to raise interference as a special defense." The defendant responds that the court properly concluded that the plaintiff must affirmatively plead noninterference, as an essential element of § 31-51q, and that the allegations in the operative complaint were insufficient to do so. We agree with the plaintiff.

As set forth previously in this opinion, § 31-51q provides that "[a]ny employer . . . who subjects any employee to discipline or discharge on account of the exercise by such employee of rights guaranteed by the first amendment to the United States Constitution or section 3, 4 or 14 of article first of the Constitution of the state, *provided such activity does not substantially or materially interfere with the employee's bona fide job performance or the working relationship between the employee and the employer*, shall be liable to such employee for damages caused by such discipline or discharge . . . ." (Emphasis added.) General Statutes (Rev. to 2019) § 31-51q.

The issue of whether a plaintiff making a § 31-51q claim must affirmatively plead noninterference is an open question that neither this court nor our Supreme Court has addressed. There is a split among the Superior Courts on this issue. Some courts have imposed upon the plaintiff the burden to plead and prove a lack of interference. See, e.g., *Coffy* v. *State*, Superior Court, judicial district of Fairfield, Docket No. CV-20-6094937-S (June 18, 2021) (71 Conn. L. Rptr. 109, 111); *Buscetto* v. *Saint Bernard School of Montville, Inc.*, Superior Court, judicial district of New London, Docket No. CV-11-6011089-S (February 22, 2013) (55 Conn. L. Rptr. 583, 587). Other courts have imposed upon the defendant the burden of raising any substantial and material interference as a special or affirmative defense. See, e.g., *D'Amato* v. *Board of Education*, Docket No. CV-19-6091032-S, 2020 WL 1656202, *12 (Conn. Super. March 3, 2020); *Matthews* v. *Dept. of Public Safety*, Superior Court, judicial district of Hartford, Docket No. CV-11-6019959-S (May 31, 2013) (56 Conn. L. Rptr. 262, 267–68). Several recent decisions from the United States District Court for the District of Connecticut also have concluded that the burden is on the defendant to raise and prove the issue of interference. See *Mumma* v. *Pathway Vet Alliance, LLC*, 648 F. Supp. 3d 373, 391–92 (D. Conn. 2023); *Bacewicz* v. *Molecular Neuroimaging, LLC*, Docket No. 3:17-cv-85 (MPS), 2019 WL 4600227, *10–11 (D. Conn. September 23, 2019); *Blue* v. *New Haven*, Docket No. 3:16-cv-1411 (MPS), 2019 WL 399904, *9–10 (D. Conn. January 31, 2019).

The plaintiff contends that we should follow the approach of the Superior Court in *Matthews* v. *Dept. of Public Safety*, supra, 56 Conn. L. Rptr. 262. In *Matthews*, the court analyzed the language of § 31-51q and determined that the question of whether a plaintiff must plead a lack of substantial interference "revolves around the impact of the term 'provided' in the text of

the [statute]." Id., 267. Applying principles of statutory construction, the court determined that the clause in § 31-51q regarding noninterference was a proviso, rather than an exception, and, therefore, the defendant bore the burden of raising the issue of interference as a special defense. Id., 267–68. Specifically, the court explained: "Clauses introduced by provided are fairly called a proviso or exception. Although they have sometimes been used interchangeably, there are some differences between a proviso and an exception. As a matter of form, the proviso is *usually part of a section establishing a general rule*, the proviso *being an added clause limiting the operation of the rule and being introduced by the word provided* or the words provided, however. . . . The operative effect of provisos and exceptions have sometimes been differentiated. For example, one who asserts a claim based upon a statute must [negate], in pleadings and proofs, any *exceptions* in the provision on which the claim is based, whereas [a] matter in a *proviso* can be left for the adversary as a defensive matter. . . . Provisos serve the purpose of restricting the operative effect of statutory language to less than what its scope of operation would be otherwise. . . . Exceptions, like provisos, operate to restrict the general applicability of legislative language. Ordinarily a proviso occurs within the body of a section while an exception is drafted as a separate section. . . . [W]e have long held that provisos and exceptions to statutes are to be [strictly] construed with doubts resolved in favor of the general rule rather than the exception and that those who claim the benefit of an exception under a statute have the burden of proving that they come within the limited class for whose benefit it was established." (Citations omitted; emphasis altered; internal quotation marks omitted.) *Matthews* v. *Dept. of Public Safety*, supra, 267–68; see *Yale University* v. *New Haven*, 71 Conn. 316, 337, 42 A. 87 (1899)

(stating that proviso is strictly construed and it must be established by its proponent).

The court in *Matthews* determined that imposing the burden on the defendant to raise the issue of interference was not only consistent with principles of statutory construction but also "comports with a logical operation of the statute and the Practice Book." Id., 268. The court further noted the practical difficulties a plaintiff would face if he were required to prove the lack of a substantial and material interference, as "he would be forced to prove a negative, which is a difficult if not impossible task." Id., citing *Arrowood Indemnity Co.* v. *King*, 304 Conn. 179, 203, 39 A.3d 712 (2012) ("the task of proving a negative is an inherently difficult one"). The court continued: "This would place the court in the peculiar position of requiring the plaintiff to plead either an extensive and exhaustive recitation of all events that may have involved interference or a boilerplate that would not give significant factual detail and would likely involve a legal conclusion. In contrast, by placing the burden on the defendant to plead a substantial and material interference as a special defense, the defendant is able to allege specific facts concerning any incidents of disruption because, as the employer, it has a wider and better knowledge of disruptive events. This creates a situation well suited for an affirmative defense, and, in light of the case law, interpretation of the statutory text and confines of logic, it makes more sense that it is the defendant's burden to prove a substantial and material interference." (Footnote omitted.) *Matthews* v. *Dept. of Public Safety*, supra, 56 Conn. L. Rptr. 268.

The defendant contends that we should, instead, follow the analysis of the Superior Court in *Coffy* v. *State*, supra, 71 Conn. L. Rptr. 109. In *Coffy*, the court analogized § 31-51q to Connecticut's dog bite statute and pointed to our Supreme Court's analysis of the dog bite

statute in *Goodwin* v. *Giovenelli*, 117 Conn. 103, 167 A. 87 (1933). At the time of the *Goodwin* decision, the dog bite statute imposed liability on the owner or keeper of any dog for damage by the dog to persons or property, "except where such damage shall have been occasioned to the body or property of a person who, at the time such damage was sustained, was committing a trespass or other tort."[18] General Statutes (1930 Rev.) § 3357; see *Goodwin* v. *Giovenelli*, supra, 105 n.1. As emphasized by the court in *Coffy*, the *Goodwin* decision held that the plaintiff bore the burden to plead and prove that he was not committing a trespass or other tort at the time of the dog attack, reasoning that, "[w]here an exception forms an integral part of that portion of a statute which creates a right, it becomes a limitation upon that right, and a plaintiff, to avail himself of the benefit of the statute, must show that he comes within the limited class for whose benefit the right was established, the burden of proof in this respect being upon him. . . . As the statute now reads, we hold that a complaint thereunder should, by proper allegations, negative the existence of circumstances which would bring the plaintiff within the exception . . . ." (Citations omitted.) *Goodwin* v. *Giovenelli*, supra, 107.

The court in *Coffy* determined that it "consider[ed] the statutory exception in the statute addressed in *Goodwin* to be functionally equivalent to the proviso in § 31-51q. Both statutes contain an enacting clause which creates a right of action for a plaintiff. In the factual scenario of the current case, the proviso within the enacting clause limits the scope of the right created by precluding the employee from suing when the

[18] The current revision of the dog bite statute similarly imposes liability "except when such damage has been occasioned to the body or property of a person who, at the time such damage was sustained, was committing a trespass or other tort, or was teasing, tormenting or abusing such dog." General Statutes § 22-357 (b).

employee's conduct, although otherwise being protected under the statute, substantially or materially interferes with the employee's job performance or the employee-employer working relationship. The proviso in § 31-51q forms an integral part of the statute and is a limitation on the right created by it. The only patent difference between the statutes, is that the statute in *Goodwin* uses the term 'except' to begin the 'exception' and § 31-51q uses the term 'provided' to begin the 'proviso.' In this case, that distinction has no impact because the function of both provisions, as just discussed, is the same. The function of the 'exception' in the dog-bite statute and the 'proviso' in § 31-51q is to place a limitation on the right created by each statute. Furthermore, no one would argue that if § 31-51q instead used the phrase, 'except if such activity substantially or materially interferes with' that its plain textual meaning would be any different." *Coffy* v. *State*, supra, 71 Conn. L. Rptr. 110–11. Applying the reasoning set forth in *Goodwin*, the court in *Coffy* thus determined that the plaintiff bore the burden of pleading and proving "the non-existence of the material interference element" of § 31-51q. Id., 111.

We adopt the well reasoned analysis set forth in *Matthews*, and we conclude that a plaintiff making a claim pursuant to § 31-51q does not have an affirmative burden to plead noninterference. Instead, a defendant may raise the issue of interference in a special defense. In reaching this conclusion, we find particularly persuasive the recent decision of the United States District Court for the District of Connecticut in *Mumma* v. *Pathway Vet Alliance, LLC*, supra, 648 F. Supp. 3d 373. In *Mumma*, the court examined the reasoning in both *Matthews* and *Coffy*. Id., 391–92. The court explained that, because the question of who bears the burden on the interference element of § 31-51q had not yet been decided by a Connecticut appellate court, its role was

to try to predict how our Supreme Court would resolve the issue. Id., 391; see also *Travelers Ins. Co.* v. *633 Third Associates*, 14 F.3d 114, 119 (2d Cir. 1994) ("[w]here the substantive law of the forum state is uncertain or ambiguous, the job of the federal courts is carefully to predict how the highest court of the forum state would resolve the uncertainty or ambiguity"). The court then predicted that our Supreme Court would adopt the reasoning of *Matthews* and would not follow the decision in *Coffy*. *Mumma* v. *Pathway Vet Alliance, LLC*, supra, 391–92.

The court in *Mumma* found the *Coffy* decision unpersuasive because, although it contained a discussion of the proviso/exception distinction, it failed to contest the practical considerations identified in *Matthews*. Id., 391. The court in *Mumma* also observed that "dog bite plaintiffs and [§] 31-51q claimants are not similarly situated; whereas the former likely knows whether he was committing a tort at the time he was attacked, the latter almost invariably does not have the same knowledge of disruptive events as the employer." (Internal quotation marks omitted.) Id., 392. We agree with this assessment. Accordingly, we conclude that the court in the present case improperly granted the defendant's motion to strike the plaintiff's § 31-51q claims set forth in counts two and three of the operative complaint on the ground that the plaintiff failed to sufficiently allege that his speech did not substantially or materially interfere with his job performance or the working relationship between him and his employer.

The judgment is reversed only with respect to the granting of the defendant's motion to strike counts two and three of the plaintiff's complaint and the case is remanded for further proceedings according to law; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

ANTOINETTA ROMANELLI, EXECUTOR (ESTATE OF ANTONIO ROMANELLI) *v.* DEPARTMENT OF SOCIAL SERVICES (AC 45560)

Moll, Cradle and Bear, Js.

Syllabus

The plaintiff, the executor of the estate of R, appealed to this court from the judgment of the trial court dismissing the plaintiff's appeal from the decision of the defendant, the Department of Social Services, denying R's application for long-term Medicaid benefits. R and the plaintiff established a trust for which they were both the grantors and the beneficiaries. Pursuant to the terms of the trust, R and the plaintiff retained the right to withdraw the trust property, which included certain real property in Old Lyme, and to revoke the agreement so long as they were not incapacitated. R was later admitted to a long-term care facility and applied for long-term care Medicaid benefits. The defendant sent a written request to R's authorized representative, indicating that the defendant had determined that the Old Lyme property was owned by the trust and asking for verification of ownership in the event that its determination was incorrect. R's representative did not provide any information in response to the request, either disputing the ownership of the Old Lyme property or arguing that it should not be included in the determination of R's Medicaid eligibility. R died, and, a few months later, the defendant denied R's application for Medicaid benefits because the value of his assets exceeded the program's eligibility limit. M, the plaintiff's attorney, filed an administrative appeal from the denial of the application, claiming that the defendant improperly had included the trust assets in its calculation of R's eligibility because R was incapable of revoking the trust to access its assets. At the administrative hearing, M testified and submitted an affidavit, the substance of which was that R was not competent to revoke the trust. The defendant's hearing officer concluded that M's affidavit was not sufficient evidence to make a determination regarding R's mental capacity and, accordingly, that the defendant properly denied R's application because, in light of the value of the Old Lyme property alone, R's assets exceeded the limit for Medicaid eligibility. The plaintiff filed an administrative appeal in the Superior Court, which dismissed the appeal. *Held*:

1. The trial court appropriately determined that the defendant's hearing officer did not act unreasonably, arbitrarily, illegally, or in abuse of her discretion in determining that the Old Lyme property was an available asset for purposes of calculating R's Medicaid eligibility and that decision was supported by substantial evidence: the plaintiff's argument that the

Old Lyme property was not "actually available" pursuant to the applicable statute (§ 17b-261 (c)) for purposes of calculating Medicaid eligibility because R was not legally capable of revoking the trust was not persuasive, as the hearing officer determined that M's affidavit and testimony were not sufficient to establish incapacity, the plaintiff did not provide any other evidence to support R's alleged mental incapacity, such as medical evidence or third-party testimony or statements, and this court could not retry the case or substitute its own judgment for that of the hearing officer with respect to the weight of the evidence.

2. The defendant did not violate due process by failing to provide, in its written request for verification of ownership of the Old Lyme property, notice that the revocability of the trust was at issue in determining R's eligibility for Medicaid benefits: contrary to the plaintiff's assertion, the defendant's request for information did not qualify under the applicable federal regulation (42 C.F.R. § 435.917 (a)) as a decision affecting R's Medicaid eligibility because, according to the clear language of the request, the application remained pending and the defendant was requesting additional information in order to make a decision regarding R's eligibility; moreover, any argument that the defendant was required to request information from the plaintiff regarding R's mental capacity failed because the burden of establishing eligibility was on R; furthermore, the defendant provided notice of its decision to deny Medicaid benefits once that decision had been made; additionally, at M's request, the plaintiff received a full hearing on the issue of R's incompetency following the denial of the application even though that issue had not been asserted previously.

Argued November 7, 2023—officially released June 11, 2024

Procedural History

Appeal from the decision of the defendant denying an application for long-term care Medicaid benefits filed by the plaintiff's decedent, brought to the Superior Court in the judicial district of New Britain and tried to the court, *Cordani, J.*; judgment dismissing the appeal, from which the plaintiff appealed to this court. *Affirmed.*

Santa Mendoza, for the appellant (plaintiff).

Tanya Feliciano DeMattia, assistant attorney general, with whom, on the brief, was *William Tong*, attorney general, for the appellee (defendant).

Opinion

BEAR, J. The plaintiff, Antoinetta Romanelli, executor of the estate of her husband, Antonio Romanelli (applicant), appeals from the judgment of the Superior Court dismissing her appeal from the decision of the defendant, the Department of Social Services, denying long-term care Medicaid benefits to the applicant. The plaintiff claims that (1) certain real property, which was contained in a trust and which the defendant used in its calculations to determine that the applicant was over the asset limit for Medicaid eligibility, was not actually available to the applicant due to his alleged incapacity to revoke the trust and therefore should not have been used to calculate his Medicaid eligibility and (2) the defendant violated due process by failing to provide notice to the applicant and/or his personal representative that the revocability of the trust was at issue in calculating the applicant's Medicaid eligibility. We disagree and, accordingly, affirm the judgment of the Superior Court.

The following facts, as set forth by the Superior Court, and procedural history are relevant to our resolution of this appeal. On October 15, 2001, the applicant and the plaintiff (collectively, Romanellis) established a Declaration of Trust (trust) of which they were both the grantors and the beneficiaries. At issue in the present case is the real property in Old Lyme that was contained in the trust.[1] In September, 2019, the applicant was admitted to a long-term care facility and, in December, 2019, the applicant and his representative filed an application for long-term care Medicaid benefits (application). The applicant died in August, 2020. On October 14, 2020, the defendant denied the applicant's

[1] The trust also contained real property located in Newington, which was used as the Romanellis' home, and which the hearing officer noted was exempt from the defendant's calculation of the applicant's Medicaid eligibility.

application for Medicaid benefits for the period from December, 2019, through September, 2020.

Santa Mendoza, the plaintiff's attorney, filed the administrative appeal on behalf of the applicant's son, Nick Romanelli, from the defendant's denial of the application for Medicaid benefits and Mendoza was the contact person with respect to that proceeding. The basis for the appeal was that the defendant improperly included the trust assets in the calculation of the applicant's eligibility although the applicant was incapable of revoking the trust to access the assets. At the February 10, 2021 administrative hearing, Mendoza testified and submitted an affidavit, the substance of which was that the applicant was not competent to revoke the trust because he lacked the mental capacity to transact business beginning in 2013 and continuing thereafter. The hearing officer stated that "[t]he appellant and counsel did not provide any medical evidence of a dementia diagnosis or any third-party testimony or statements that support these claims. Further, these reports were not provided to the [defendant] during the application process although an extension was granted by the [defendant] to dispute the classification of the trust's accessibility. The [defendant] made the correct determination of the trust's accessibility based on the information that was provided to [it]." The hearing officer concluded that she "did not find [Mendoza's] affidavit sufficient verification to make a determination of [the applicant's] mental capacity . . . ." The hearing officer instead found that, because the value of the Old Lyme property alone put the Romanellis over the asset limit, the defendant properly denied the applicant Medicaid benefits.

The plaintiff filed an administrative appeal, pursuant to General Statutes § 4-183, in the Superior Court from the defendant's denial of Medicaid benefits. The court determined that the hearing officer did not err in finding

that Mendoza's testimony and affidavit failed to prove that the applicant lacked the mental capacity to revoke the trust and access the Old Lyme property. The court dismissed the appeal. This appeal followed.

I

The plaintiff first claims that, according to General Statutes § 17b-261 (c), the Old Lyme property was not "actually available" for purposes of calculating Medicaid eligibility because the applicant was not legally capable of revoking the trust. We are not persuaded.

"[R]eview of an administrative agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable. . . . Neither [the appellate] court nor the trial court may retry the case or substitute its own judgment for that of the administrative agency on the weight of the evidence or questions of fact. . . . Our ultimate duty is to determine, in view of all the evidence, whether the agency, in issuing its order, acted unreasonably, arbitrarily, illegally or in abuse of its discretion." (Internal quotation marks omitted.) *Miller* v. *Dept. of Agriculture*, 168 Conn. App. 255, 265–66, 145 A.3d 393, cert. denied, 323 Conn. 936, 151 A.3d 386 (2016); see also General Statutes § 4-183 (j).

"The [Medicaid] program, which was established in 1965 as Title XIX of the Social Security Act and is codified at 42 U.S.C. § 1396 et seq. ([M]edicaid act), is a joint federal-state venture providing financial assistance to persons whose income and resources are inadequate to meet the costs of, among other things, medically necessary nursing facility care. . . . The federal government shares the costs of [M]edicaid with those states that elect to participate in the program, and, in

return, the states are required to comply with requirements imposed by the [M]edicaid act and by the [S]ecretary of the Department of Health and Human Services. . . . Specifically, participating states are required to develop a plan . . . containing reasonable standards . . . for determining eligibility for and the extent of medical assistance to be provided. . . . Connecticut has elected to participate in the [M]edicaid program and has assigned to the [defendant] the task of administering the program. . . . Pursuant to General Statutes §§ 17b-262 and 17b-10, the [defendant] has developed Connecticut's state [M]edicaid plan and has promulgated regulations that govern its administration. . . . The [M]edicaid act, furthermore, requires participating states to set reasonable standards for assessing an individual's income and resources in determining eligibility for, and the extent of, medical assistance under the program." (Citations omitted; internal quotation marks omitted.) *Pikula* v. *Dept. of Social Services*, 321 Conn. 259, 264–66, 138 A.3d 212 (2016).

Section 17b-261 (c) provides in relevant part that, "[f]or the purposes of determining eligibility for the Medicaid program, an available asset is one that is actually available to the applicant or one that the applicant has the legal right, authority or power to obtain or to have applied for the applicant's general or medical support. . . ." Section 17b-198-8 (*l*) (2) of the Regulations of Connecticut State Agencies provides in relevant part that "[t]he corpus of a trust shall be treated as a counted asset of a person . . . if the terms of the trust permit such person to revoke the trust and receive the corpus of the trust upon revocation."

Section 11 of the trust provides that the Romanellis retained during their lifetime "[t]he right to withdraw all or any part of the trust property and to revoke this agreement entirely and the trust hereby created" and further provides that this right to withdraw could be

exercised "[i]f both grantors are alive and competent, severally, only with respect to each grantor's separate share." Section 11 further provides that, "[i]n the event of the incapacity of one or both of the grantors, this trust may not be revoked by any legal or personal representative of an incapable grantor." Accordingly, the trust would be irrevocable, and the Old Lyme property would not be available as an asset for determining Medicaid eligibility if the applicant were incapacitated at the time of the filing of the application.

At the administrative hearing, Mendoza testified that she was the Romanellis' attorney, that she visited the Romanellis once or twice each year to handle issues such as taxes, and that, by 2013, when the applicant was approximately ninety-two years old, he "was not capable of any financial dealings," including revoking the trust. She further stated that the applicant was in a long-term care facility "because he is completely incapable . . . ." In her affidavit, Mendoza stated that the applicant had dementia after 2012 and that, by 2013, he was not competent to revoke the trust. The hearing officer concluded that the defendant correctly had denied the applicant's application because the value of the Old Lyme property had placed him over the asset limit allowable for Medicaid coverage for long-term care. The hearing officer reasoned that no medical evidence of a dementia diagnosis, third-party testimony, or statements in support of the applicant's incapacity was presented at the hearing and that Mendoza's affidavit did not provide "sufficient verification to make a determination of his mental capacity . . . ." The hearing officer further noted that the defendant was not made aware of any questions regarding the applicant's mental capacity during the application process and that the defendant made the correct determination of the trust's accessibility on the basis of the information that had been provided.

The court noted that the hearing officer, who was in the best position to evaluate and weigh the evidence, found the evidence offered at the administrative hearing concerning the applicant's incapacity to be insufficient.[2] The court stated: "The affidavit was from the applicant's personal attorney, who was representing the plaintiff at the hearing and who was obviously advocating the position most favorable to the applicant, as any attorney would. While it was not absolutely required that medical evidence be submitted concerning the applicant's mental capacity, such medical evidence would have been more compelling. Further, while the attorney affidavit and testimony was some evidence, the evidence was not impartial and one could, but was not required to, reasonably question whether an attorney had the necessary skill and qualification to make such an assessment on her own. Accordingly, although the hearing officer could have credited the affidavit, it was not error for the hearing officer to find that the affidavit and corresponding testimony alone were insufficient evidence to conclude that the applicant was mentally incapacitated. . . . In this regard, it must be noted that, throughout the process, the plaintiff bore the burden of proof to prove eligibility for the Medicaid benefits and any alleged incapacity." (Footnote omitted.) The court additionally determined that "not only was the attorney

[2] The court explained that "[t]he plaintiff has taken the position that the applicant did not have the mental capacity to terminate the trust and remove his share of the assets. If the applicant had the mental capacity to terminate the trust and remove the trust assets, then the trust assets were available resources. Further, the applicant had the burden to prove his eligibility for Medicaid benefits, the inaccessibility of any asset, and any alleged incapacity. The sole evidence concerning the applicant's mental capacity was an affidavit and testimony from his personal lawyer expressing her personal opinion that the applicant was mentally incapacitated. In the administrative hearing . . . the hearing officer accepted the affidavit as evidence, considered it and determined that it was insufficient evidence for her to conclude that the applicant was mentally incapacitated." (Footnote omitted.) In other words, the hearing officer concluded that the plaintiff failed to prove at the hearing the applicant's lack of mental capacity to revoke the trust.

the applicant's longtime attorney, she was now actively representing the applicant's wife and the estate and was expressing an opinion that would have an impact on the effectiveness of a trust that this attorney put in place for the applicant and the applicant's spouse."

On appeal, the plaintiff contends that the defendant improperly included the Old Lyme property in the calculation of available assets for purposes of determining the applicant's Medicaid eligibility because the evidence presented at the administrative hearing, specifically, Mendoza's affidavit and testimony, established that the applicant lacked the capacity to revoke the trust.

In particular, the plaintiff argues that the hearing officer erroneously determined that medical testimony is an absolute requirement to prove mental incapacity. In support of her argument, the plaintiff highlights the final sentence in the following quotation from the decision of the hearing officer, which was made in the context of distinguishing *Bassford* v. *Bassford*, Superior Court, judicial district of Middlesex, Docket No. CV-15-6012903-S (March 24, 2016) (reprinted at 180 Conn. App. 335, 183 A.3d 686 (2018)), aff'd, 180 Conn. App. 331, 183 A.3d 680 (2018): "In *Bassford*, the decedent had been involuntarily conserved. The [P]robate [C]ourt determined his capacity. Also, the court used the decedent's medical records and testimony of his personal attorney and spouse in their determination of his capacity. In this case, these were not provided for the record and the burden of that proof falls to the applicant. *A determination of capacity cannot be made without this documentation*." (Emphasis added.) It is clear, however, from the entire decision in the present case, that the hearing officer considered Mendoza's testimony and affidavit and concluded that they did not provide sufficient evidence to prove that the applicant was incompetent. In so concluding, the hearing officer

stated that Mendoza's opinion as to the applicant's mental incapacity alone was not sufficient and that the plaintiff did not provide any additional supporting evidence, such as medical evidence "or any third-party testimony or statements that support" the applicant's alleged mental incapacity.

The hearing officer determined that Mendoza's affidavit and testimony were not sufficient to establish incapacity, and we cannot retry the case or substitute our own judgment for that of the hearing officer with respect to the weight of the evidence. See, e.g., *Northwest Hills Chrysler Jeep, LLC* v. *Dept. of Motor Vehicles*, 201 Conn. App. 128, 147–48, 241 A.3d 733 (2020); see also General Statutes § 4-183 (j). Rather, it is within the province of the hearing officer to weigh evidence and reach factual conclusions. See, e.g., *Lawrence* v. *Kozlowski*, 171 Conn. 705, 708, 372 A.2d 110 (1976), cert. denied, 431 U.S. 969, 97 S. Ct. 2930, 53 L. Ed. 2d 1066 (1977).

For the foregoing reasons, we conclude that the court appropriately determined that the hearing officer, in reaching the decision that the Old Lyme property was an available asset for purposes of calculating the applicant's Medicaid eligibility, did not act unreasonably, arbitrarily, illegally, or in abuse of her discretion and that the decision is supported by substantial evidence.

II

The plaintiff next claims that the defendant violated due process by failing to provide, in its written request for verification of ownership of the Old Lyme property, notice of the separate issue that the revocability of the trust was at issue in determining the applicant's eligibility for Medicaid benefits. We are not persuaded.

The following facts, as found by the hearing officer, are relevant. On September 23, 2020, the defendant sent

a notice,[3] indicating that it had determined that the total available assets owned by the applicant and the plaintiff were $440,419.80, and that Medicaid benefits could not begin until that amount was reduced to $128,020, which number reflected the community spouse protected amount of $126,420 plus the protected amount of $1600 for the applicant. On September 29, 2020, Karen Thorpe, a social worker and the applicant's authorized representative who signed the application for Medicaid benefits along with the applicant, informed Nick Romanelli via email that the defendant was considering the Old Lyme property as an available asset to be used in calculating the applicant's eligibility for Medicaid benefits.[4] On September 30, 2020, the defendant sent Thorpe a written request, entitled "We Need Verification from You" (request), which stated in part "RE: Non Home property in Old Lyme CT-the [defendant] has determined that this property is owned by [the trust]. If you do not agree with this, please provide verification of ownership."[5]

[3] The notice, which is in the return of record, indicates that it was sent to the plaintiff, with a copy to Karen Thorpe, the applicant's authorized representative for purposes of the Medicaid application. The hearing officer identifies the applicant's son, Nick Romanelli, his father having died, as the appellant.

[4] In an email, which is contained in the record, Thorpe informed Nick Romanelli that the defendant's legal department had determined that, because the Old Lyme property is in a revocable trust, it is treated as being owned by the Romanellis and, thus, will be counted as an available asset in determining the applicant's Medicaid eligibility, which will result in the defendant denying the applicant's application.

[5] The "hearing summary" of the proceedings before the hearing officer, which is dated February 8, 2021, contains the following relevant facts. The authorized representative for the applicant with respect to his Medicaid application was Thorpe. Neither Mendoza nor Nick Romanelli was an authorized representative and, therefore, no information was able to be shared with them directly during the application process, but information could be obtained from them. Thorpe was the sole provider of information to the defendant during the application process. The defendant sent the spousal assets determination to Thorpe and discussed that determination with her. No additional information was provided to the defendant by the due date. Thorpe worked with Nick Romanelli. Mendoza was not involved and did not provide any information to the defendant during the application process.

The request further stated that the due date for the applicant's response was October 11, 2020. Neither Thorpe nor Nick Romanelli raised any issue or provided any information in response to the request that either disputed the ownership of the Old Lyme property or argued that the applicant's lack of mental competency was a defense to the inclusion of the Old Lyme property in the defendant's determination of the applicant's Medicaid eligibility. On October 14, 2020, the defendant denied the applicant's Medicaid application for exceeding the asset limit.

The plaintiff argues that the "confusing verbiage" of the request did not indicate that the trust property was to be included as an available asset for determining Medicaid eligibility because the defendant concluded that the trust was revocable. She further contends that, "[w]hen an agency omits essential information in any notice, this directly implicates the fundamental tenets of due process."

"A fundamental principle of due process is that each party has the right to receive notice of a hearing, and the opportunity to be heard at a meaningful time and in a meaningful manner." (Internal quotation marks omitted.) *Mikucka* v. *St. Lucian's Residence, Inc.*, 183 Conn. App. 147, 163, 191 A.3d 1083 (2018). Regarding notice of an agency's determination as to Medicaid eligibility, the Code of Federal Regulations provides in relevant part that "the agency must provide all applicants and beneficiaries with timely and adequate written notice of any decision affecting their eligibility, including an approval, denial, termination or suspension of eligibility, or a denial or change in benefits and services. . . ." 42 C.F.R. § 435.917 (a) (2019). The notice of the

No claim of the applicant's alleged incompetency as a basis for his lack of right to access either of the properties was made during the application process, but that omission did not deprive the plaintiff of the right to raise that issue in a hearing.

defendant's decision to deny the applicant benefits was sent to the plaintiff via letter dated October 14, 2020.

The September 30, 2020 written request to Thorpe explained that the defendant "must have proof of certain information so that we can make a decision about your application," provided a deadline for providing that information to the defendant, and further stated that, if no information was received by the due date, then "the case will be processed based on the information received." Therefore, according to the clear language of the request, the application was still pending and the defendant had requested additional information *in order to* make a decision regarding the applicant's Medicaid eligibility after seeking information from the applicant's authorized representative concerning the trust's ownership of the Old Lyme property.[6] Not only does the request for information about property ownership not qualify under 42 C.F.R. § 435.917 (a) as a decision affecting an applicant's eligibility, but any argument that the defendant was required to request information from the plaintiff regarding the applicant's mental capacity fails because, "[a]t all times, the burden of establishing eligibility is on the applicant." *Harrison* v. *Commissioner of Income Maintenance*, 204 Conn.

[6] The plaintiff also argues that there was a lack of legal notice "of the legal counsel's decision of September 1, 2020." The record contains an email chain dated September 1, 2020, between the eligibility services worker and legal counsel for the defendant regarding the ownership of the Old Lyme property. This internal email contained preliminary discussions of eligibility and did not constitute a decision affecting eligibility for which the due process requirement of notice attaches. See 42 C.F.R. § 435.917 (a) (2019). Additionally, the defendant provided notice in October, 2020, of its decision to deny the applicant Medicaid benefits.

The plaintiff further argues that "there was no opportunity to know that the [defendant] would only accept medical evidence to support a claim of incapacity and irrevocability because this position also was never communicated by the [defendant's] case worker or legal counsel." As we detail in part I of this opinion, the hearing officer did not determine that only medical evidence could prove incapacity, and, thus, we reject this argument.

672, 679, 529 A.2d 188 (1987). Moreover, when the defendant made the decision to deny Medicaid benefits, notice of that decision was provided on October 14, 2020.

Additionally, on December 8, 2020, Mendoza, as attorney for the applicant's estate, wrote to the defendant and requested a hearing on the denial of the application "to present our argument that these assets [including the Old Lyme property] should have been excluded from the determination." That hearing was held, and, although the defense of incompetency had not been previously asserted,[7] the plaintiff received a full hearing on that issue. Accordingly, we conclude that there was no due process violation.

The judgment is affirmed.

In this opinion the other judges concurred.

C. W. *v.* E. W. ET AL.*
(AC 46122)

Alvord, Suarez and Lavine, Js.

Syllabus

The plaintiff sought to recover damages from the defendants for, inter alia, breach of contract and unjust enrichment in connection with an alleged

[7] The court noted that no challenge to the applicant's mental capacity was made during the application process and that "[i]t was only later, after [the defendant] had already denied the benefits and during the administrative hearing, that the applicant first attempted to challenge his capacity. During the application process, [the defendant] clearly provided the applicant with an opportunity to present all necessary evidence, ultimately advising the applicant that [the defendant] intended to deny his application based upon excess assets unless the applicant provided documentation to dispute [the defendant's] position. The applicant failed to timely dispute the [defendant's] position by attempting to challenge capacity during the application process."

* 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.

oral agreement pursuant to which the defendants agreed to sell to the plaintiff certain residential property after he performed repairs to it. The plaintiff claimed that he expended substantial funds and personal labor with the understanding that the agreed upon purchase price would be in compensation for the labor and materials he supplied. The defendants filed an answer to the amended complaint, asserting that they did not agree to sell the property to the plaintiff. At trial, the court admitted into evidence an exhibit offered by the plaintiff that documented the tasks that the plaintiff claimed to have performed at the property and his hours worked. The plaintiff testified that he used a project management software program to create the table of tasks in the exhibit from data that he contemporaneously entered as he worked. The court found that, although there was no agreement to sell the property, the plaintiff had incurred certain costs for materials and labor to rehabilitate the property and rendered judgment for the plaintiff on his unjust enrichment claim. In awarding the plaintiff damages for his labor, the court found that the plaintiff's evidence of his labor was unreliable, specifically, his exhibit documenting the number of hours he had worked, and, instead, relied on E's valuation of the plaintiff's services. On the plaintiff's appeal to this court, *held*:

1. The plaintiff could not prevail on his claim that the trial court improperly rendered judgment for the defendants on his breach of contract claim because the court failed to consider judicial admissions allegedly made by the defendants in their original answers as to the existence of a contract: although the defendants' original answers asserted that they had agreed to sell the property for a reduced price because the plaintiff is the defendant E's son, the defendants' amended answer denied the existence of an agreement, which was consistent with E's testimony at trial; moreover, the amended answer had been filed more than two months before trial, and the plaintiff had filed a reply to the special defenses asserted therein.
2. The trial court, in ruling on the plaintiff's unjust enrichment claim, erred in finding that the plaintiff's evidence of his labor was unreliable: the court's decision rested on clearly erroneous factual findings as to how the exhibit depicting the plaintiff's logged work hours was created, as the plaintiff's uncontroverted testimony was that his hours were recorded contemporaneously and that he had entered his hours into the computer program, which recorded the hours over a period of time, not that the hours were based on the plaintiff's memory as to the number of hours worked, or that they were a product of computations created by the software; moreover, because the trial court's clearly erroneous factual findings as to the plaintiff's exhibit constituted harmful error, this court concluded that the plaintiff was entitled to a new trial as to his unjust enrichment and quantum meruit claims.

Submitted on briefs February 13—officially released June 11, 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 Waterbury, where the case was tried to the court, *Hon. Joseph H. Pellegrino*, judge trial referee; judgment in part for the defendants, from which the plaintiff appealed to this court; thereafter, the plaintiff withdrew the remaining count of the complaint and filed an amended appeal. *Reversed in part*; *further proceedings*.

Bruce P. Bennett, for the appellant (plaintiff).

E. W. and *A. W.*, self-represented, the appellees (defendants).

Opinion

ALVORD, J. The plaintiff, C. W., appeals from the judgment of the trial court rendered following a court trial in an action seeking enforcement of an alleged oral agreement pursuant to which the self-represented defendants, E. W. and A. W., would sell the plaintiff real property in Waterbury after he performed repairs to it. On appeal, the plaintiff claims that the court improperly (1) rendered judgment in favor of the defendants on the plaintiff's breach of contract claim after failing to consider judicial admissions allegedly made by the defendants as to the existence of the contract, and (2) found, in the portion of its memorandum of decision addressing the plaintiff's unjust enrichment claim, the plaintiff's evidence of his labor at the property to be unreliable.[1] We agree with the plaintiff's second

[1] See footnote 7 of this opinion. The plaintiff also states, in his statement of issues, that the court erred in failing to address real property taxes paid by the plaintiff and in declining to award damages for the plaintiff's expenditures related to electrical repairs. Aside from that statement, the only other mention of these two claims is in the nature of a conclusion in the plaintiff's brief. "[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." (Internal quotation marks omitted.) *Darin* v. *Cais*, 161 Conn. App. 475, 483, 129 A.3d

claim and, accordingly, we reverse the judgment in part.[2]

The following facts, as found by the trial court, and procedural history are relevant to this appeal. In 2009, E. W., who had immigrated to the United States from Jamaica, purchased with his sister, A. W., real property located in Waterbury (property). In 2014, the plaintiff, who is E. W.'s son, also immigrated to the United States from Jamaica. E. W. encouraged the plaintiff to come to the United States and undertook the responsibilities of providing the plaintiff with shelter and support. When the plaintiff arrived in the United States, he initially stayed with E. W. in New York, but there was no bedroom available for him and disagreements ensued among family members. As a result, E. W. drove the plaintiff to Connecticut to live at the property and told him that he could live there so long as he paid the taxes on the property. At that time, the third floor of the property was habitable but the first and second floors were not. The plaintiff assisted E. W., who provided expertise, in the rehabilitation of the first and second floors of the property. The plaintiff worked on the property in some instances by himself when E. W. was not present, purchased materials, and provided labor to accomplish the repairs. A. W. was aware of the work the plaintiff was performing at the property.

The plaintiff commenced the present action in January, 2020. In the operative, amended complaint filed in May, 2022, the plaintiff alleged causes of action sounding in breach of contract, fraudulent misrepresentation, unjust enrichment, quantum meruit, detrimental reliance, and bad faith. He also sought foreclosure of a mechanic's lien that he had recorded on the land

716 (2015). We conclude that these claims are inadequately briefed and, accordingly, we decline to address them.

[2] See footnote 11 of this opinion.

records relating to work he claimed to have performed at the property. In count one, the plaintiff alleged that E. W. told the plaintiff in March, 2015, that he did not want to devote any additional funds or efforts to repair the property, the defendants would sell the property to the plaintiff for $35,000, and the plaintiff should obtain a mortgage to purchase the property.[3] The plaintiff alleged that, because he could not obtain a mortgage to purchase the property due to the property being in a state of disrepair, the defendants agreed that the plaintiff would repair the property and, upon completion of the repairs, the plaintiff would obtain a mortgage and the defendants would sell him the property for $35,000. The plaintiff alleged that he expended substantial funds and personal labor with the understanding that the $35,000 purchase price of the property would be in compensation for the labor and materials he supplied. The plaintiff alleged that he requested, in August, 2019, that the defendants put their agreement into writing so that he could obtain a mortgage, but the defendants refused to do so. The plaintiff alleged that the defendants subsequently breached the alleged oral contract in various ways, including informing the plaintiff that he would have to pay rent, listing the property at a sale price of $125,000, removing his personal belongings from the property, informing the plaintiff that he could purchase the property for $60,000, rather than the previously agreed upon price of $35,000, serving him with

[3] In counts two and five of the amended complaint, the plaintiff alleged fraudulent misrepresentation and detrimental reliance, on the basis of the allegations that the defendants represented to the plaintiff that he could reside at the property rent free and purchase the property for $35,000. The plaintiff alleged that the defendants had the intent of inducing the plaintiff to expend personal labor and funds to repair the property. The plaintiff further alleged that the representations were knowingly material, false and misleading and that the plaintiff relied on the representations to his detriment.

In count six, the plaintiff alleged that the defendants' conduct was malicious and evidenced a reckless disregard for his rights.

In count seven, the plaintiff sought foreclosure of the mechanic's lien.

a notice to quit, and commencing a summary process eviction action against him.

In count three, the plaintiff alleged a claim for unjust enrichment. Specifically, the plaintiff alleged that he provided substantial labor and materials toward the improvement of the property and the defendants unjustly refused to reimburse or compensate him. The plaintiff alleged that the defendants benefitted from his labor and materials and have been unjustly enriched at the plaintiff's expense. In count four, the plaintiff asserted a quantum meruit claim. He alleged, inter alia, that the reasonable value of the labor and funds he had expended was at least $135,000, and that he is entitled to compensation in that amount.

The defendants filed an answer and special defenses on May 23, 2022; see footnote 5 of this opinion; and the plaintiff filed a reply denying the allegations of the special defenses on August 2, 2022.

A trial was held before the court over several dates in August and September, 2022. In addition to his own testimony, the plaintiff presented the testimony of Alan Thomas O'Doherty, a licensed real estate salesperson who testified as to the amount for which the property could sell; Clyde Saunders, an expert in the construction industry; and Martin Gail, an electrician who testified to electrical work performed at the property. The defendants presented the testimony of E. W.; H. I., a son of E. W.; and J. T., a tenant at the property. The court also received documentary evidence, and all parties submitted posttrial briefs.

On December 9, 2022, the court issued a memorandum of decision in which it found that "there was neither an express written agreement nor was there any oral agreement to sell the property." The court, accordingly, ruled in favor of the defendants on the breach of contract, fraudulent misrepresentation, detrimental

reliance, and bad faith counts. As to the plaintiff's unjust enrichment claim; see footnote 11 of this opinion; the court found that the plaintiff provided materials to rehabilitate the property, the defendants were aware of and benefitted from the materials, and, thus, the plaintiff was entitled to reimbursement in the amount of $11,999.63. With respect to labor, the court found the value of the plaintiff's work at the property to be $1768 and awarded him that amount. The total award in favor of the plaintiff was $13,767.63. See footnote 10 of this opinion. This appeal followed.[4] Additional facts and procedural history will be set forth as necessary.

I

The plaintiff's first claim on appeal is that the court erred in rejecting his breach of contract claim on the basis that it failed to recognize that the defendants judicially admitted, in their March, 2020 answers to the plaintiff's original complaint, that they had agreed to sell the property to the plaintiff. We are not persuaded.

The following additional procedural history is relevant. In the plaintiff's original complaint, he alleged that, "[o]n or about November 4, 2019, in contravention of the 2014 agreement, the defendants informed the

[4] As to the foreclosure of the mechanic's lien, the court stated in its memorandum of decision that "[t]he plaintiff must wait twenty days after the judgment in this case is filed and if no appeal is filed, he may seek to foreclose the amount of this judgment." On May 5, 2023, this court ordered the parties to file memoranda "addressing whether this appeal should be dismissed for lack of a final judgment because the trial court's decision did not dispose of all counts of the complaint or of all the causes of action brought by or against any party . . . unless the plaintiff withdraws the outstanding seventh count of the operative complaint seeking foreclosure of a mechanic's lien and files an amended appeal on or before May 15, 2023." (Citations omitted.) On May 15, the plaintiff withdrew the foreclosure count and filed a response to the order in which he notified this court of the withdrawal. On June 28, 2023, this court ordered that the appeal would be dismissed unless the plaintiff filed an amended appeal on or before July 10, 2023. On July 5, 2023, the plaintiff amended his appeal to reflect the withdrawal.

plaintiff that rather than the $35,000 purchase price previously agreed to pursuant to the 2014 agreement, the purchase price would be $60,000." In answers filed on March 6 and 9, 2020, E. W. responded to this allegation by stating: "Denies as to the allegation contained in the first part of this paragraph 18 that states 'in contravention of the 2014 agreement.' [E. W.] admits to the second part of the allegation to the extent it states that the defendant agreed to sell the property to his son, the plaintiff herein, for $60,000 instead of the market price/listed price of $125,000. The only consideration for [E. W.] to reduce this price was that the plaintiff is a son of the defendant, [E. W.]." In A. W.'s March 6, 2020 answer, she responded similarly, with the exception of identifying the plaintiff as her nephew.

On May 9, 2022, the plaintiff filed an amended complaint with a similar allegation. In the defendants' joint answer; see footnote 5 of this opinion; they asserted: "Objection, there cannot be a breach as the defendants . . . have no agreement with the plaintiff to repair and sell property to the plaintiff." At trial, E. W. testified that he did not agree to sell the property to the plaintiff for $35,000.

Although the plaintiff raised his judicial admission claim in his testimony and posttrial brief, he relied on the answers filed by the defendants to his original complaint. He did not brief the effect of the answer filed by the defendants to his amended complaint. In its memorandum of decision, the court found that "there was neither an express written agreement nor was there any oral agreement to sell the property."

The following legal principles are relevant to our resolution of this claim. "An admission in a defendant's answer to an allegation in a complaint is binding as a judicial admission. . . . A judicial admission dispenses with the production of evidence by the opposing party

as to the fact admitted, and is conclusive upon the party making it. . . . Upon the amendment of the original answer, the superseded pleading ceases to be a conclusive judicial admission and becomes nothing more than an evidentiary admission to be weighed and considered by the trial court along with the rest of the evidence." (Citations omitted; internal quotation marks omitted.) *Isaac* v. *Truck Service, Inc.*, 52 Conn. App. 545, 550–51, 727 A.2d 755 (1999), aff'd, 253 Conn. 416, 752 A.2d 509 (2000).

In the present case, the defendants filed an amended answer shortly after the plaintiff amended his complaint.[5] The amended answer was filed more than two months before trial began, and the plaintiff filed a reply to the special defenses asserted therein. In their amended answer, the defendants denied the existence of an agreement to sell the property to the plaintiff, and the denial of any agreement was consistent with the defendants' position during the trial. Accordingly, the plaintiff's claim that the responses contained in the defendants' original answers constituted judicial admissions that there existed an agreement to sell the property is without merit. See, e.g., *Crowell* v. *Danforth*, 222 Conn. 150, 155, 609 A.2d 654 (1992). To the extent that the plaintiff requests this court to treat the superseded responses as evidentiary admissions, we decline to do so. See *Downing* v. *Dragone*, 216 Conn. App. 306, 331, 285 A.3d 59 (2022) ("[t]his court will not reweigh the evidence or resolve questions of credibility" (internal quotation marks omitted)), cert. denied, 346 Conn.

[5] The plaintiff contends that the operative responsive pleadings are the original, March, 2020 answers filed in response to the plaintiff's original complaint. We are not persuaded. Although the answer to the amended complaint was filed by the self-represented defendants under the heading "objection to the plaintiff's second amended complaint" and the court marked it "overruled," the filing in substance consisted of an answer with special defenses, and the plaintiff filed a reply to it.

903, 287 A.3d 601 (2023). Accordingly, we reject the plaintiff's claim.[6]

II

The plaintiff next claims that, in its memorandum of decision, the court improperly found his evidence of his labor at the property to be unreliable, after admitting the document that set forth his work as a full exhibit at trial. The defendants respond that the court properly rejected exhibit 7 "for lack of trustworthiness and reliability." We agree with the plaintiff.

The following additional procedural history is relevant to our resolution of this claim. At trial, the plaintiff's counsel offered into evidence, as exhibit 7, a document reflecting, inter alia, the tasks the plaintiff claimed to have performed at the property and the number of hours he spent performing each task. The plaintiff's counsel represented that exhibit 7 also included statistics published by the Connecticut Department of Labor as to the annual median wage of tradespeople performing labor tasks similar to those identified by the plaintiff. The defendants objected to the admission of the exhibit on a number of different bases, none of which implicated hearsay or the reliability of the software program used by the plaintiff to record his hours worked. The court ruled that the evidence of the labor

[6] The plaintiff also argues that the court's citation to the statute of frauds, set forth in General Statutes § 52-550, in rejecting his breach of contract claim, was improper. It is unnecessary for this court to consider the merits of a claim of error that is unrelated to the grounds on which the court based its judgment. See, e.g., *Ingels* v. *Saldana*, 103 Conn. App. 724, 728–29, 930 A.2d 774 (2007) (court declined to address merits of appellant's claim of error related to breach of contract claim because trial court based its decision on breach of fiduciary duty claim and, thus, claimed error was "irrelevant to the judgment from which the defendant appeal[ed]"). Because the court expressly found that "there was neither an express written agreement *nor was there any oral agreement to sell the property*," we need not address any contention that the court improperly relied on the statute of frauds in denying the plaintiff's breach of contract claim. (Emphasis added).

rates was inadmissible and, following the request by the plaintiff's counsel that it take judicial notice of the labor rates, declined to do so.[7] Exhibit 7 otherwise was admitted into evidence as a full exhibit.[8]

The plaintiff testified that he is an information technology professional by trade and had used the computer application Microsoft Project, a project management software program, as a recording tool in connection with prior construction projects that he had performed in Jamaica. As relevant to the present case, the plaintiff testified that he used Microsoft Project to record his hours and schedule his work at the property. Specifically, the plaintiff testified "it's basically my input, but it's recorded over a period of time. So, the . . . app is just storing what I'm putting into it. It's not telling me what it was. I'm putting in the information." Data from the software then was used to generate a table of tasks shown on exhibit 7. The plaintiff also testified as to each of the tasks listed on exhibit 7 and the hours he spent completing those tasks. A. W. and the trial court extensively questioned the plaintiff, both on cross-examination during the plaintiff's case-in-chief and on direct examination during the defendants' case, about Microsoft Project, his use of the software, and the man-

[7] On appeal, the plaintiff also claims that the court erred in failing to take judicial notice of the labor rates and in declining to recognize the testimony of the plaintiff's expert witness in support of the plaintiff's proposed value of his labor. The plaintiff also claims that the court erred in accepting E. W.'s valuation of the plaintiff's work on the project. Because we reverse the judgment of the trial court and remand the case for a new trial on the plaintiff's unjust enrichment claim, we decline to address these issues in this opinion.

[8] The exhibit list initially did not reflect exhibit 7. On October 13, 2022, the plaintiff filed a motion for order seeking to amend the exhibit list to include exhibit 7. On October 18, 2022, the court issued an order stating in relevant part that the "[p]laintiff's trial exhibit 7 was admitted as a full exhibit with the redaction of the last three columns entitled—Task—CT DOL Labor Rate and value. The court marked this as a full exhibit with the redactions as mentioned at trial and [it] should be included in the list of full exhibits." An amended list of exhibits subsequently was filed reflecting exhibit 7's status as a full exhibit.

ner in which he logged his hours.[9] A. W. also cross-examined the plaintiff as to the number of hours he

[9] The following colloquy occurred during the defendants' direct examination of the plaintiff as to the tasks reflected in exhibit 7:

"[A. W.]: How did you come up with the hours that you worked for the first row, make, and prep, and install the window—

"[The Plaintiff]: I've answered this already.

"The Court: You can answer it again, sir, if she asked you the question. How'd you come up with 120 hours?

"[The Plaintiff]: I had all the hours in the app that I used to track the progress of the project.

"The Court: You did it from an app.

"[The Plaintiff]: No. I entered the—I recorded the hours in the app that I used to track . . . the progress of the project.

"The Court: Have you any—did you write these hours down? Do you have a notebook or anything indicating the hours you spent on each of these tasks?

"[The Plaintiff]: The app pretty much—

"The Court: No, no.

"[The Plaintiff]: Not on notebook.

"The Court: Just answer my question.

"[The Plaintiff]: No. Not on notebook, no.

"The Court: No, okay. And is this an estimate as to the amount of hours you spent?

"[The Plaintiff]: It would be more actual.

"The Court: Excuse me.

"[The Plaintiff]: It would be actual.

"The Court: These are the actual hours that you spent.

"[The Plaintiff]: Right, right.

"The Court: And, in some way, you've recorded the actual hours.

"[The Plaintiff]: Right, right.

"The Court: We just don't have . . . the document or . . . the notebook where you kept the actual hours.

"[The Plaintiff]: Yeah, the tablet.

"The Court: The what?

"[The Plaintiff]: TabIet.

"The Court: Okay. He answers the question. He [said], these are the actual hours.

"[A. W.]: Okay.

"[A. W.]: Will you be—if we ask you to provide the—show us how it's been logged on—can you show how it's been logged on the tablet?

"[The Plaintiff]: You have the data here.

"[A. W.]: Pardon me?

"[The Plaintiff]: You have the data right here.

"[A. W.]: No, no, no, no. Can you provide us how you logged the hours on there, meaning is it going by day or by week? How were they logged?

"[The Plaintiff]: I start the project. I put in the time. And then, each day that I go, I mark the progress when I stop. Next day, I go—I continue, I enter that, and I keep going on.

spent on the tasks reflected in exhibit 7. In their posttrial briefing, aside from A. W. arguing that the plaintiff's labor bill was "exorbitant" and that it included "a few overlapping hours and overlapping dates," the defendants did not otherwise contest exhibit 7.

In its memorandum of decision, the trial court stated: "The plaintiff next seeks to recover monies for the labor he personally expended renovating the property. The plaintiff claims that he devoted 2486 hours to working on the property, as evinced by exhibit 7. At trial, the plaintiff testified at one point that the total number of hours worked was computed with the assistance of a computer program. When the court pressed him on the involvement of the computer program, the plaintiff said that he remembered all of the hours he worked on the project although he never made any simultaneous notes or memorandum as to the hours worked, and relied on his memory as to the number of hours he worked on the project. There was no testimony at trial as to any computer program that was used to compute the hours

"[A. W.]: But that's what I'm asking now. Can you provide that evidence to us?

"[The Plaintiff]: What do you mean, the procedure.

"[A. W.]: Of how it's been logged, yeah, because you said you start and you stop; so we need to see the evidence?

"[The Plaintiff]: You need to see the evidence of the procedure of doing it. So, basically . . .

"The Court: Wait a minute. I think she's asking, can you provide us with the document that you recorded these hours while you were doing the work?

"[The Plaintiff's Counsel]: Your Honor, I'm . . . gonna object. There's no testimony that it was on a document. [The plaintiff] has testified that it was recorded each day on an app, an application on a digital or an electronic tablet. Is that the program that he's talking about that he did that?

"[The Plaintiff]: Yes.

"The Court: It—it's a program. It's a computer program.

"[A. W.]: Okay. . . . So, it's a computer program. But doesn't he have a backup that shows you the hours—

"[The Plaintiff]: The device . . . broke while I was working one day on the house.

"[A. W.]: And you never have—did you have a backup?

"[The Plaintiff]: No."

worked as stated. The plaintiff testified that the number of hours worked, as shown in exhibit 7, was from his recollection. In the plaintiff's [posttrial] brief, dated October 13, 2022, the plaintiff's attorney states that 'corresponding to the expenses he incurred for the material incorporated into the repair and improvement of the property, the plaintiff performed extensive labor in the repair and improvement of the property. . . . By the use of the computer application Microsoft Project, the plaintiff tracked the time he spent repairing and improving the property. The time is reflected in the plaintiff's trial exhibit 7.' As stated, there was never any evidence presented at trial that the time computed in exhibit 7 was from a Microsoft program. The plaintiff has admitted, through his attorney, that the hours generated in exhibit 7 were the product of a computer program, which certainly is contrary to his testimony in court. The court cannot consider the plaintiff's claim that the hours generated in exhibit 7 was the product of a computer program because the plaintiff has failed to provide any evidence of the program's trustworthiness and reliability. . . . Accordingly, the court rejects the plaintiff's claim that he worked 2486 hours renovating the property." (Citation omitted.)

The court then stated that it accepted E. W.'s valuation of the plaintiff's work at the property, which amounted to $1768. In accepting E. W.'s valuation, the court stated that E. W. "is a skilled craftsman with experience and expertise in the construction industry. Before immigrating to this country, [E. W.] was active in all fields of construction in Jamaica, where he specialized in carpentry and joinery, as well as performing plumbing and electrical work. When [E. W.] arrived in the United States, he continued to work in the construction industry. Additionally, he obtained an electrical certificate from Southern Westchester BOCES Adult Education in June, 2006 . . . . Accordingly, [E. W.] is

eminently qualified to assess the value of the plaintiff's work . . . ." The court then awarded the plaintiff $1768 for his work at the property, along with $11,999.63 for the materials he purchased and used to renovate the property.[10]

In its memorandum of decision, the court relied on *Federal Deposit Ins. Corp.* v. *Carabetta*, 55 Conn. App. 369, 377, 739 A.2d 301, cert. denied, 251 Conn. 927, 742 A.2d 280 (1999), to conclude that the plaintiff had failed to establish that the software program used to create exhibit 7 was trustworthy and reliable. *Carabetta* relies on the seminal case of *American Oil Co.* v. *Valenti*, 179 Conn. 305, 359, 426 A.2d 305 (1979). In *American Oil Co.*, our Supreme Court "first addressed the standard to be used in admitting computer generated evidence [adopting] a general rule, requiring testimony by a person with some degree of computer expertise, who has sufficient knowledge to be examined and cross-examined about the functioning of the computer. In that case, the court cautioned, [c]omputer machinery may make errors because of malfunctioning of the hardware, the computer's mechanical apparatus. Computers may also, and more frequently, make errors that arise out of defects in the software, the input procedures, the data base, and the processing program. . . . In view of the complex nature of the operation of computers and general lay unfamiliarity with their operation, courts have been cautioned to take special care to be certain that the foundation is sufficient to warrant a finding of trustworthiness and that the opposing party has full opportunity to inquire into the process by which information is fed into the computer." (Internal quotation marks omitted.) *State* v. *Swinton*, 268 Conn. 781, 806–807, 847 A.2d 921 (2004).

[10] We note that the court, in calculating the total award to the plaintiff, misstated its labor award as $1700. Thus, the total award reflected in the memorandum of decision was $68 less than it should have been.

We begin by setting forth the relevant legal principles governing our review of the plaintiff's claim. In the present case, the trial court made factual findings predicated on its understanding and rejection of exhibit 7. "[W]here the factual basis of the [trial] 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. . . . 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. . . . Under the clearly erroneous standard of review, a finding of fact must stand if, on the basis of the evidence before the court and the reasonable inferences to be drawn from that evidence, a trier of fact reasonably could have found as it did. . . . In reviewing factual findings, [w]e do not examine the record to determine whether the [court] could have reached a conclusion other than the one reached. . . . Instead, we make every reasonable presumption . . . in favor of the trial court's ruling. . . .

"[W]here . . . some of the facts found [by the trial court] are clearly erroneous and others are supported by the evidence, we must examine the clearly erroneous findings to see whether they were harmless, not only in isolation, but also taken as a whole. . . . If, when taken as a whole, they undermine appellate confidence in the court's [fact-finding] process, a new hearing is required." (Citations omitted; internal quotation marks omitted.) *Circulent, Inc.* v. *Hatch & Bailey Co.*, 217 Conn. App. 622, 629–30, 289 A.3d 609 (2023).

We thoroughly have reviewed the record and conclude that the trial court's decision as to the plaintiff's

unjust enrichment claim rests on clearly erroneous factual findings as to how exhibit 7 was created. Specifically, the court mistakenly found that the plaintiff did not make "simultaneous notes or memorandum of the hours worked," "[t]here was no testimony at trial as to any computer program that was used to compute the hours worked as stated," and "the hours generated in exhibit 7 were the product of a computer program . . . ." Our review of the record reveals that these findings are not supported by the evidence. First, the plaintiff testified that his hours were recorded contemporaneously, specifically, that "I start the project. I put in the time. And then, each day that I go, I mark the progress when I stop. Next day, I go—I continue, I enter that, and I keep going on." Second, the plaintiff testified at length regarding his use of Microsoft Project, that he input his hours into the software, and that the software "recorded [his hours] over a period of time." The defendants offered no evidence to the contrary on either of these points. Thus, the uncontroverted evidence was that the hours were contemporaneously recorded by the plaintiff in Microsoft Project, not that they were based on the plaintiff's "memory as to the number of hours he worked on the project" or were a "product" of computations created by the Microsoft Project software.

Having concluded that the court's judgment as to the plaintiff's unjust enrichment count relied on the court's clearly erroneous factual findings regarding exhibit 7, we "are compelled to conclude that the court's error was harmful, requiring a new trial." *Circulent, Inc.* v. *Hatch & Bailey Co.*, supra, 217 Conn. App. 632; see also, e.g., *Downing* v. *Dragone*, 184 Conn. App. 565, 574–75, 195 A.3d 699 (2018) (trial court's reasoning substantially relied on clearly erroneous factual finding, requiring new trial). As the trial court stated in its memorandum of decision, "[a]t issue in the present case is

the value of the services and materials rendered by the plaintiff that the defendants either knew about or impliedly accepted." The court credited the plaintiff's evidence of the expenditures for the materials purchased, finding that "the cost of the materials used and paid for by the plaintiff, as shown in exhibits 3 and 4, were provided by the plaintiff to rehabilitate the property in the amount of $11,999.63. The court further finds that the defendants were aware of and benefitted from the materials provided, and therefore the plaintiff should be reimbursed based on the theory of unjust enrichment." Turning to the value of the plaintiff's labor, the court rejected his claim that he worked 2486 hours renovating the property largely because of its misunderstanding as to the plaintiff's use of Microsoft Project, in favor of accepting E. W.'s valuation of the plaintiff's services in the amount of $1768. Accordingly, we conclude that the court's clearly erroneous factual findings as to exhibit 7 constitute harmful error, and the plaintiff is entitled to a new trial on his unjust enrichment and quantum meruit claims.[11]

[11] Unjust enrichment and quantum meruit are related causes of action. "Unjust enrichment is a legal doctrine to be applied when no remedy is available pursuant to a contract. . . . Plaintiffs seeking recovery for unjust enrichment must prove (1) that the defendants were benefited, (2) that the defendants unjustly did not pay the plaintiffs for the benefits, and (3) that the failure of payment was to the plaintiffs' detriment. . . . Quantum meruit is a theory of contract recovery that does not depend upon the existence of a contract, either express or implied in fact. . . . Rather, quantum meruit arises out of the need to avoid unjust enrichment to a party, even in the absence of an actual agreement. . . . Centered on the prevention of injustice, quantum meruit strikes the appropriate balance by evaluating the equities and guaranteeing that the party who has rendered services receives a reasonable sum for those services." (Citations omitted; internal quotation marks omitted.) *Pollansky* v. *Pollansky*, 162 Conn. App. 635, 657–58, 133 A.3d 167 (2016).

In a footnote in his principal appellate brief, the plaintiff contends that "[t]he trial court concluded that there was no contract to sell the property but did not make any factual finding as to any agreement to repair and improve the property. It appears the damages to be awarded would be for quantum meruit, 'the value of the services rendered.' [*Shapero* v. *Mercede*, 262 Conn. 1, 7, 808 A.2d 666 (2002)]."

The judgment is reversed only with respect to the unjust enrichment and quantum meruit counts of the plaintiff's complaint and the case is remanded for a new trial on those counts; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

GHP MEDIA, INC. *v.* TANYA HUGHES ET AL. (AC 44921)

Alvord, Suarez and Seeley, Js.

Syllabus

The plaintiff, G Co., a printing company, sought to recover damages from the defendants T Co., a rival printing company, and H, a former employee of G Co., in connection with H's alleged theft and use of G Co.'s trade secret information and other intellectual property for the benefit of T Co. H, as an employee of G Co., had access to confidential, proprietary, and trade secret information belonging to G Co. When H became an employee of T Co., while she was still employed by G Co., she allegedly brought documents belonging to G Co. to her office at T Co. and used the information therein to solicit and divert customers from G Co. to T Co. After G Co. commenced the action, T Co. filed a third-party complaint against the third-party defendants, R and L, both officers of G Co., for indemnification. T Co. alleged, inter alia, that R and L had a duty to preserve the confidentiality of G Co.'s assets, and that R and L breached their duties as officers of G Co. because they had authorized H to work from home and to have access to the sensitive information at issue. The trial court granted R and L's motion to strike T Co.'s third-party complaint, from which T. Co. appealed to this court. *Held* that the trial court properly granted R and L's motion to strike T Co.'s revised third-party complaint, as T Co. could not prevail on its claim that it was entitled to indemnification for T Co.'s alleged use of G Co.'s stolen

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In its memorandum of decision, the court stated that "[t]he fourth count of the complaint sounds in quantum meruit, as the plaintiff seeks to recover the value of the services rendered. The court has awarded damages under the claim of unjust enrichment and therefore will not consider this count having awarded damages on the basis of unjust enrichment." Because the court's ruling on the quantum meruit count was dependent on its adjudication of the unjust enrichment count, our reversal of the judgment as to the unjust enrichment count also requires reversal of the judgment of the court as to the quantum meruit count.

confidential information because R and L did not undertake reasonable efforts to prevent H from stealing G Co.'s confidential information; moreover, to the extent that R and L owed G Co. a fiduciary duty to protect its confidential information, that duty was entirely different from H's duty not to steal G Co.'s confidential information, as well as T Co.'s duty not to use that confidential information once it became aware that such information had been stolen.

Argued October 18, 2023—officially released June 11, 2024

Procedural History

Action to recover damages for, inter alia, tortious interference with contract, brought to the Superior Court in the judicial district of Ansonia-Milford, where the court, *Brown*, *J.*, granted the plaintiff's motion to cite in Reza Shafii as a party defendant; thereafter, the court, *Hon. Arthur A. Hiller*, judge trial referee, granted the motion of the defendant Shafiis', Inc., to file a third-party complaint; subsequently, the court, *Hon. Arthur A. Hiller*, judge trial referee, granted the third-party defendants' motion to strike the third-party plaintiff's revised complaint; thereafter, the court, *Hon. Arthur A. Hiller*, judge trial referee, granted the third-party plaintiff's motion for judgment and rendered judgment thereon, from which the third-party plaintiff appealed to this court. *Affirmed.*

John-Henry M. Steele, for the appellant (defendant/third-party plaintiff Shafiis', Inc.).

Andrew A. Cohen, for the appellees (third-party defendant John Robinson et al.).

Opinion

SUAREZ, J. The defendant and third-party plaintiff, Shafiis', Inc., doing business as TigerPress (TigerPress),[1]

[1] TigerPress and Tanya Hughes were named as the original defendants in the underlying action. On January 7, 2019, the plaintiff, GHP Media, Inc., filed a motion to cite in Reza Shafii, the president of TigerPress, as a defendant in the underlying action. On March 15, 2019, the court, *Brown*, *J.*, granted GHP Media, Inc.'s motion.

appeals from the judgment of the trial court rendered in favor of the third-party defendants, John Robinson and Joseph LaValla, both officers of the plaintiff, GHP Media, Inc. (GHP),[2] after it granted their motion to strike TigerPress' revised third-party complaint for indemnification. On appeal, TigerPress claims that the court, in granting the third-party defendants' motion to strike, improperly concluded that its revised third-party complaint failed to allege that TigerPress, Robinson, and LaValla owed an identical duty to GHP in the underlying action. We affirm the judgment of the trial court.

The following procedural history is relevant to this appeal. GHP commenced the underlying action against TigerPress and the defendant Tanya Hughes in September, 2017. In its June 10, 2020 amended complaint, GHP alleged the following facts. On June 7, 2017, GHP purchased all the assets of a commercial printing company known as Integrity Graphics (Integrity).[3] At the time of the sale, Hughes was an employee of Integrity. From July 10 to 19, 2017, following the sale of Integrity, Hughes was employed by GHP as a sales consultant. On July 12, 2017, Hughes, as a new employee of GHP, signed an acknowledgment for the receipt of GHP's employee handbook. The employee handbook included a confidentiality policy, which stated that GHP's intellectual property could not be used or disclosed by the employee after his or her engagement with the company ended. During her time as an employee of GHP, Hughes took home thousands of documents containing confidential, proprietary, and trade secret information belonging to GHP. Hughes understood that she was allowed

[2] It is undisputed that Robinson is an owner and officer of GHP. It is also undisputed that LaValla is currently an officer of GHP, and that both Robinson and LaValla were supervisors of the defendant Tanya Hughes and Jennifer Wallace when they were employees of GHP.

[3] It is undisputed that LaValla was the owner and officer of Integrity.

to take these documents home because she was an employee of GHP and was permitted to use them solely for GHP's purposes.

On July 17, 2017, Hughes became a paid employee of TigerPress, a direct competitor of GHP, while she was still employed by GHP. On July 19, 2017, Hughes informed GHP that she was resigning from her employment at GHP to work for TigerPress. After becoming an employee of TigerPress, Hughes brought GHP's documents to her office at TigerPress and stored them in her filing cabinet. In addition, Hughes and TigerPress took possession of another set of customer files belonging to GHP, which files purportedly were taken by another former GHP employee, Jennifer Wallace, who also became an employee of TigerPress in July, 2017. Wallace left the employment of TigerPress in September, 2017. Following Wallace's departure from her employment at TigerPress, Hughes was instructed to take over the files left by Wallace. Hughes then incorporated Wallace's files into her own files. Hughes used these files to solicit and divert customers from GHP to TigerPress, and she continued to use the confidential information in her capacity as an employee of TigerPress. TigerPress also participated in the diversion of customers and business from GHP to itself by using the confidential information at issue.

In its amended complaint, which consists of twenty-two counts, GHP set forth causes of action against Hughes, TigerPress, and Reza Shafii sounding in, inter alia, tortious interference with contract, tortious interference with business relationships, computer offenses in violation of General Statutes §§ 53a-251 (e) (1) and (2)[4] and

[4] General Statutes § 53a-251 defines various computer crimes. Section 53a-251 (e) provides in relevant part: "Misuse of computer system information. A person is guilty of the computer crime of misuse of computer system information when: (1) As a result of his accessing . . . a computer system, he intentionally makes or causes to be made an unauthorized display, use, disclosure or copy, in any form, of data residing in, communicated by or produced by a computer system; or (2) he intentionally or recklessly and

52-570b,[5] conversion, civil theft, and violations of the Connecticut Uniform Trade Secrets Act (CUTSA), General Statutes § 35-50 et seq., and the Connecticut Unfair Trade Practices Act, General Statutes § 42-110b et seq. Out of the twenty-two counts brought against Hughes, TigerPress, and Shafii, only count one of the amended complaint alleged a breach of the duty of loyalty. Specifically, GHP alleged that Hughes, "[a]s an agent of GHP . . . had a duty to act in good faith, loyalty, and honesty toward her employer. . . . The solicitation and diversion of business by [Hughes], during her paid employment by GHP, and her use of GHP's time and resources to pursue her own business interests, on behalf of a direct competitor, was a violation of that duty." On December 12, 2018, TigerPress filed an answer admitting to some of the allegations in the complaint, denying some of the allegations, and asserting the special defense of waiver, disclosure, unclean hands, and nonjusticiability.[6] On December 17, 2018, Hughes also filed an answer denying all of the material allegations and adopting the special defenses in TigerPress' answer.[7]

without authorization (A) alters, deletes, tampers with, damages, destroys or takes data intended for use by a computer system, whether residing within or external to a computer system, or (B) intercepts or adds data to data residing within a computer system . . . ."

[5] General Statutes § 52-570b establishes a cause of action for computer related offenses. Section 52-570b provides in relevant part: "(a) Any aggrieved person who has reason to believe that any other person has been engaged, is engaged or is about to engage in an alleged violation of any provision of section 53a-251 may bring an action against such person and may apply to the Superior Court for: (1) An order temporarily or permanently restraining and enjoining the commencement or continuance of such act or acts; (2) an order directing restitution; or (3) an order directing the appointment of a receiver. . . ."

[6] On January 16, 2020, Shafii filed a separate answer in which he admitted to some of the allegations in the amended complaint, denied some of the allegations, and asserted the same special defenses as those asserted by TigerPress.

[7] On January 22, 2019, Hughes filed a revised answer admitting some of the allegations in the plaintiff's complaint.

On September 12, 2019, TigerPress moved, pursuant to General Statutes § 52-102a,[8] for permission to serve a third-party complaint for indemnification on Robinson and LaValla. On November 4, 2019, the court, *Hon. Arthur A. Hiller*, judge trial referee, granted TigerPress' motion. On December 6, 2019, TigerPress filed a third-party complaint, subsequently revised on February 3, 2020 (revised third-party complaint), against Robinson and LaValla for indemnification. In its revised third-party complaint, TigerPress alleged that, "[i]n its [amended] complaint, GHP purportedly claims that it has sustained damages as a consequence of the alleged wrongful conduct of . . . Hughes and [TigerPress], arising from . . . Hughes and [TigerPress'] alleged breach of duties to preserve the confidentiality of certain GHP assets, intellectual property, trade information, and alleged extremely confidential, proprietary, and trade secret documents and customer files." Although TigerPress denied the existence of such purported duties, it alleged that, "if such duties exist . . . it is Robinson [and LaValla], as [officers] . . . of GHP, who had a duty to preserve the confidentiality of the alleged GHP assets, intellectual property, trade information, and claimed extremely confidential, proprietary, and trade secret documents and customer files." TigerPress further alleged that Robinson and LaValla breached their duty to preserve the confidentiality of GHP's assets by authorizing Hughes to work from home and allowing her to take trade secret information to her house. Specifically, TigerPress alleged that, "[d]espite

[8] General Statutes § 52-102a provides in relevant part: "(a) A defendant in any civil action may move the court for permission as a third-party plaintiff to serve a writ, summons and complaint upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. The motion may be filed at any time before trial and permission may be granted by the court if, in its discretion, it deems that the granting of the motion will not unduly delay the trial of the action nor work an injustice upon the plaintiff or the party sought to be impleaded. . . ."

the existence of [their] fiduciary duty to preserve GHP's alleged assets, intellectual property, trade information, and trade secrets that Robinson [and LaValla] owed to GHP . . . Robinson authorized . . . Hughes to work from home . . . . Similarly, even though Robinson [and LaValla] knew that . . . Hughes, while working from home, must have had in her possession the kind of information [they] now [claim] is GHP's alleged assets, intellectual property, trade information, and trade secrets, when . . . Hughes gave her notice that she was terminating her employment and going to work for an entity that Robinson [and LaValla] knew was a direct competitor of GHP . . . [they] . . . did not ask or direct anyone else to ask . . . Hughes if she had any customer files or other documents or information . . . [or] demand or direct anyone else to demand that . . . Hughes return [the] customer files or other documents or information that GHP now claims are its . . . extremely confidential, proprietary and trade secret documents/customer files . . . ."

On May 14, 2020, Robinson and LaValla filed a motion to strike the revised third-party complaint, arguing that TigerPress failed to allege therein that "[TigerPress], on [the] one hand, and [Robinson] and [LaValla], on the other, owe identical duties to [GHP], for which they are jointly and severally liable." On May 14, 2020, Robinson and LaValla filed a memorandum of law in support of their motion to strike TigerPress' revised third-party complaint. In their memorandum of law, Robinson and LaValla argued that TigerPress' revised third-party complaint "does not set forth any facts showing that [TigerPress] has any joint obligation or identical duties with [Robinson] and [LaValla]. . . . [Robinson] and [LaValla] have independent legal relationships with, and consequent duties to, their own company, [GHP]. Specifically, [Robinson], as an officer and owner of [GHP], had a fiduciary duty to preserve the confidentiality of

his own company's assets. . . . [LaValla] had the same duty. . . . But this cannot possibly constitute identical duties with [TigerPress] as to [GHP], for which [Robinson] and [LaValla] are jointly and severally liable." On July 17, 2020, TigerPress filed a memorandum of law in opposition to the motion to strike its revised third-party complaint. In its memorandum of law, TigerPress contended that "[t]he allegations in the third-party complaint demonstrate that, if [GHP] sustained any injuries here, which is denied, the fault lies with GHP's owner, [Robinson], and one of GHP's corporate officers, [LaValla], for their failure to preserve the alleged confidential, trade secret nature of this information. . . . This is the identical duty that [GHP] alleges that [Hughes] and [TigerPress] violated."

On December 18, 2020, the court issued a memorandum of decision in which it granted Robinson and LaValla's motion to strike TigerPress' revised third-party complaint. In its memorandum of decision, the court relied on this court's decision in *Chicago Title Ins. Co.* v. *Accurate Title Searches, Inc.*, 173 Conn. App. 463, 481, 164 A.3d 682 (2017), for the legal principle that, "[t]o assert a common-law indemnity claim, the asserting party must show that both parties had an identical duty to the third party and that both parties are jointly and severally liable for the loss incurred." The trial court stated that officers owe fiduciary duties to their corporations, including a duty of loyalty. Furthermore, a duty of loyalty encompasses the duty not to disclose confidential information. The court concluded that "[TigerPress] has alleged that [the duty to not disclose confidential information] is the duty breached by [Robinson and LaValla]. . . . [TigerPress] does not owe [GHP] this duty, as it is a competing corporation. It is therefore precluded from asserting an indemnity claim against [Robinson and LaValla] because it does not

allege an identical duty with [them] that caused the losses incurred by [GHP]."

On January 7, 2021, TigerPress filed a motion to reargue in which it agreed with the court's conclusion that it owed no duty to preserve the confidential information of GHP, as it is a competing corporation, but asserted that GHP has also alleged that TigerPress is liable for violating GHP's rights under certain provisions of CUTSA, namely, § 35-51 (b) (1) and (2) (B) (iii).[9] In particular, TigerPress argued that its liability "is claimed by [GHP] here to be derived from [Hughes] and [Wallace], whom [GHP] claims owed [it] a duty to maintain the secrecy and limit the use of its alleged trade secrets." On February 18, 2021, the court issued a memorandum of decision on TigerPress' motion to reargue, denying the motion. In its memorandum of decision, the court reasoned that the analysis and conclusion in its December 18, 2020 memorandum of decision applies equally to TigerPress' CUTSA argument. Specifically, the court stated that "CUTSA does not define an identical duty for which the third-party plaintiff and [third-party] defendants are jointly and severally liable to [GHP]. The language in clause (iii) does not explicitly define any duty, much less an identical one. It simply refers to the person who owes a duty: 'derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use.' As the duty is not defined in the statute, it must arise from elsewhere. Consequently, even if [Robinson and LaValla] could be jointly liable with [TigerPress] under

[9] General Statutes § 35-51 (b) provides in relevant part: " 'Misappropriation' means: (1) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or (2) disclosure or use of a trade secret of another without express consent by a person who . . . (B) at the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was . . . (iii) derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use . . . ."

the statute, their duty would be the very duty of loyalty alleged in the indemnification claim, which the court already has held to be distinct from [TigerPress'] duty."

On March 5, 2021, TigerPress appealed from the court's decision granting the third-party defendants' motion to strike and from the denial of TigerPress' motion to reargue. That appeal was docketed under AC 44563. On July 29, 2021, this court ordered, sua sponte, that the parties file memoranda addressing why the appeal should not be dismissed for lack of a final judgment. See *Pellecchia* v. *Connecticut Light & Power Co.*, 139 Conn. App. 88, 90–91, 54 A.3d 658 (2012) ("[t]he granting of a motion to strike . . . ordinarily is not a final judgment because our rules of practice afford a party a right to amend deficient pleadings" (internal quotation marks omitted)), cert. denied, 307 Conn. 950, 60 A.3d 740 (2013). On August 25, 2021, TigerPress filed a motion for judgment on its third-party complaint. On August 26, 2021, the trial court rendered judgment on the third-party complaint in favor of Robinson and LaValla. On August 30, 2021, TigerPress filed the present appeal from the court's December 18, 2020 judgment granting the third-party defendants' motion to strike. That appeal was docketed under AC 44921. On September 8, 2021, this court dismissed the appeal docketed under AC 44563, and further ordered, sua sponte, that all future filings be made Docket No. AC 44921.

On appeal, TigerPress claims that the judgment in favor of the third-party defendants "should be vacated and the order granting the motion to strike reversed." TigerPress argues that it alleged "an identical duty owed to [GHP] by [Robinson and LaValla] that GHP alleges [TigerPress] owes to GHP." We are not persuaded.

We first set forth the applicable standard of review. "Because a motion to strike challenges the legal sufficiency of a pleading and, consequently, requires no

factual findings by the trial court, our review of the court's ruling . . . is plenary. . . . We take the facts to be those alleged in the complaint that has been stricken and we construe the complaint in the manner most favorable to sustaining its legal sufficiency. . . . Thus, [i]f facts provable in the complaint would support a cause of action, the motion to strike must be denied. . . . Moreover, we note that [w]hat is necessarily implied [in an allegation] need not be expressly alleged. . . . It is fundamental that in determining the sufficiency of a complaint challenged by a defendant's motion to strike, all well-pleaded facts and those facts necessarily implied from the allegations are taken as admitted. . . . Although [w]e assume the truth of both the specific factual allegations and any facts fairly provable thereunder . . . [a motion to strike] . . . does not admit legal conclusions or the truth or accuracy of opinions stated in the pleadings. . . . A motion to strike is properly granted if the complaint alleges mere conclusions of law that are unsupported by the facts alleged. Furthermore, [t]he interpretation of pleadings is always a question of law for the court and . . . our interpretation of the pleadings therefore is plenary." (Citations omitted; internal quotation marks omitted.) *Desmond* v. *Yale-New Haven Hospital, Inc.*, 212 Conn. App. 274, 284, 275 A.3d 735, cert. denied, 343 Conn. 931, 276 A.3d 433 (2022).

"[W]e have long 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 pleadings with reference to the general theory upon which it proceeded, and to 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. . . . [E]ssential allegations may not be supplied by conjecture or remote implication . . . .'' (Internal quotation marks omitted.) *Chicago Title Ins. Co.* v. *Accurate Title Searches, Inc.*, supra, 173 Conn. App. 479.

Having set forth our standard of review, we turn to the governing legal principles that are relevant to our resolution of this appeal. ''Indemnification involves a claim for reimbursement in full from one on whom a primary responsibility is claimed to rest, while apportionment, sometimes called contribution, involves a claim for reimbursement of a share of a payment necessarily made by the claimant which equitably ought to be paid in part by others. . . . In an action for indemnity . . . one tortfeasor seeks to impose total liability upon another.'' (Citation omitted; internal quotation marks omitted.) *Valente* v. *Securitas Security Services, USA, Inc.*, 152 Conn. App. 196, 203, 96 A.3d 1275 (2014).

''In the absence of an express contract for indemnification or statutory provisions authorizing actions for indemnification . . . a party may nonetheless assert an implied right to indemnification as a measure of restitution. . . . Where a party seeks restitution in the form of common-law indemnification, several authorities agree that the party seeking indemnity and the party from whom indemnification is sought must be considered jointly and severally liable for the loss incurred by the putative indemnitee. See 42 C.J.S. [98, Indemnity § 2 (2007)] ([i]ndemnity applies only where there is an *identical duty* owed by one and discharged by another); see also id., § 33, p. 149 ([a] cause of action for implied indemnification requires a showing that the plaintiff and the defendant owed a duty to a third party, and that the plaintiff discharged the duty which, as

between the plaintiff and the defendant, should have been discharged by the defendant); 41 Am. Jur. 2d [383, Indemnity § 1 (2015)] ([i]ndemnity requires that a common duty be mutually owed to a third party); 1 Restatement (Third), Restitution and Unjust Enrichment, § 23, comment (d) (2011) (A claim to indemnity or contribution arises when the claimant has discharged all or part of a joint obligation. A claim under this section is readily distinguishable, therefore, from the similar claim that arises when A and B owe independent duties to a third party C; or when A, acting with adequate justification, renders a performance to C for which B would have been liable to C directly. . . . The restitution claim that arises from such transactions is . . . more often referred to as a claim to equitable subrogation.). The consensus expressed by these authorities fully aligns with our jurisprudence concerning claims for common-law indemnification." (Citations omitted; emphasis added; internal quotation marks omitted.) *Chicago Title Ins. Co.* v. *Accurate Title Searches, Inc.*, supra, 173 Conn. App. 480–81.

Even if we assume, without deciding, that there is a common-law action for indemnification based upon intentional torts,[10] TigerPress' argument that its revised

[10] Claims for indemnification typically arise in cases in which the defendant is alleged to have acted negligently. See *Chicago Title Ins. Co.* v. *Accurate Title Searches, Inc.*, supra, 173 Conn. App. 485. In the present case, GHP did not allege, in its amended complaint, a cause of action for negligence against Hughes or TigerPress. Rather, GHP alleged that Hughes and TigerPress were liable for various intentional torts. Although there is no controlling appellate authority in Connecticut, the majority of our Superior Courts have held that a party cannot seek indemnification for intentional torts. See, e.g., *Peterson* v. *Hume*, Superior Court, judicial district of Hartford, Docket No. CV-11-5035394-S (March 30, 2015); *Wood* v. *Club, LLC*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-13-6016946-S (November 29, 2013) (57 Conn. L. Rptr. 238, 240); *Martel* v. *Burkamp*, Docket No. CV-H7684, 2009 WL 2243768, *2 (Conn. Super. July 23, 2009); *Starview Ventures Ltd., LLC* v. *Acadia, Ins.*, Superior Court, judicial district of New Haven, Docket No. CV-06-5003463-S (September 9, 2008) (46 Conn. L. Rptr. 342, 345). In *Martel*, the court reasoned that "the denial of indemnification claims where the only allegation against the claimant is premised on inten-

third-party complaint alleged an identical duty owed by it, Robinson, and LaValla to GHP warrants little discussion. In essence, the revised third-party complaint asserts that TigerPress is entitled to indemnification for TigerPress' use of GHP's stolen confidential information because Robinson and LaValla did not undertake reasonable efforts to prevent Hughes from stealing GHP's confidential information. To the extent that Robinson and LaValla owe GHP a fiduciary duty to protect its confidential information, that duty is entirely different from Hughes' duty not to steal GHP's confidential information, and TigerPress' duty not to use that confidential information once it became aware that such information had been stolen.

Accordingly, we conclude that the trial court properly granted the third-party defendants' motion to strike.

The judgment is affirmed.

In this opinion the other judges concurred.

ALTAVISTA INVESTMENTS, LLC *v.* LEYLA MAKEEVA ET AL.
(AC 46885)

Elgo, Seeley and Westbrook, Js.

Syllabus

B Co., which held a note that was secured by a mortgage on the plaintiff's property, filed a motion to intervene in postjudgment summary process

tional misconduct serves to discourage such misconduct and is consistent with sound public policy." *Martel* v. *Burkamp*, supra, 2009 WL 2243768, *2. Moreover, as one Superior Court judge has observed, "plaintiffs cannot assert a common-law indemnity claim by merely attaching a negligence label to allegations for which negligence does not apply." *Maxwell* v. *Bozelko*, Docket No. CV-11-6006411S, 2017 WL 3251294, *4 (Conn. Super. June 30, 2017). Because GHP has not argued that TigerPress' indemnification claim fails on the basis that it seeks indemnification for its alleged intentional torts, we assume without deciding that such an indemnification claim is permissible if the duties owed by the defendant and alleged indemnitor are identical.

eviction proceedings for the limited purpose of asserting its rights with respect to use and occupancy payments made by the defendants and participating in any proceedings to determine the final distribution of those funds. The trial court held a hearing in accordance with the applicable statute (§ 47a-35b), and denied B Co.'s motion to intervene, determining that B Co. was not a proper party to the eviction action because it did not have a possessory interest in the real property. On B Co.'s appeal to this court, *held* that the trial court improperly failed to permit B Co. to intervene in the postjudgment proceedings as a matter of right, and, accordingly, this court reversed the trial court's judgment and remanded the case with direction to grant B Co.'s motion to intervene and for further proceedings in accordance with § 47a-35b: pursuant to the four factor test for intervention as of right, which the trial court improperly failed to consider, this court had jurisdiction over the appeal because B Co. demonstrated a colorable claim of intervention as of right, such that the denial of its motion for intervention was a final judgment for purposes of appeal; moreover, the trial court improperly denied the motion to intervene on its merits because the motion was clearly timely, as it was filed with the trial court during the pendency of the appeal from the judgment of possession for the express purpose of vindicating rights under § 47a-35b, pursuant to which the trial court was not required to hold a hearing until the final disposition of the appeal, B Co. had a direct right to the subject matter of the postjudgment litigation, as neither the plaintiff nor the defendants contested B Co.'s assertion that it had a contractual right to the use and occupancy payments, that right was a substantial one, as reflected in the amount of the accumulated use and occupancy payments at issue, B Co.'s interest would likely be impaired by any disposition in which it was not permitted to participate because § 47a-35b expressly provides that the court's distribution of the accumulated use and occupancy payments is to be conclusive, and B Co.'s interest in the use and occupancy payments was clearly adverse to the interests of the plaintiff and the defendants, and, accordingly, the existing parties to the litigation would not adequately protect B Co.'s interest in obtaining the use and occupancy payments; furthermore, because the § 47a-35b hearing was separate and distinct from the underlying eviction action, whether B Co. had a possessory interest in the property that was subject to the eviction action was not a proper consideration for the trial court in determining whether to grant the motion to intervene, instead, the court should have determined whether B Co. had a sufficient interest in the § 47a-35b hearing, and such interest was apparent from the record.

Argued March 11—officially released June 11, 2024

Procedural History

Summary process action, brought to the Superior Court in the judicial district of Stamford-Norwalk,

Housing Session, where the plaintiff withdrew the complaint as to the defendant John Doe et al.; thereafter, the court, *Spader*, *J.*, rendered judgment against the defendant Stanislav V. Lenskiy et al. for failure to appear; subsequently, the court, *Spader*, *J.*, rendered judgment of possession for the plaintiff, from which the named defendant et al. appealed to this court, which affirmed the trial court's judgment; thereafter, the court, *Cirello*, *J.*, denied the motion to intervene filed by Baotou Capital, LLC, and Baotou Capital, LLC, appealed to this court. *Reversed*; *judgment directed*; *further proceedings*.

Matthew B. Gibbons, with whom was *Patrick M. Fahey*, for the appellant (proposed intervenor Baotou Capital, LLC).

Opinion

WESTBROOK, J. In the underlying summary process eviction action (eviction action), the trial court rendered a judgment of possession against the defendant Leyla Makeeva and seven other defendants, in favor of the plaintiff, Altavista Investments, LLC.[1] See *Altavista Investments, LLC* v. *Makeeva*, 220 Conn. App. 901, 297 A.3d 285 (2023) (affirming judgment of possession). Baotou Capital, LLC (Baotou), which holds a note secured by a mortgage on residential property located

[1] In addition to Makeeva, the following additional parties were named as defendants in the underlying eviction action: Vladimir Lenskiy, Valerian Lenskiy, Zinaida Lenskaya, Stanislav V. Lenskiy, Anastasia Lenskiy, Vitaly Lenskiy, Ilana Lenskiy, and four additional occupants noticed by aliases in accordance with General Statutes § 47a-23 (b). The action later was withdrawn as to the unnamed defendants, and the court rendered judgment against Stanislav V. Lenskiy, Anastasia Lenskiy, Vitaly Lenskiy, and Ilana Lenskiy for failure to appear.

Neither the plaintiff nor any of the defendants filed a brief or otherwise participated in the present appeal, and, consequently, this court issued an order that they would not be permitted to participate in oral arguments and that the appeal would be considered solely on the basis of Baotou Capital, LLC's brief and oral argument, and the record as defined by Practice Book § 60-4.

at 969 North Street in Greenwich (property), the property at issue in the eviction action, filed the present appeal from the denial of its postjudgment motion to intervene on the basis of an ownership interest it claims in use and occupancy payments made by the defendants in lieu of bond during the pendency of the prior appeal. See General Statutes § 47a-35a (a).[2] Baotou claims that the trial court improperly determined that, because it lacked any possessory interest in the property, it was not a proper party to the eviction action and, thus, also was not entitled to intervene in postjudgment proceedings pursuant to General Statutes § 47a-35b[3] regarding the final distribution of the use and occupancy payments. We agree that the court improperly failed to permit Baotou to intervene as a matter of right and, accordingly, reverse the judgment of the court.

The record reveals the following relevant facts and procedural history. The plaintiff purchased the property in 2017.[4] The plaintiff financed the purchase by executing a $4,940,000 note and a mortgage in favor of Baotou's

[2] General Statutes § 47a-35a (a) provides in relevant part that, if an "appeal is taken by the defendant occupying a dwelling unit . . . in an action of summary process," the defendant must give the adverse party an appeal bond or, "upon motion by the defendant and after [a] hearing," the court shall order, in lieu of a bond, "the defendant to deposit with the court payments for the reasonable fair rental value of the use and occupancy of the premises during the pendency of [an] appeal accruing from the date of such order. . . ."

[3] General Statutes § 47a-35b provides: "Upon final disposition of the appeal, the trial court shall hold a hearing to determine the amount due each party from the accrued payments for use and occupancy and order distribution in accordance with such determination. Such determination shall be based upon the respective claims of the parties arising during the pendency of the proceedings after the date of the order for payments and shall be conclusive of those claims only to the extent of the total amount distributed."

[4] At the hearing on the motion to intervene, the defendants' attorney provided the court with the following undisputed background information regarding the plaintiff's purchase of the property and the relationships between the various parties. "[T]he [plaintiff's] principal . . . is a gentleman named Vladimir Guzinsky. He is the sole owner of [the plaintiff]. [The plaintiff] was formed solely for the purchase of [the property]. [Guzinsky]

predecessor in interest, Patriot Bank, N.A. (Patriot Bank).[5] Pursuant to the terms of the mortgage, in addition to a security interest in the property, the plaintiff granted to Patriot Bank the plaintiff's rights to "[a]ll of the rents, receipts, revenues, income, issues thereof and profits now due or which may become due or to which [the plaintiff] may now or hereafter shall become entitled . . . or may demand or claim, arising or issuing from or out of any and all using, leasing, licensing, possessing, operating from, residing in, selling or otherwise enjoying the [m]ortgaged [p]roperty or any part thereof . . . ." In addition to the note and mortgage, the plaintiff also executed a separate assignment of leases and rentals, which provided, in relevant part, an assignment of "[a]ll rents, additional rents, payments in connection with any termination, cancellation or surrender of any Lease, revenues, income, issues and profits arising from the Leases and renewals and replacements thereof and any cash or security deposited in connection therewith and together with all rents, revenues, income, issues and profits . . . from the use,

was, at one time, the best friend of [the defendant] Vladimir Lenskiy . . . . They and their wives and their children vacationed together, spent a significant amount of time together. In 2002, [Vladimir Lenskiy] purchased the [property]. In 2005 . . . he tore down the former home and finished the construction on the house that stands on the property since that time . . . . He and his wife raised their children in that home, the children grew up, and he continues to reside in that home ever since 2005. In 2012, [Vladimir Lenskiy] ran into some financial trouble with the bank that then had the mortgage on the construction loan. And there was a period of years where they were negotiating but eventually that bank started a foreclosure action against [him]. [Vladimir Lenskiy] negotiated with that bank to give him permission to sell the property at a short sale to [the plaintiff]. . . . [Guzinsky] formed [the plaintiff] to save his friend from the foreclosure action and bought it at a short sale . . . in June of 2017, for $3.8 million. Two months later, he financed the property with Patriot Bank . . . ." Guzinsky allowed the defendants to retain possession of the property, and, although Guzinsky "created a lease . . . between himself and [Vladimir Lenskiy] . . . [Vladimir Lenskiy] had never paid [Guzinsky] rent."

[5] The terms of the original note and mortgage were subsequently amended. All references to the note and mortgage in this opinion are to the operative amended loan documents.

enjoyment and occupancy of the [p]roperty . . . .'' As part of the assignment of leases and rentals, Patriot Bank granted the plaintiff a revocable license to collect and receive rents and other sums due under any lease. This license automatically was to be revoked in the event of a default as set forth in the loan documents.

In October, 2019, the plaintiff entered into a purported multiyear arrangement with Makeeva to lease the property for quarterly payments of $60,000. In June, 2020, Patriot Bank commenced a mortgage foreclosure action (foreclosure action) against the plaintiff and its tenants, which remains ongoing. See *Patriot Bank, N.A.* v. *Altavista Investments, LLC*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-20-6047105-S.

In August, 2021, the plaintiff commenced the underlying summary process eviction action alleging both nonpayment of rent and that the defendants' right or privilege to occupy the property had terminated. On June 14, 2022, the court, *Spader, J.*, issued a memorandum of decision concluding that, although the plaintiff had failed to meet its burden with respect to its claim of nonpayment of rent due to a lack of any enforceable lease, it nevertheless had prevailed with respect to its claim that any right of the defendants to occupy the property had terminated. The court rendered a judgment of possession in favor of the plaintiff with a stay of execution through July 31, 2022. The court also concluded that its ''findings . . . regarding a lack of a rental agreement [do] not impact the plaintiff's ability to ask for use and occupancy payments in the event of an appeal filed by the defendants.''

The defendants Makeeva and Vladimir Lenskiy timely appealed from the judgment of possession and also filed a motion asking the court to order appropriate use and occupancy payments in lieu of an appeal bond

with surety. The court granted the motion, ordering the defendants to deposit monthly payments of $24,000 with the clerk of the court.

Shortly after the appeal was filed in the eviction action, Patriot Bank assigned the operative note, mortgage, and assignment of leases and rents to Baotou. The court in the foreclosure action granted a motion to substitute Baotou for Patriot Bank as the party plaintiff in that action.

On February 7, 2023, Baotou filed a postjudgment motion to intervene in the eviction action for the limited purpose of asserting its rights with respect to the use and occupancy payments being deposited with the clerk of court and participating in any proceedings to determine the final distribution of those funds. Makeeva and Vladimir Lenskiy initially filed an objection to the motion to intervene in which they argued that such intervention was "both premature and presumptuous" and that Baotou "must wait for the entry of judgment in the foreclosure [action] and the resolution of the appeal in the [eviction] action." They later withdrew their objection. The plaintiff also filed an objection to the motion to intervene arguing that Baotou was not a proper party to the eviction action, which is limited to the issue of possession, and, thus, should not be permitted to intervene.

In response to a May 12, 2023 caseflow request from Baotou seeking adjudication of its motion to intervene, the court, *Cirello*, *J.*, issued an order that it would "consider the motion to intervene . . . when it considers the use and occupancy disbursement required by [§] 47a-35b." On July 25, 2023, this court issued a memorandum decision affirming the judgment of possession. *Altavista Investments*, *LLC* v. *Makeeva*, supra, 220 Conn. App. 901. The defendants did not file a petition for certification to appeal to our Supreme Court.

The court scheduled a hearing on Baotou's motion to intervene for August 29, 2023. The court subsequently issued an order denying the motion to intervene. The court provided the following rationale for its ruling: "[Baotou] seeks to assert a money damages claim or a right to money held by the clerk in this [eviction] action for possession. [Baotou] is not the owner of the subject property nor able to terminate the possessory interest of the defendant[s] through eviction as authorized in a summary process action. Its claims for the money held by the clerk's office are based on contract principles and privity against the plaintiff . . . . As [Baotou] does not seek a possessory interest in the subject property, it is not a proper party to this action." This appeal followed.[6]

Rather than turning directly to the merits of the appeal, Baotou, in its appellate brief, first addresses a threshold issue, namely, whether this appeal was taken from an appealable final judgment. See *In re Santiago G.*, 325 Conn. 221, 228, 157 A.3d 60 (2017) ("[u]nless a specific right to appeal otherwise has been provided by statute, we must always determine the threshold question of whether the appeal is taken from a final judgment before considering the merits of the claim" (internal quotation marks omitted)). We agree with Baotou that we have jurisdiction over the present appeal.

"The jurisdiction of the appellate courts is restricted to appeals from judgments that are final. General Statutes §§ 51-197a and 52-263; Practice Book § [61-1] . . . . The policy concerns underlying the final judgment rule are to discourage piecemeal appeals and to facilitate the speedy and orderly disposition of cases

[6] On March 7, 2024, the plaintiff filed a caseflow request asking the court to hold a hearing to distribute the $336,000 in use and occupancy payments currently held by the court. Baotou filed an objection arguing that the court should not hold a hearing until this court resolved its appeal regarding Baotou's right to intervene. The court sustained Baotou's objection.

at the trial court level. . . . The appellate courts have a duty to dismiss, even on [their] own initiative, any appeal that [they lack] jurisdiction to hear." (Internal quotation marks omitted.) *Heyward* v. *Judicial Dept.*, 159 Conn. App. 794, 799–800, 124 A.3d 920 (2015).

"An otherwise interlocutory order is appealable in two circumstances: (1) where the order or action terminates a separate and distinct proceeding, or (2) where the order or action so concludes the rights of the parties that further proceedings cannot affect them. . . . That the present matter arises postjudgment does not affect that analysis: the final judgment rule still applies." (Citations omitted; internal quotation marks omitted.) *Ricketts* v. *Ricketts*, 203 Conn. App. 1, 4–5, 247 A.3d 223 (2021); id., 5 (citing well established two part test of appealability set forth in *State* v. *Curcio*, 191 Conn. 27, 31, 463 A.2d 566 (1983)).

"General Statutes §§ 52-102[7] and 52-107[8] govern the intervention of nonparties to an action and provide for both permissive intervention and intervention as a matter of right. . . . Therefore, under the second

[7] "General Statutes § 52-102 provides in relevant part: 'Upon motion made by any party or nonparty to a civil action, the person named in the party's motion or the nonparty so moving, as the case may be, (1) may be made a party by the court if that person has or claims an interest in the controversy, or any part thereof, adverse to the plaintiff, or (2) shall be made a party by the court if that person is necessary for a complete determination or settlement of any question involved therein . . . .' " *BNY Western Trust* v. *Roman*, 295 Conn. 194, 203 n.6, 990 A.2d 853 (2010).

[8] "General Statutes § 52-107 provides: 'The court may determine the controversy as between the parties before it, if it can do so without prejudice to the rights of others; but, if a complete determination cannot be had without the presence of other parties, the court may direct that such other parties be brought in. If a person not a party has an interest or title which the judgment will affect, the court, on his application, shall direct him to be made a party.' Accord Practice Book § 9-18; see also General Statutes § 52-108 and Practice Book § 9-19 (allowing new parties to be brought in)." *BNY Western Trust* v. *Roman*, 295 Conn. 194, 203–204 n.7, 990 A.2d 853 (2010).

prong of *Curcio*, whether the trial court's action on a motion to intervene is appealable depends on whether intervention is an absolute right or a matter within the trial court's discretion. . . . [A]n unsuccessful applicant for intervention in the trial court does not have a final judgment from which to appeal unless he can make a colorable claim to intervention as a matter of right.[9] If he does make such a colorable claim, on appeal the court has jurisdiction to adjudicate both his claim to intervention as a matter of right and to permissive intervention.[10] . . .

"In order for a proposed intervenor to establish that it is entitled to intervene as a matter of right, the proposed intervenor must satisfy a well established four element conjunctive test: [T]he motion to intervene must be timely, the movant must have a direct and substantial interest in the subject matter of the litigation, the movant's interest must be impaired by disposition of the litigation without the movant's involvement and the movant's interest must not be represented adequately by any party to the litigation. . . . A proposed intervenor must allege sufficient facts, through its motion to intervene and the pleadings, to make the requisite showing of its right to intervene. . . . No additional testimony or evidence is required. . . . Failure to meet any one of the four elements, however, will preclude intervention as of right." (Citations omitted; footnotes

[9] See *King* v. *Sultar*, 253 Conn. 429, 435–36, 754 A.2d 782 (2000) (reasserting that denial of motion to intervene filed by person with colorable claim to intervention as matter of right is final judgment for purposes of appeal and holding that proposed intervenor has party status for purposes of § 52-263).

[10] "A colorable claim is one that is superficially well founded but that may ultimately be deemed invalid . . . . For a claim to be colorable, the [proponent of the claim] need not convince the trial court that he necessarily will prevail; he must demonstrate simply that he *might* prevail." (Citation omitted; emphasis in original; internal quotation marks omitted.) *In re Santiago G.*, supra, 325 Conn. 231.

added; footnotes in original; footnotes omitted; internal quotation marks omitted.) *BNY Western Trust* v. *Roman*, 295 Conn. 194, 203–206, 990 A.2d 853 (2010). For purposes of determining the jurisdictional issue, we apply a plenary scope of review as to whether all four elements have been met. Id., 207–208 n.12.[11]

Baotou's motion for intervention in the present matter is atypical in that it was filed after the court rendered a final judgment of possession and sought only to intervene in postjudgment proceedings regarding distribution of use and occupancy payments. Regardless of the precise procedural posture of the motion, however, when we consider the four elements of the test for intervention as of right, we are persuaded not only that Baotou demonstrates a colorable claim of intervention as of right such that the denial of its motion was a final judgment for purposes of appeal, but also that the court improperly denied the motion to intervene on its merits.[12] Because the same four factor test applies both to the jurisdictional question and to our consideration of the merits of the motion to intervene; see *In re Santiago G.*, supra, 325 Conn. 231–32; for brevity sake, we combine our analysis of the four factors.

The first element of the test is whether the motion to intervene was timely. "Whether a motion to intervene is timely involves a determination of how long the intervenor was aware of an interest before he or she tried to intervene, any prejudicial effect of intervention on the existing parties, any prejudicial effect of a denial

[11] Our Supreme Court has clarified that "[t]he denial of a motion to intervene as of right raises a question of law and warrants plenary review, whereas a denial for permissive intervention is reviewed with an abuse of discretion standard." (Internal quotation marks omitted.) *Kerrigan* v. *Commissioner of Public Health*, 279 Conn. 447, 454 n.10, 904 A.2d 137 (2006).

[12] Because we conclude that the court should have permitted Baotou to intervene as a matter of right, we do not consider the issue of permissive intervention.

on the applicant and consideration of any unusual circumstances either for or against timeliness. . . . Factors to consider also include the nature of the interest and the purpose for which the intervenor is seeking to be brought into the action. . . . [T]here are no absolute ways to measure timeliness . . . .'' (Internal quotation marks omitted.) *Austin-Casares* v. *Safeco Ins. Co. of America*, 310 Conn. 640, 649, 81 A.3d 200 (2013).

Here, Baotou's motion to intervene was timely.[13] The motion to intervene was filed with the trial court during the pendency of the appeal from the judgment of possession for the express purpose of vindicating rights pursuant to § 47a-35b, which governs the distribution of accrued use and occupancy payments following an appeal. Because the trial court was not required to hold a hearing in accordance with § 47a-35b until ''final disposition of the appeal,'' and Baotou filed its motion to intervene while the appeal was still pending, the motion was clearly timely.

The second and third elements of the test ask whether the proposed intervenor has a direct and substantial interest in the subject matter of the litigation and whether that interest would be impaired by a disposition without the involvement of the proposed intervenor. Because these factors are analytically related, we consider them together. See *Wallingford Center Associates* v. *Board of Tax Review*, 68 Conn. App. 803, 812, 793 A.2d 260 (2002).

[13] Ordinarily, the timeliness of a motion would be an issue of fact for the trial court that we would review on appeal under a clearly erroneous standard. See *Alves* v. *Giegler*, 348 Conn. 364, 385, 306 A.3d 455 (2024). In the present case, however, the court made no findings regarding the timing of the motion, and no one has raised a claim of untimeliness. The facts surrounding the timing of the motion, however, are not in dispute. Under these unique circumstances, it is appropriate for us to reach a conclusion regarding the timeliness of the motion as a matter of law on the basis of the undisputed facts in the record, both as to the threshold jurisdictional inquiry and with regard to the merits of the motion to intervene.

"Intervention allows one who was not a party in an original action to become a party upon his request. He has a derivative role by virtue of an action already shaped by the original parties. He takes the controversy as he finds it and may not introduce his own claims to restyle the action. . . . This is all the more true where a statute allows intervention for a specified purpose." (Citation omitted; internal quotation marks omitted.) *Nizzardo* v. *State Traffic Commission*, 259 Conn. 131, 154, 788 A.2d 1158 (2002). Here, although § 47a-35b does not expressly provide for the intervention of interested parties, it tasks the trial court with holding "a hearing to determine the amount due each party from the accrued payments . . . ." The statute contains no language indicating that only the current parties to the summary process action may participate in the distribution proceedings. See General Statutes § 47a-35b; *Franco* v. *East Shore Development, Inc.*, 271 Conn. 623, 632, 858 A.2d 703 (2004) (despite use of term "party" in statute authorizing statutory proceeding, nonparty intervention was permitted in absence of express contrary indication). Both common sense and judicial economy dictate that an outside entity with a demonstrable claim to a share of the distribution should be permitted to intervene in order to fulfill the purpose of the statute: an equitable distribution of the accrued payments.

In their oppositions to the motion to intervene, neither the plaintiff nor the defendants contested Baotou's assertion that it has a contractual right to the use and occupancy payments by virtue of Patriot Bank's assignment of the loan documents, including the assignment of leases and rents. Moreover, neither party to the underlying action has participated in the present appeal to raise such an argument. In short, not only does Baotou have a direct right to the subject matter of the postjudgment litigation at issue, that right is also a substantial one, as reflected in the amount of the accumulated use and occupancy payments at issue: $336,000.

Moreover, Baotou's interest would likely be impaired by any disposition in which it was not permitted to participate. Section 47a-35b expressly provides that the court's distribution of the accumulated use and occupancy payments "shall be conclusive," suggesting that Baotou's exclusion from the distribution proceeding could prove fatal, or at the least impair, any later attempt to assert a right to the distributed funds. Even if it were able to later establish in the foreclosure action that it is entitled under the loan documents to any distribution made to the plaintiff, it is uncertain, given the plaintiff's alleged default on the mortgage debt, that Baotou would be able to recover the distributed funds. The fact that Baotou possibly could vindicate its rights to the use and occupancy payments by instituting another lawsuit is not pertinent to whether it should be permitted to intervene now given that our "rules of intervention should be liberally construed, in order to avoid multiplicity of suits and settle all related controversies in one action." (Internal quotation marks omitted.) *Schaghticoke Tribal Nation* v. *Harrison*, 264 Conn. 829, 838–39, 826 A.2d 1102 (2003). On balance, we conclude that the second and third elements of the four part test are met.

Finally, the fourth element of the test is whether the interest of the proposed intervenor can be represented adequately by any existing party to the litigation. "The burden for establishing inadequate representation of similar interests is minimal. Indeed, the United States Supreme Court has acknowledged that one successfully establishes inadequate representation if the applicant shows that representation of his interest *may* be inadequate . . . . The particular circumstances of each case will dictate whether the absentee has an interest different from that of an existing party, and doubts should be resolved in favor of intervention." (Citation omitted; emphasis added; internal quotation marks omitted.)

Rosado v. *Bridgeport Roman Catholic Diocesan Corp.*, 60 Conn. App. 134, 149–50, 758 A.2d 916 (2000). "[A] presumption of inadequacy arises when an absentee must rely on his opponent or one whose interests are adverse to his." Id., 149. Baotou's interest in the use and occupancy payments is clearly adverse to both the plaintiff and the defendants. A distribution of the accumulated funds to either the plaintiff or the defendants obviously would deprive Baotou of the funds and, as discussed, likely would give rise to further legal action. Accordingly, the existing parties would not adequately protect Baotou's interest in obtaining the use and occupancy payments. Thus, the fourth element is satisfied.

The trial court, in denying the motion to intervene, did not engage in an analysis utilizing the appropriate four factor test. Instead, the primary reason given by the court for not permitting Baotou to intervene in the postjudgment proceedings was Baotou's lack of any present possessory interest in the property that was the subject of the eviction action. This was far too narrow of a lens, or perhaps the wrong lens entirely, through which to view Baotou's request for intervention. As a party with a clear and undisputed interest in the distribution of the accrued use and occupancy payments, Baotou had an absolute right to intervene.

"The underlying purpose of a § 47a-35b proceeding is to place some obligation on a nonpaying tenant to provide a property owner with surety against further financial losses while the summary process judgment is being considered on appeal. . . . A proceeding to order the distribution of funds held by the court in a summary process action under § 47a-35b is properly limited to those claims related to the use and occupancy of the premises during the pendency of the appeal." (Citation omitted; internal quotation marks omitted.)

Rock Rimmon Grange #142, Inc. v. *Bible Speaks Ministries, Inc.*, 112 Conn. App. 1, 7, 961 A.2d 1012 (2009). "[T]he evident purpose of the statute was to authorize the court to settle equitably the many disputes which may arise during the pendency of the proceeding *not necessarily related to the merits of the action*." (Emphasis added; internal quotation marks omitted.) Id., 6. In other words, a § 47a-35b hearing is unrelated to the determination of the possessory interests in the property in a summary process action. Rather, in the present case, it involves a dispute that falls outside of the merits of the eviction action, one that is between primarily the plaintiff and Baotou over who should receive the benefit of the use and occupancy payments made by the defendants during their unsuccessful appeal.

In *MFS Associates, Inc.* v. *Autospa Realty Corp.*, 19 Conn. App. 32, 560 A.2d 484 (1989), this court construed an analogous statute, General Statutes § 47a-26f,[14] which governs the distribution of use and occupancy payments paid into court during the pendency of an eviction action rather than following an appeal in lieu of bond. Id., 33 n.1, 35; see also *Rock Rimmon Grange #142, Inc.* v. *Bible Speaks Ministries, Inc.*, supra, 112 Conn. App. 5 (§§ 47a-26f and 47a-35b are "nearly identical in language and purpose"). In *MFS Associates, Inc.*, after the trial court had dismissed the summary process action for lack of subject matter jurisdiction, the defendant tenant moved for disbursement of the use and occupancy payments that it had paid into court during the pendency of the action. *MFS Associates, Inc.* v. *Autospa Realty Corp.*, supra, 34. The trial court granted

[14] General Statutes § 47a-26f provides: "After entry of final judgment, the court shall hold a hearing to determine the amount due each party from the accrued payments for such use and occupancy and order distribution in accordance with its determination. Such determination shall be based upon the respective claims of the parties arising during the pendency of the proceedings after the date of the order for payments and shall be conclusive of such claims only to the extent of the total amount distributed."

the motion, and the plaintiff landlord appealed. Id. This court held that the trial court improperly had ordered the funds disbursed to the defendant simply because the action had been dismissed for lack of subject matter jurisdiction. Id., 35. This court further concluded that a proceeding for disbursement of use and occupancy funds paid into court by a tenant during the pendency of a summary process action "is a *statutory proceeding separate and distinct from the summary process action that it follows*." (Emphasis added.) Id.

Given the nearly identical language and purpose of § 47a-35b, we are convinced that the statutorily prescribed hearing to distribute use and occupancy payments made during the pendency of an appeal from a judgment of possession in a summary process action is also a separate and distinct proceeding from the underlying eviction action. Accordingly, Baotou's possessory interest in the property was not a proper consideration in determining whether to grant the motion to intervene; the relevant question was whether Baotou had a sufficient interest in the separate and distinct distribution proceeding. Baotou's interest is apparent on this record, and, therefore, the court improperly denied its motion to intervene as a matter of right.

The judgment is reversed and the case is remanded with direction to grant Baotou's motion to intervene and for further proceedings in accordance with § 47a-35b.

In this opinion the other judges concurred.

JAMES R. BRENNAN *v.* BOARD OF ASSESSMENT APPEALS OF THE TOWN OF SEYMOUR
(AC 46258)

Elgo, Suarez and Clark, Js.

Syllabus

The plaintiff appealed to this court from the judgment of the trial court affirming the decision of the defendant board of assessment appeals,

which upheld the revaluation of the plaintiff's residential dwelling and the declassification of his nonresidential land as farmland by the town tax assessor. During a trial to the court, the plaintiff presented testimony from H, a licensed appraiser, that the residential portion of the plaintiff's property was valued at $105,000, a valuation which exceeded the assessor's allegedly excessive valuation. The court thereafter suggested that it could rely on the $105,000 valuation given by H and issue a decision only as to the plaintiff's claim regarding the declassification of his nonresidential property, and counsel for both parties agreed. Following trial, the court determined that the plaintiff had abandoned his claim regarding the valuation of his residential dwelling during the trial and that the nonresidential property was not currently being used as farmland in accordance with the factors set forth in the applicable statute (§ 12-107c). *Held*:

1. The plaintiff could not prevail on his claim that the trial court erred in determining that he had abandoned his claim regarding the proper valuation of his residential dwelling; because the plaintiff's counsel agreed with the court at trial that it did not have to resolve the plaintiff's claim regarding the valuation of his residential dwelling and expressly assented to the court's suggestion that it needed to address only the claim regarding the declassification of the plaintiff's nonresidential property as farmland, the plaintiff had abandoned his claim regarding the valuation of his residential dwelling.
2. The plaintiff's claim that the trial court improperly considered the factors set forth in § 12-107c (a) in determining whether the plaintiff's nonresidential property was still being used as a farm for purposes of the statute (§ 12-504h) governing the termination of a farmland classification was unavailing: this court determined that it was clear that, when §§ 12-107c and 12-504h are read together, the declassification of property previously classified as farmland occurs when the use of such land is changed or when the property is sold by the record owner, and the fact that an assessor makes no actual change in the classification of a property previously classified as farmland for many years after the occurrence of one of the triggering events in § 12-504h is irrelevant; moreover, in the present case, the assessor was required to conduct a townwide revaluation of all the properties for the town's grand list and, during the course of his townwide revaluation, the assessor conducted a field review of the plaintiff's nonresidential property, determined that it was not in actual use as farmland and declassified it as farmland, and the plain language of §§ 12-107c and 12-504h, read within the context of the overall statutory scheme affording favorable tax treatment to certain undeveloped property and case law applying that scheme, makes clear that it was proper for the trial court to consider the factors set forth in § 12-107c when it affirmed the assessor's determination.
3. The trial court's finding concerning the current use of the plaintiff's nonresidential property was not clearly erroneous as there was ample

evidence in the record to support the court's determination that the current use of that property did not constitute farm use: in making its determination, the court relied on the assessor's examination of the plaintiff's nonresidential property and his testimony that, inter alia, he had not seen any farming activity on the nonresidential property and had seen sheep on such property on only one occasion when he observed a few sheep run out of the plaintiff's barn, and that he took into account the factors set forth in § 12-107c (a), including the acreage of the land, the portion of the land in actual use for farming or agricultural operations, the productivity of the land or lack thereof, the gross income derived therefrom, or losses, as here, and the nature and value of the equipment, or lack thereof, used in connection therewith; moreover, although the plaintiff testified that his prior use of the nonresidential property consisted of raising multiple species and breeds of livestock and animals, he also testified that during the townwide revaluation he only had four female sheep on his nonresidential property and that he no longer had any farming equipment, such as a tractor or lifting equipment, on the nonresidential property.

Argued November 13, 2023—officially released June 11, 2024

Procedural History

Appeal from the decision of the defendant affirming the decision of its tax assessor to, inter alia, declassify the plaintiff's nonresidential land as farmland, brought to the Superior Court in the judicial district of Ansonia-Milford and tried to the court, *Hon. Arthur A. Hiller*, judge trial referee; judgment for the defendant, from which the plaintiff appealed to this court. *Affirmed.*

Steven P. Kulas, for the appellant (plaintiff).

Raymond J. Rigat, for the appellee (defendant).

Opinion

SUAREZ, J. In this administrative tax appeal, the plaintiff, James R. Brennan, appeals from the judgment of the trial court affirming the decision of the defendant, the Board of Assessment Appeals of the Town of Seymour (board), which upheld the revaluation of his residential dwelling and the declassification of his 7.26 acres of nonresidential land (excess property) as farmland by the Seymour tax assessor (assessor). On appeal,

the plaintiff claims that the court improperly (1) determined that he had abandoned his claim regarding the proper value of his residential dwelling, (2) considered the factors set forth in General Statutes § 12-107c (a) in determining whether the excess property was no longer being used as a farm for purposes of General Statutes § 12-504h, and (3) determined that the plaintiff changed the use of the excess property so as to have lost the entitlement to the farmland designation previously granted to him by the assessor. We affirm the judgment of the trial court.

The following facts, as found by the court or which are undisputed by the parties, and procedural history are relevant to our resolution of this appeal. The plaintiff owns approximately eight acres of real property located in Seymour (town). Of this land, 40,000 square feet are devoted to residential use, with a residential dwelling located thereon. Previously, the assessor had classified the excess property as farmland for tax purposes. On October 1, 2020, as a result of a townwide reassessment, the assessor terminated the classification of the plaintiff's excess property as farmland and assessed the plaintiff's property, in its entirety, as follows: "Dwelling—$90,100; Outbuildings—$10,400; and Land—$122,000, for a total assessment of $222,500." The plaintiff appealed the assessor's valuation of his residential dwelling and the assessor's declassification of his excess property to the board, which upheld the assessor's determinations.

On April 28, 2021, the plaintiff filed an appeal from the board's decision in the Superior Court. The plaintiff's administrative tax appeal consisted of a two count complaint. In count one of his complaint, the plaintiff alleged that, on October 1, 2020, he was the record owner of the subject property and that the valuation of his property "by the assessor was not its true and actual value

on that assessment date but was grossly excessive, disproportionate and unlawful." He further alleged that "the board failed to reduce the value of the dwelling . . . ." In count two of his complaint, the plaintiff alleged that the "assessor of the town reduced the farm acreage from 7.26 acres to 0 acres." He also alleged that "the board failed to restore the farm acreage to 7.26 acres."

The court, *Hon. Arthur A. Hiller*, judge trial referee, held a trial de novo that was conducted remotely over the course of four days.[1] On January 26, 2023, the court issued a memorandum of decision, rendering judgment in favor of the defendant. In its memorandum of decision, the court determined that the plaintiff had abandoned count one of his administrative tax appeal. With respect to count two, the court found that the excess property was not currently being used as a farm in accordance with the factors set forth in § 12-107c (a). This appeal followed. Additional facts and procedural history will be set forth as necessary.

Before addressing the merits of the plaintiff's claims, we begin by setting forth the applicable legal principles underlying municipal tax appeals, as well as our applicable standard of review. "We review a court's determination in a tax appeal pursuant to the clearly erroneous standard of review. Under this deferential standard, [w]e do not examine the record to determine whether the trier of fact could have reached a conclusion other

[1] On September 12, 2022, the court heard testimony from the plaintiff, the plaintiff's appraiser, the plaintiff's neighbors, the assessor, and an advocate from the Connecticut Farm Bureau Association. At the conclusion of evidence that day, the court asked the parties if they wanted to have an opportunity to introduce additional evidence as to the plaintiff's farm activity. On October 3, 2022, the court held a hearing, and the plaintiff offered into evidence his 2017–2021 tax records, which the court admitted into evidence without objection. On November 21, 2022, and January 19, 2023, the court held two additional hearings where it heard arguments by counsel.

than the one reached. Rather, we focus on the conclusion of the trial court, as well as the method by which it arrived at that conclusion, to determine whether it is legally correct and factually supported. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . In making this determination, every reasonable presumption must be given in favor of the trial court's ruling. . . .

"We afford wide discretion to the court's determination of the value of property in a property tax appeal. . . . When the court acts as the fact finder, it may accept or reject evidence regarding valuation as it deems appropriate. . . . Because a tax appeal is heard de novo, a trial court judge is privileged to adopt whatever testimony he reasonably believes to be credible. . . . Thus, credibility determinations are within the exclusive province of the court." (Citations omitted; internal quotation marks omitted.) *Digital 60 & 80 Merritt, LLC* v. *Board of Assessment Appeals*, 211 Conn. App. 559, 577–78, 274 A.3d 952, cert. denied, 343 Conn. 926, 275 A.3d 1212 (2022).

"[General Statutes §] 12-117a,[2] which allows taxpayers to appeal the decisions of municipal boards of tax review to the Superior Court, provide[s] a method by which an owner of property may directly call in question the valuation placed by assessors upon his property . . . . In a § 12-117a appeal, the trial court performs a two step function. The burden, in the first instance, is

[2] General Statutes § 12-117a provides in relevant part: "Any person . . . claiming to be aggrieved by the action of . . . the board of assessment appeals . . . in any town or city may . . . make application, in the nature of an appeal therefrom to the superior court for the judicial district in which such town or city is situated . . . ."

upon the plaintiff to show that he has, in fact, been aggrieved by the action of the board in that his property has been overassessed. . . . In this regard, [m]ere overvaluation is sufficient to justify redress under [§ 12-117a], and the court is not limited to a review of whether an assessment has been unreasonable or discriminatory or has resulted in substantial overvaluation. . . . Whether a property has been overvalued for tax assessment purposes is a question of fact for the trier. . . . The trier arrives at his own conclusions as to the value of land by weighing the opinion of the appraisers, the claims of the parties in light of all the circumstances in evidence bearing on value, and his own general knowledge of the elements going to establish value including his own view of the property. . . .

"Only after the court determines that the taxpayer has met his burden of proving that the assessor's valuation was excessive and that the refusal of the board of tax review to alter the assessment was improper, however, may the court then proceed to the second step in a § 12-117a appeal and exercise its equitable power to grant such relief as to justice and equity appertains . . . . If a taxpayer is found to be aggrieved by the decision of the board of tax review, the court tries the matter de novo and the ultimate question is the ascertainment of the true and actual value of the applicant's property. . . . If the court finds that the property has been in fact overvalued, it has the power to, and should, correct the valuation. . . .

"Section 12-117a provides a remedy only for an aggrieved taxpayer seeking to reduce his tax assessment. It provides no remedy for a municipality claiming to have undervalued a taxpayer's property." (Citations omitted; footnote added; internal quotation marks omitted.) *Konover* v. *West Hartford*, 242 Conn. 727, 734–36, 699 A.2d 158 (1997).

"In contrast to § 12-117a . . . which allows a taxpayer to challenge the assessor's valuation of his property, [General Statutes] § 12-119[3] allows a taxpayer to bring a claim that the tax was imposed by a town that had no authority to tax the subject property, or that the assessment was manifestly excessive and could not have been arrived at except by disregarding the provisions of the statutes for determining the valuation of [the real] property . . . . Our case law makes clear that a claim that an assessment is excessive is not enough to support an action under this statute. Instead, § 12-119 requires an allegation that something more than mere valuation is at issue. . . . The first category in § 12-119 embraces situations where a tax has been laid on a property not taxable in the municipality where it is situated. . . . This category is not applicable to the facts of this case and, thus, will not be addressed.

"The second category [in § 12-119] consists of claims that assessments are (a) manifestly excessive and (b) . . . could not have been arrived at except by disregarding the provisions of the statutes for determining the valuation of the property. . . . Cases in this category must contain allegations beyond the mere claim that the assessor overvalued the property. [The] plaintiff . . . must satisfy the trier that [a] far more exacting test has been met: either there was misfeasance or nonfeasance by the taxing authorities, or the assessment was arbitrary or so excessive or discriminatory as in itself to show a disregard of duty on their part. . . . Only if the plaintiff is able to meet this exacting

[3] General Statutes § 12-119 provides in relevant part: "When it is claimed that . . . a tax laid on property was computed on an assessment which, under all the circumstances, was manifestly excessive and could not have been arrived at except by disregarding the provisions of the statutes for determining the valuation of such property, the owner thereof . . . may, in addition to the other remedies provided by law, make application for relief to the superior court for the judicial district in which such town or city is situated. . . ."

test by establishing that the action of the assessors would result in illegality can the plaintiff prevail in an action under § 12-119. The focus of § 12-119 is whether the assessment is illegal. . . . The statute applies only to an assessment that establishes a disregard of duty by the assessors." (Citations omitted; footnote added; internal quotation marks omitted.) *Tyler's Cove Assn., Inc.* v. *Middlebury*, 44 Conn. App. 517, 526–27, 690 A.2d 412 (1997). We address the plaintiff's claims in turn.[4]

I

The plaintiff first claims that the court erred in determining that he had abandoned his claim regarding the proper valuation of his residential dwelling. Specifically, the plaintiff argues that "the record does not show that his counsel waived or abandoned his claim under count one of the complaint. Counsel's acknowledgement of the trial court's finding as to the value of the residential property is no more than that and should not be construed as a waiver or an abandonment of the plaintiff's claim in count one of the complaint." We are not persuaded.

The following additional facts are relevant to the resolution of this claim. In count one of his complaint, the plaintiff alleged that the assessor valued the residential dwelling at $90,100. He further alleged that the valuation of the residential dwelling was "not its true and actual value on [October 1, 2020] but was grossly excessive, disproportionate and unlawful." During the September 12, 2022 trial, the plaintiff presented testimony from Susan Homiski, a licensed appraiser, that the residential portion of the property, which included both the residential dwelling and the 40,000 square foot parcel on which it was situated, was valued at $105,000. It was

[4] Although the plaintiff did not explicitly set forth the statutory basis for this administrative tax appeal in his complaint, we note that such actions are brought pursuant to § 12-117a or § 12-119.

not clear from Homiski's testimony, however, whether her valuation included the plaintiff's dwelling because her written appraisal stated that the house was unmarketable. On January 19, 2023, the court held a hearing to clarify whether Homiski's $105,000 valuation considered the dwelling in its current condition or whether it considered that the dwelling had to be demolished. At the January 19, 2023 hearing, the following colloquy between the court, the plaintiff's counsel, and the defendant's counsel took place:

"The Court: So, how do I get a value for the house?

"[The Plaintiff's Counsel]: Well, I think, if you look at our appraisal, [Homiski] values the lot with the house as it's currently existing on it. So . . . the only thing I could surmise is she valued that particular piece of property, knowing that the house may be taken down, and that's what it's worth.

"The Court: Oh, boy. She doesn't say that at all.

"[The Plaintiff's Counsel]: I know but—

"The Court: Can we agree, [Defendant's Counsel] . . . that I don't have to worry about the assessment of the house? We'll buy $105,000, and I don't have to worry about that. I don't have to worry about count one, is that fair?

"[The Defendant's Counsel]: I would agree, Your Honor. Because if you look at the assessed value of the house, it was close to that.

"The Court: Good. So, [Plaintiff's Counsel]?

"[The Plaintiff's Counsel]: *That's fine, Your Honor.*

"The Court: So, I only have to do count two?

"[The Defendant's Counsel]: Correct. Whether it's a farm or not.

"The Court: Oh, much better.

* * *

"The Court: So, I only have to decide whether the use [of the plaintiff's excess property] changed. That's it.

"[The Plaintiff's Counsel]: *Yes*, *Your Honor*.

"The Court: That's it. So, I can do this—I don't have to write the law. I just have to decide whether the use [of the plaintiff's excess property] changed.

"[The Defendant's Counsel]: Yes, Your Honor.

"The Court: I appreciate that. That should make it much easier for me, either it did, or it didn't.

"[The Plaintiff's Counsel]: That's absolutely I think what the statute requires and that's the basis of our appeal on that." (Emphasis added.)

In its memorandum of decision, the court stated that the plaintiff had abandoned count one of his complaint and that the parties had "agreed that the only decision for the court to make" concerned the declassification of the plaintiff's excess property. "Both our Supreme Court and this court have stated the principle that, when a party abandons a claim or argument before the trial court, that party waives the right to appellate review of such claim because a contrary conclusion would result in an ambush of the trial court . . . ." (Internal quotation marks omitted.) *State* v. *McLaughlin*, 135 Conn. App. 193, 198, 41 A.3d 694, cert. denied, 307 Conn. 904, 53 A.3d 219 (2012).

In the present case, with respect to count one, the court questioned the parties during the January 19, 2023 hearing as to how it should arrive at a value for the plaintiff's dwelling. The court asked the parties whether it had to "worry about the assessment of the house." The court suggested that it could rely on the $105,000 valuation given by Homiski and counsel for both parties agreed. Upon further inquiry, the court stated, "I don't

have to worry about count one, is that fair?" Counsel for both parties agreed. At the conclusion of the January 19, 2023 hearing, the court, once again, confirmed that it only needed to address count two, stating: "So, I only have to decide whether the use [of the plaintiff's excess property] changed. That's it." The plaintiff's counsel replied, "[y]es, Your Honor." Therefore, by agreeing with the court that it did not have to resolve the claim set forth in count one, and by expressly assenting to the court's suggestion that all it had to address was count two, the plaintiff abandoned the claim alleged in count one of his complaint. Accordingly, we decline to afford the plaintiff any relief with respect to this claim.

II

Next, the plaintiff claims that, in determining whether the plaintiff's excess property was still being used as a farm for purposes of § 12-504h, the court improperly considered the factors set forth in § 12-107c (a).[5] He asserts that the only "task for the assessor and for the trial court on appeal was to determine if there had been a change of ownership of the [excess] property or a change of use for the [excess] property as provided for in [§ 12-504h]." The defendant, on the other hand, argues that the court properly considered the factors enumerated in § 12-107c (a) in determining that the plaintiff's excess property was no longer entitled to retain its classification as farmland. We agree with the defendant.

We begin by setting forth our standard of review and relevant legal principles that govern the resolution of this claim. "Because this issue raises a question of statutory interpretation, our review is plenary. . . . A fundamental tenet of statutory construction is that statutes

[5] We interpret this claim as being brought under § 12-119 because the plaintiff asserts that the assessment of his excess property was manifestly excessive and could not have been arrived at except by disregarding the provisions of § 12-504h.

are to be considered to give effect to the apparent intention of the lawmaking body. . . . The 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. . . . In the present case, the defendant relies on § 12-504h, a provision contained in the real estate conveyance tax scheme. . . . The provisions that govern our resolution of the issue, however, are contained in the property tax assessment scheme, specifically, General Statutes §§ 12-107a through 12-107e, which pertain to the assessment and classification of property as farm land, forest land and open space land." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Carmel Hollow Associates Ltd. Partnership* v. *Bethlehem*, 269 Conn. 120, 129–30, 848 A.2d 451 (2004). Our Supreme Court has stated that, when "more than one [statutory provision] is involved, we presume that the legislature intended [those provisions] to be read together to create a harmonious body of law . . . ." (Internal quotation marks omitted.) *Cardenas* v. *Mixcus*, 264 Conn. 314, 326, 823 A.2d 321 (2003). We conclude that the plain language of §§ 12-107c and 12-504h, read within the context of the overall statutory scheme affording favorable tax treatment to certain undeveloped property and case law applying that scheme, makes clear that it was proper for the court to consider the factors in § 12-107c in determining whether the excess property was still being used as a farm for purposes of § 12-504h.

The statutory scheme relating to the designation and classification of farmland for tax assessment purposes is contained in chapter 203 of the General Statutes, entitled "Property Tax Assessment," and begins with a

declaration of policy. As our Supreme Court has articulated, "General Statutes [(Rev. to 2003)] § 12-107a provides in relevant part: It is hereby declared (a) that it is in the public interest to encourage the preservation of farm land, forest land, and open space land in order to maintain a readily available source of food and farm products . . . to conserve the state's natural resources and to provide for the welfare and happiness of the inhabitants of the state, (b) that it is in the public interest to prevent the forced conversion of farm land, forest land and open space land to more intensive uses as the result of economic pressures caused by the assessment thereof for purposes of property taxation at values incompatible with their preservation as such farm land, forest land and open space land, and (c) that the necessity in the public interest of the enactment of the provisions of sections 12-107b to 12-107e, inclusive, is a matter of legislative determination. Thus, the purpose of §§ 12-107a through 12-107e is to encourage the preservation of property designated as farm land . . . by ensuring against the conversion of such land to more intensive uses as the result of higher property tax assessments." (Internal quotation marks omitted.) *Carmel Hollow Associates Ltd. Partnership* v. *Bethlehem*, supra, 269 Conn. 130–31.

General Statutes § 12-107b (1) provides in relevant part: "The term 'farm land' means any tract or tracts of land, including woodland and wasteland . . . constituting a farm unit . . . ." Section 12-107c sets forth the procedure by which an owner of land may request that their property be classified as farmland. Section 12-107c (a) provides in relevant part: "An owner of land may apply for its classification as farm land on any grand list[6] of a municipality by filing a written application for such classification with the assessor thereof

[6] A grand list is the aggregate list of assessed values of all property in a given municipality. See General Statutes § 12-55 (a). The contents of a town's grand list is defined by § 12-55 (a), which provides in relevant part: "Each

. . . . The assessor shall determine whether such land is farm land and, if such assessor determines that it is farm land, he or she shall classify and include it as such on the grand list. In determining whether such land is farm land, such assessor shall take into account, among other things, the acreage of such land, the portion thereof in actual use for farming or agricultural operations, the productivity of such land, the gross income derived therefrom, the nature and value of the equipment used in connection therewith, and the extent to which the tracts comprising such land are contiguous. The assessor shall not deny the application of an owner of land for classification of such land as farm land if such land meets the criteria for classification as farm land pursuant to this subsection. . . .'' (Footnote added.)

Section 12-504h is contained in chapter 223 of the General Statutes, entitled ''Real Estate Conveyance Tax,'' and provides in relevant part: ''Any such classification of farm land pursuant to section 12-107c . . . shall be deemed personal to the particular owner who requests and receives such classification and shall not run with the land. Any such land which has been classified by a record owner shall remain so classified without the filing of any new application subsequent to such classification, notwithstanding the provision of sections 12-107c, 12-107d, 12-107e and 12-107g, until either of the following shall occur: (1) The use of such land is changed to a use other than that described in the application for the existing classification by said record owner, or (2) such land is sold or transferred by said record owner. . . .''[7]

[town's] grand list shall contain the assessed values of all property in the town, reflecting the statutory exemption or exemptions to which each property or property owner is entitled, and including, where applicable, any assessment penalty added . . . for the assessment year commencing on the October first immediately preceding. . . .''

[7] We note that, after the court decided *Carmel Hollow Associates Ltd. Partnership*, §§ 12-107a and 12-504h were amended, effective July 1, 2007,

"Section 12-504h was enacted in 1974 . . . to eliminate the necessity of applying annually for the classification of property as farm land, forest land or open space land. . . . The statute thus provides that property may retain its classified status until the occurrence of certain events that terminate the classification and require the filing of a new application, these events being the sale of the property or a change in its use. . . .

"[A]lthough § 12-504h is part of the real estate conveyance tax scheme, there is nothing in its language to suggest that it does not apply to the termination of a classification for the purpose of property tax assessments as well. Indeed, [§ 12-504h] directly refers to land that has been classified *pursuant to* §§ 12-107c, 12-107d or 12-107e of the property tax assessment scheme. . . . Furthermore, [§ 12-504h] provides that those classifications remain valid *until* the occurrence of the disqualifying events described therein. . . . Moreover, it would make no sense to construe § 12-504h as requiring the termination of a classification for the purpose of imposing a real estate conveyance tax, but not for the purpose of *revaluing* property on the grand list of a municipality." (Citation omitted; emphasis altered; internal quotation marks omitted.) *Carmel Hollow Associates Ltd. Partnership* v. *Bethlehem*, supra, 269 Conn. 140–41.[8]

to include maritime heritage land. See Public Acts 2007, No. 07-127, §§ 3 and 10.

[8] Our Supreme Court, in *Carmel Hollow Associates Ltd. Partnership*, addressed the issue of whether a tax assessor is authorized to declassify forest land. Our Supreme Court held that, under the tax assessment scheme for forest land, pursuant to § 12-107d, "the state forester is the only official to whom authority is expressly granted to determine whether property qualifies as forest land." *Carmel Hollow Associates Ltd. Partnership* v. *Bethlehem*, supra, 269 Conn. 141. Therefore, for the purposes of § 12-504h, property previously classified as forest land cannot be deemed to have changed its use until the state forester determines the land no longer qualifies as forest land. Under § 12-107c, the classification statute for farmland, it is only the tax assessor that makes that determination.

Under the property tax assessment scheme, each town is required to periodically revalue property on its grand list. General Statutes § 12-62 is entitled "Revaluation of real property" and provides in relevant part: "(b) (1) (A) Commencing October 1, 2006, and until September 30, 2023, each town shall implement a revaluation not later than the first day of October that follows, by five years, the October first assessment date on which the town's previous revaluation became effective . . . ." Section 12-62 (b) (2) further provides in relevant part: "When conducting a revaluation, an assessor shall use generally accepted mass appraisal methods which may include, but need not be limited to, the market sales comparison approach to value, the cost approach to value and the income approach to value. Prior to the completion of each revaluation, the assessor shall conduct a field review. . . ." Moreover, General Statutes § 12-63, which is part of the property tax assessment scheme, governs the rule of valuation and provides in relevant part: "(a) The present true and actual value of land classified as farm land pursuant to section 12-107c . . . shall be based upon its current use without regard to neighborhood land use . . . ."

When the foregoing provisions are read together, it is clear that the declassification of property previously classified as farmland occurs in two alternative ways. First, when the use of such land is changed; or second, when the property is sold by the record owner. See General Statutes § 12-504h. The fact that an assessor makes no actual change in the classification of a property previously classified as farmland for many years after the occurrence of one of the triggering events in § 12-504h is irrelevant. An assessor, during a townwide revaluation pursuant to § 12-62, must determine the true and actual value of the land based upon its current use. In doing so, an assessor must conduct a field review to determine the current use of the property. In

determining whether a property is currently being used as a farm, an assessor, pursuant to § 12-107c, "shall take into account, among other things, the acreage of such land, the portion thereof in actual use for farming or agricultural operation, the productivity of such land, the gross income derived therefrom, the nature and value of the equipment used in connection therewith, and the extent to which the tracts comprising such land are contiguous." General Statutes § 12-107c (a).

In the present case, the assessor was required to conduct a townwide revaluation of all the properties for the October 1, 2020 grand list. During the course of his townwide revaluation, the assessor conducted a field review of the plaintiff's excess property, determined that it was not in actual use as farmland and declassified it. On appeal to the Superior Court, the court concluded that, on the basis of the factors set forth in § 12-107c, the plaintiff's excess property was not being used as a farm and affirmed the assessor's determination. We conclude that the court properly relied on the factors set forth in § 12-107c when it determined that the plaintiff's excess property was not currently being used as a farm.

III

Finally, the plaintiff claims that the court erred in determining that the plaintiff had changed the use of the excess property so as to have lost the entitlement to the farmland designation previously granted to him by the assessor. Specifically, the plaintiff argues that there was no evidence in the record to support a finding that he had begun to use his excess property as something other than a farm. We are not persuaded.

As we have previously stated in this opinion, we review the court's factual determinations in a tax appeal pursuant to the clearly erroneous standard. See *Digital 60 & 80 Merritt, LLC* v. *Board of Assessment Appeals*,

supra, 211 Conn. App. 577. "[W]e do not examine the record to determine whether the trier of fact could have reached a conclusion other than the one reached. Rather, we focus on the conclusion of the trial court, as well as the method by which it arrived at that conclusion, to determine whether it is legally correct and factually supported. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . In making this determination, every reasonable presumption must be given in favor of the trial court's ruling." (Citation omitted; internal quotation marks omitted.) Id.

In the present case, the court concluded that "it would be in direct conflict with the statutory scheme to retain a farmland classification on land that no longer qualifies as such and then assess it based on its nonfarm current use." (Internal quotation marks omitted.) In making this determination, the court relied on the assessor's examination of the plaintiff's excess property. At trial, the assessor testified that he took into account the factors set forth in § 12-107c (a). In its memorandum of decision, the court noted that the assessor looked at "the acreage of the land, the portion of the land in actual use for farming or agricultural operations, the productivity of the land or lack thereof, the gross income derived therefrom, or losses, as here, and the nature and value of the equipment, or lack thereof, used in connection therewith." As we concluded in part II of this opinion, the court properly considered the § 12-107c (a) factors in determining whether there had been a change in use of the plaintiff's excess property.

Our careful review of the record reveals that there is sufficient evidence in the record to support the court's

determination that there was in fact a change in the current use of the plaintiff's excess property. During the September 12, 2022 trial, the plaintiff testified that his prior use of the excess property consisted of raising multiple species and breeds of livestock and animals. Specifically, the plaintiff stated that he previously had raised pigs, goats, rabbits, sheep, and steer on the excess property. As to his current use of the excess property, the plaintiff testified that he now uses it to breed sheep and sell the lambs. The plaintiff also testified, however, that during the 2020 townwide revaluation, he only had four female sheep on the excess property and did not own any male sheep. The plaintiff further testified that, in contrast with his past practice, he no longer had any farming equipment, such as a tractor or lifting equipment, on the excess property. The assessor testified that the last time he was on the plaintiff's excess property was during the 2015 townwide revaluation, and thereafter he would drive by the plaintiff's premises and observe some of the activities taking place on his excess property. The assessor further testified that he had not seen any farming activity on the excess property and had seen sheep on the plaintiff's excess property on only one occasion, when he observed a few sheep run out of the plaintiff's barn.

On the basis of our careful review of the record, we conclude that there is ample evidence in it to support the court's determination that the current use of the plaintiff's excess property did not constitute farm use. Accordingly, the court's finding concerning the current use of the excess property was not clearly erroneous.

The judgment is affirmed.

In this opinion the other judges concurred.

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NOTICE OF CONNECTICUT STATE AGENCIES

DEPARTMENT OF SOCIAL SERVICES

Notice of Proposed Medicaid State Plan Amendment (SPA)

SPA 24-0013: Federally Qualified Health Centers (FQHC) Stabilization Payment

The State of Connecticut Department of Social Services (DSS) proposes to submit the following Medicaid State Plan Amendment (SPA) to the Centers for Medicare & Medicaid Services (CMS) within the U.S. Department of Health and Human Services (HHS). Public comment information is at the bottom of this document.

Changes to Medicaid State Plan

Effective on or after June 12, 2024, SPA 24-0013 will amend Attachment 4.19-B of the Medicaid State Plan to incorporate one-time stabilization payments (i.e., a one-time supplemental payment) made to in-state Federally Qualified Health Centers (FQHCs) enrolled in Connecticut Medicaid. The purpose of this change is necessary to provide one-time temporary stabilization funding to each in-state FQHC and help ensure ongoing access to services provided by FQHCs for Medicaid members. This is a one-time supplemental payment that does not affect each FQHC's underlying prospective payment system methodology. Payments will be equally distributed to each FQHC that meets the criteria from a total pool of $32,000,000.

Fiscal Impact

This proposed change is estimated to increase annual aggregate expenditures by $32,000,000 in State Fiscal Year (SFY) 2024.

Obtaining SPA Language and Submitting Comments

The proposed SPA is posted on the DSS website at this link: https://portal.ct.gov/DSS/Health-And-Home-Care/Medicaid-State-Plan-Amendments. The proposed SPA may also be obtained at any DSS resource center, at the Town of Vernon Social Services Department, or upon request from DSS (see below).

To request a copy of the SPA from DSS or to send comments about the SPA, please email: **Public.Comment.DSS@ct.gov** or write to: Department of Social Services, Medical Policy Unit, 55 Farmington Avenue, 9th Floor, Hartford, CT 06105. Please reference ''SPA 24-0013: Federally Qualified Health Centers (FQHC) Stabilization Payment''.

Anyone may send DSS written comments about this SPA. Written comments must be received by DSS at the above contact information no later than **June 27, 2024**.

NOTICES

Supreme Court Sessions

Notice is hereby given that the calendar of sessions for the next court year has been adopted.

Sessions last approximately two weeks and are subject to change. Any deviation from the calendar as adopted, will be noticed in the court's Docket.

The first day of each of the sessions for the 2024 - 2025 court year is as follows: September 16, 2024; October 28, 2024; December 2, 2024; January 27, 2025; March 3, 2025; April 7, 2025; and May 12, 2025.

Carl D. Cicchetti
Chief Clerk

Appellate Court Sessions

Notice is hereby given that the calendar of sessions for the next court year has been adopted.

Sessions last approximately three weeks and are subject to change. Any deviation from the calendar as adopted, will be noticed in the court's Docket.

The first day of each of the sessions for the 2024 - 2025 court year is as follows: September 3, 2024; October 7, 2024; November 12, 2024; January 6, 2025; February 3, 2025; March 10, 2025; April 14, 2025; and May 19, 2025.

Carl D. Cicchetti
Chief Clerk

NNH CV18-6087812 S
OFFICE OF CHIEF DISCIPLINARY COUNSEL
VS.
SUSAN NEWMAN

SUPERIOR COURT
OF NEW HAVEN AT NEW HAVEN
MAY 5, 2024

Notice of Suspension of Attorney

Pursuant to Practice Book § 2-54, notice is hereby given that on May 5, 2024, in the above-referenced matter, Susan Newman (juris number 421188) was suspended from the practice of law in Connecticut for a period of two years, effective May 5, 2024. Any application for reinstatement shall be made pursuant to the provisions of Practice Book § 2-53.

By the Court
(Abrams, J.)

Notice of Reprimand of Attorney

Pursuant to Practice Book Section 2-54, notice is hereby given of the following reprimand ordered by the reviewing committee of the Statewide Grievance Committee:

Reviewing Committee Reprimand

April 5, 2024: Tamarah E. Gay - 427602

Copies of the full text of the decision of the Statewide Grievance Committee are available through the Committee's offices at 999 Asylum Avenue, Fifth Floor, Hartford, Connecticut 06105. The fee for copies is $.25 (twenty-five cents) per page. The full text of the decision is also available on the Connecticut Judicial Branch website (www.jud.ct.gov).

Attest:

Christopher L. Slack
Statewide Bar Counsel