CONNECTICUT LAW JOURNAL

Published in Accordance with General Statutes Section 51-216a

VOL. LXXXVI No. 5 July 30, 2024 151 Pages

Table of Contents

CONNECTICUT REPORTS

J. F. *v.* M. F. (Order), 349 C 919 3
Volume 349 Cumulative Table of Cases 5

CONNECTICUT APPELLATE REPORTS

In re M. S., 226 CA 857 . . . . . 3A
Child neglect; ex parte order of temporary custody; claim that trial court applied incorrect legal standard in sustaining order of temporary custody on basis that it improperly failed to find that minor child was at risk of immediate physical danger pursuant to statute (§ 46b-129).
Volume 226 Cumulative Table of Cases 17A

Bank of New York Mellon *v.* Horsey, 227 CA 94 . . . . . 118A
Foreclosure; motion to set aside judgment; mootness; whether defendants filed at least two motions to open or similar motions pursuant to applicable rule of practice (§ 61-11 (g)) prior to filing their motion to set aside judgment; whether automatic appellate stay applied to toll running of law days; whether appeal was moot because this court could not provide defendant any practical relief after law days had passed and title to property had vested in plaintiff.
585 Main Street, LLC *v.* Premier Auto, LLC (See Meineke Bristol, LLC *v.* Premier Auto, LLC), 227 CA 64 . . . . . 88A
Gateway Development/East Lyme, LLC *v.* Duong, 227 CA 38 . . . . . 62A
Summary process; claim that trial court improperly concluded that plaintiff sublessor was not required to provide defendant sublessees with pretermination notice and opportunity to cure default for nonpayment of rent pursuant to terms of sublease agreement; claim that trial court improperly relied on terms of sublease agreement and failed to consider evidence of parties' course of performance in its interpretation of agreement.
Mariamma Babu, LLC *v.* Premier Auto, LLC (See Meineke Bristol, LLC *v.* Premier Auto, LLC), 227 CA 64 . . . . . 88A
Meineke Bristol, LLC *v.* Premier Auto, LLC, 227 CA 64 . . . . . 88A
Breach of contract; mootness; whether failure to challenge trial court's alternative ground for excluding certain evidence at trial rendered portion of appeal moot; whether plaintiff provided adequate record to review its claim that trial court erred in determining that it failed to prove its breach of contract claim.
Premier Auto, LLC *v.* American Trading Co. (See Meineke Bristol, LLC *v.* Premier Auto, LLC), 227 CA 64 . . . . . 88A
State *v.* Brelsford, 227 CA 53 . . . . . 77A
Motion for sentence modification; whether trial court abused its discretion in finding that defendant had failed to establish good cause to modify his sentence pursuant to statute (§ 53a-39).
State *v.* Cruz, 227 CA 75 . . . . . 99A
Assault first degree; criminal possession of firearm; carrying pistol without permit; motion for joinder; unpreserved claim that defendant's rights to confrontation and fair trial were violated when state misrepresented in motion to join for trial defendant's case with case against codefendant that evidence in both cases was cross admissible.

(continued on next page)

Walters *v.* Servidio, 227 CA 1 . . . . . 25A
Express easement; implied easement; obstruction of easement; trespass; slander of title; nuisance or disturbance of right pursuant to statute (§ 47-41); claim that trial court improperly determined that plaintiffs could not prevail on their claims of express easement, easement by implication, or obstruction of purported easement with regard to defendants' property; claim that trial court improperly determined that any implied easement rights granted to plaintiffs by property map were extinguished pursuant to Marketable Record Title Act (§ 47-33b et seq.); claim that trial court improperly determined that defendants prevailed on counts of counterclaim alleging trespass, slander of title, and violation of § 47-41.
Volume 227 Cumulative Table of Cases 139A

SUPREME COURT PENDING CASES

Summaries 1B

MISCELLANEOUS

Notice of Reprimand of Attorney 1C

CONNECTICUT LAW JOURNAL
(ISSN 87500973)

Published by the State of Connecticut in accordance with the provisions of General Statutes § 51-216a.

Commission on Official Legal Publications
Office of Production and Distribution
111 Phoenix Avenue, Enfield, Connecticut 06082-4453
Tel. (860) 741-3027, FAX (860) 745-2178
www.jud.ct.gov

JOSEPH DIBENEDETTO, *Publications Deputy Director*

Published Weekly – Available at https://www.jud.ct.gov/lawjournal

Syllabuses and Indices of court opinions by
ERIC M. LEVINE, *Reporter of Judicial Decisions*
Tel. (860) 757-2250

The deadline for material to be published in the Connecticut Law Journal is Wednesday at noon for publication on the Tuesday six days later. When a holiday falls within the six day period, the deadline will be noon on Tuesday.

ORDERS

CONNECTICUT REPORTS

Vol. 349

J. F. *v.* M. F.

The plaintiff's petition for certification to appeal from the Appellate Court, 225 Conn. App. 902 (AC 47058), is denied.

J. F., self-represented, in support of the petition.

Decided July 23, 2024

Cumulative Table of Cases
Connecticut Reports
Volume 349

(Replaces Prior Cumulative Table)

Ajdini *v.* Frank Lill & Son, Inc. 1
Workers' compensation benefits; claim that Compensation Review Board improperly upheld decision of Workers' Compensation Commission administrative law judge, who precluded defendant employer from contesting liability as to plaintiff's claims for workers' compensation benefits; whether employer had timely filed with administrative law judge its notice of intention to contest plaintiff's right to compensation benefits pursuant to statute (§ 31-294c (b)).
Amado *v.* Commissioner of Correction (Order) 911
Avon *v.* Sastre (Order) 905
Bank of America, National Assn. *v.* Sorrentino (Order) 915
Bartolotta *v.* Human Resources Agency of New Britain, Inc. (Order) 908
Brewer *v.* Commissioner of Correction (Order) 910
Cardoza *v.* Waterbury (Order) 911
Cooke *v.* Williams 451
Legal malpractice; fraud; certification from Appellate Court; whether Appellate Court improperly upheld trial court's dismissal of plaintiff's legal malpractice claim against defendant attorney and defendant law firm for lack of subject matter jurisdiction; whether appellate or postconviction relief from underlying conviction was necessary element of claim of legal malpractice filed by criminally convicted plaintiff against his former habeas counsel; whether plaintiff's legal malpractice claim challenged validity of his underlying conviction; whether Appellate Court properly reversed trial court's judgment with respect to trial court's dismissal of plaintiff's fraud claim against defendants.
Davis *v.* Commissioner of Correction (Order) 917
Delgado *v.* Commissioner of Correction (Order) 902
Dept. of Public Health *v.* Estrada 223
Administrative appeal; alleged retaliation by plaintiff employer against defendant employee for employee's purported whistleblower disclosure; certification from Appellate Court; whether defendant Commission on Human Rights and Opportunities had subject matter jurisdiction to adjudicate employee's whistleblower retaliation claim brought pursuant to statute (§ 4-61dd); whether commission waived and abandoned several merits arguments by failing to raise or brief them before this court or Appellate Court; claim that employee's disclosure concerned misconduct in municipal government to which § 4-61dd does not apply; whether employee was entitled to whistleblower protection under § 4-61dd for reporting her own error; whether employee failed to prove that employer's adverse personnel actions were result of employee's reporting of her errors rather than fact that employee had made such errors.
Deutsche Bank AG *v.* Vik. 120
Tortious interference with business expectancy; litigation privilege; motion to dismiss; certification from Appellate Court; whether plaintiff's appeal was rendered moot by virtue of this court's decision in Deutsche Bank AG *v.* Sebastian Holdings, Inc. *(346 Conn. 564); whether Appellate Court incorrectly determined that plaintiff's claims against defendants were barred by litigation privilege.*
Deutsche Bank National Trust Co. *v.* Heidel (Order) 914
Donald G. *v.* Commissioner of Correction (Order) 902
Feaser *v.* Landress (Order) 904
Grant *v.* Commissioner of Correction (Order) 912
Green *v.* Paz (Order) 918
Green Tree Servicing, LLC *v.* Clark (Order) 913
Greer *v.* State (Order) 908
Homebridge Financial Services, Inc. *v.* Jakubiec (Order) 909
In re A. H. (Order) 918
In re Denzel W. (Order) 918
In re Wendy G.-R. (Order) 916

In re Zayden J. (Order) . . . 916
James P. *v.* Commissioner of Correction (Order) . . . 911
J. B. *v.* Y. H. (Order) . . . 905
J. F. *v.* M. F. (Order) . . . 919
Kuselias *v.* Zingaro & Cretella, LLC (Order) . . . 916
Markley *v.* State Elections Enforcement Commission . . . 67
Public campaign financing under statutory (§ 9-700 et seq.) Citizens' Election Program; first amendment; administrative appeal to trial court from decision of defendant, State Elections Enforcement Commission, assessing fines against plaintiffs, candidates for state legislative office in 2014 general election, for violating certain statutes and regulations governing campaign financing and Citizens' Election Program; unconstitutional conditions doctrine, discussed; claim that defendant had violated plaintiffs' first amendment rights by enforcing applicable statutes and regulations to preclude publicly funded candidates from using candidate committee funds to pay for campaign communications that, as rhetorical device, invoked name of candidate in different electoral race; whether communications at issue were prohibited functional equivalent of express advocacy for defeat of another candidate or, instead, were constitutionally protected messages in direct furtherance of publicly funded candidates' own campaigns.
Marshall *v.* Marshall (Order) . . . 902
M&T Bank *v.* Lewis . . . 9
Foreclosure; motion to strike; motion to dismiss appeal; whether federal filed rate doctrine implicates subject matter jurisdiction; whether trial court improperly struck special defenses of unclean hands and breach of implied covenant of good faith and fair dealing; whether defendant's allegations concerning conduct of plaintiff bank in purchasing force placed property insurance for defendant's property arose from making, validity or enforcement of mortgage; whether allegations were otherwise legally sufficient to plead valid special defenses of unclean hands and breach of implied covenant of good faith and fair dealing.
M. T. *v.* C. T. (Order) . . . 915
Nationstar Mortgage, LLC *v.* Zanett (Order) . . . 913
9 Pettipaug, LLC *v.* Planning & Zoning Commission . . . 268
Zoning; appeal from decision of defendant planning and zoning commission amending its zoning regulations; motion to dismiss; summary judgment; certification from Appellate Court; whether trial court correctly determined that defendant's publication of legal notice of its decision to amend certain zoning regulations did not comply with statute (§ 8-3 (d)) requiring that such notice be published "in a newspaper having a substantial circulation in the municipality"; meaning of terms "substantial circulation" and "general circulation," discussed; test for determining whether newspaper is one of general or substantial circulation, discussed.
Northland Investment Corp. *v.* Public Utilities Regulatory Authority . . . 35
Administrative appeal; utilities; appeal to trial court from supplemental decision of defendant, Public Utilities Regulatory Authority (PURA), which found that plaintiff landlord's use of ratio utility billing (RUB) was not authorized by statute (§ 16-262e (c)); whether trial court erred in upholding PURA's determination that § 16-262e (c) prohibits plaintiff's proposed use of RUB methodology to recoup building wide utility costs by billing tenants for their estimated, proportionate share of total cost of utilities; claim that, if § 16-262e (c) prohibits landlords from utilizing RUB methodology, then it must also prohibit "building in" approach deemed acceptable by PURA.
Norwich *v.* Brenton Family Trust (Order) . . . 905
Rapp *v.* Commissioner of Correction (Order) . . . 909
Rios *v.* Commissioner of Correction (Order) . . . 910
Rodriguez *v.* Hartford (Orders) . . . 907
Seaport Capital Partners, LLC *v.* Speer (Order) . . . 909
Smith *v.* Gerace (Order) . . . 917
Stanley *v.* Grant (Order) . . . 903
Stanley *v.* Quiros (Order) . . . 903
State *v.* Andres C. . . . 300
Sexual assault third degree; risk of injury to child; certification from Appellate Court; claim that defendant was entitled to disclosure of contents of complainant's handwritten journals, existence of which first came to light during trial, because they constituted "statement" under relevant rules of practice (§§ 40-13A and 40-15 (1)); whether complainant adopted or approved her journals as her statement

for purposes of rules of practice; claim that defendant's rights under Brady *v.* Maryland *(373 U.S. 83) were violated insofar as prosecutors delegated review of complainant's journals for exculpatory and impeachment material to nonlawyer investigator employed by state's attorney's office; request that this court adopt prophylactic rule under federal constitution requiring prosecutor to personally review for impeachment or exculpatory information any purportedly exculpatory or impeachment material that first comes to light during trial.*

State *v.* Bember 417

Felony murder; attempt to commit robbery first degree; carrying pistol or revolver without permit; claim that trial court abused its discretion in permitting state to question certain witnesses about specific terms of their cooperation agreements with state during direct examination; claim that prosecutor impermissibly vouched for cooperating witnesses' credibility by introducing truthfulness provisions of their cooperation agreements, eliciting testimony from them that their attorneys were present in courtroom during their testimony, and referencing their previous testimony in other cases on behalf of state; claim that trial court abused its discretion in concluding that cooperating witnesses' testimony was sufficiently reliable to be admissible at trial pursuant to statute (§ 54-86p) governing reliability and admissibility of jailhouse informant testimony; whether trial court abused its discretion in opening reliability hearing to allow state to introduce certain evidence; harmlessness of trial court's improper consideration of its own assessment of cooperating witnesses' testimony in another case in determining that their proposed testimony was sufficiently reliable to be admitted at trial in present case; claim that trial court's denial of defendant's motion to suppress recording of jailhouse phone call and .22 caliber revolver seized by police as result of information acquired from recording violated defendant's rights under fourth amendment to the United States constitution.

State *v.* Bennings (Orders) 906

State *v.* Connecticut State University Organization of Administrative Faculty, AFSCME, Council 4, Local 2836, AFL-CIO 148

Application to vacate arbitration award; motion to confirm arbitration award; termination of employment; whether trial court improperly vacated arbitration award reinstating grievant to his position as state university's director of student conduct on ground that award violated public policy; factors that reviewing court should consider in evaluating whether arbitration award reinstating discharged employee violates public policy enumerated in Burr Road Operating Co. II, LLC *v.* New England Health Care Employees Union, District 1199 *(316 Conn. 618), discussed.*

State *v.* Roberts (Order) 912

State *v.* Webber (Order) 915

Supronowicz *v.* Eaton (Order) 904

Vertefeuille *v.* Good Foundation, Inc. (Order) 901

Viering *v.* Groton Long Point Assn., Inc. (Order) 901

U.S. Bank National Assn. *v.* Blackman (Order) 904

Vecchiarino *v.* Potter (Order) 906

Vega *v.* Commissioner of Correction (Order) 914

Wahba *v.* JPMorgan Chase Bank, N.A. 483

Foreclosure; certification from Appellate Court; claim, as alternative ground for affirming Appellate Court's judgment, that doctrine of res judicata barred trial court from entertaining plaintiff's request that trial court modify judgment of strict foreclosure and order foreclosure by sale; whether Appellate Court incorrectly concluded that trial court lacked authority to entertain plaintiff's request that trial court modify judgment of strict foreclosure and order foreclosure by sale; whether Appellate Court incorrectly concluded that, even if trial court had authority on remand to order foreclosure by sale, plaintiff was required to file motion to open judgment of strict foreclosure and to present evidence that value of subject property had substantially increased since date of original judgment before trial court could exercise that authority; to extent that Appellate Court held in Connecticut National Bank *v.* Zuckerman *(31 Conn. App. 440) that reviewing court's order affirming judgment of strict foreclosure and remanding case to trial court for setting of new law days precludes trial court from opening judgment and ordering foreclosure by sale, overruled.*

Williams *v.* Commissioner of Correction (Order) 901

Williams *v.* Mansfield (Order) 908

CONNECTICUT APPELLATE REPORTS

Vol. 226

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

IN RE M. S.*
(AC 47122)

Alvord, Moll and Seeley, Js.

Syllabus

The minor child, M, appealed to this court from the judgment of the trial court sustaining an ex parte order granting temporary custody of M to the petitioner, the Commissioner of Children and Families, and adjudicating M neglected pursuant to statute (§ 46b-129). The respondent mother, S, had a long-standing issue with alcohol abuse and would engage in binge drinking outside the home. During these binges, S would leave M in the care of her partner, H. Although H has been taking care of M for many years and was a father figure to her, he was also a registered sex offender, was on the central registry of the Department of Children and Families for physical abuse of a child and has a history of intimate partner violence. At the time the ex parte order of temporary custody was granted, M was in the care of H and S's whereabouts were unknown and no one was able to contact her. At the adjudication hearing, the trial court found, inter alia, that H had no legal authority with respect

* 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.

to M and no ability to address emergencies or her needs, and it expressed those same concerns if S were to relapse and leave the home again. The trial court also found that, given H's background, he may be an inappropriate caregiver, could not find him "suitable and worthy" and thus found an element of predictive neglect based on the caregiver in whom S had vested M's care. On appeal, M claimed that the trial court applied the incorrect legal standard in sustaining the order of temporary custody, specifically, that the court failed to find that she was in immediate physical danger because the only allegation by the petitioner concerning an immediate risk of physical danger to M was that she had been left in the care of someone unfit to care for her. *Held* that the trial court applied the correct legal standard in sustaining the order of temporary custody and in adjudicating M neglected: the trial court accurately set forth the legal standard in the adjudication hearing's opening, its findings regarding S's issues with alcohol abuse satisfied § 46b-129, and a review of the entire record provided strong support for this conclusion; moreover, the court used the phrase "suitable and worthy" when referencing H only after it had set forth sufficient findings in support of sustaining the order of temporary custody and thus the court's use of that phrase did not lead to the conclusion that the court had used that standard in sustaining the order of temporary custody; furthermore, H was not a party to the action, nor was there any motion filed to vest temporary custody of M with H and, thus, the potential outcomes of the hearing were limited to the trial court sustaining the order of temporary custody or vacating the order of temporary custody and returning M to S.

Argued May 22—officially released July 22, 2024**

Procedural History

Petition by the Commissioner of Children and Families to adjudicate the respondents' minor child neglected, brought to the Superior Court in the judicial district of New London, Juvenile Matters at Waterford, and tried to the court, *Hon. John C. Driscoll*, judge trial referee; judgment sustaining an ex parte order of temporary custody and adjudicating the minor child neglected, from which the minor child appealed to this court. *Affirmed.*

Joshua D. Michtom, senior assistant public defender, for the appellant (minor child).

** July 22, 2024, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

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

Opinion

ALVORD, J. This appeal, brought by the minor child, M. S., arises from the trial court's judgment sustaining an ex parte order granting temporary custody of the child to the petitioner, the Commissioner of Children and Families, and adjudicating the child neglected. On appeal, the child challenges only the sustaining of the order of temporary custody and claims that the court erred in making that decision without finding that she was at risk of immediate physical harm. The respondent mother, Stephanie S., is not participating in this appeal.[1] We affirm the judgment of the trial court.

The following facts and procedural history are relevant to the resolution of this appeal. The respondent's involvement with the Department of Children and Families (department) began before the order of temporary custody because of concerns regarding the respondent's substance use. The department has had prior involvement with the child and with an older sibling, who now lives in Ohio. In June, 2023, the department received a referral from a therapist who was treating the child's maternal grandmother (grandmother). The grandmother had expressed concern to her therapist because the respondent had disappeared and left the child, who was eleven years old at the time, with the respondent's partner, S, who is a registered sex offender. The grandmother also reported concern about the respondent's alcohol use.

[1] The respondent mother did not file an appeal or submit a brief in the present appeal. The respondent father did not participate in the proceedings before the trial court. We, therefore, refer in this opinion to the respondent mother as the respondent.

After unsuccessful attempts to contact the respondent, the department called S and made contact with him through a subsequent text message. S provided an address where he was staying with the child, and the department conducted a visit there on July 18, 2023. Also on that date, the petitioner, pursuant to General Statutes § 17a-101g, invoked a ninety-six hour hold on the child and placed the child in the care and custody of the petitioner. On July 21, 2023, the petitioner filed a motion for an order of temporary custody, alleging that the child was "in immediate physical danger from surroundings." The order of temporary custody was granted ex parte by the court, *Hoffman*, *J.*, that same day, with the court finding that the child was "in immediate physical danger from surroundings . . . [a]nd [a]s a result of said conditions, the child's . . . safety [was] endangered and immediate removal from such surroundings [was] necessary to ensure the child's . . . safety and continuation in the home [was] contrary to the welfare of said child . . . ." Also on July 21, 2023, the petitioner filed a neglect petition. The respondent did not appear at the preliminary hearing held before the court, *Hon. John C. Driscoll*, judge trial referee, on July 26, 2023. The order of temporary custody was sustained without prejudice.

On August 29, 2023, the respondent appeared in court for the first time and entered denials to the allegations in the neglect petition. The respondent also filed a motion to vacate the order of temporary custody. On September 15, 2023, the petitioner filed a motion to consolidate the trial on the contested order of temporary custody with the trial on the adjudicatory phase of the neglect petition, which the court, *Hon. John C. Driscoll*, judge trial referee, granted on September 27, 2023, the first day of trial. The respondent and S were present for the hearing.

At the consolidated trial, the petitioner presented the testimony of Kaitlyn Grayson, an investigative social worker with the department; Elizabeth Caviggia, a social worker supervisor with the department; and Jennifer Manfredi, a social worker with the department. Both the respondent and the child declined to present the testimony of any witnesses.

On October 11, 2023, the court adjudicated the child neglected and sustained the order of temporary custody. The court found that the whereabouts of the child's father was unknown and that he had not been involved in the child's life for years. The court found that, at the time of the granting of the ex parte order of temporary custody, the respondent's whereabouts also were unknown. The court noted that the respondent has a long-standing issue with alcohol. Although the respondent has an agreement with S that she would not drink in the home, the agreement has not controlled her alcoholism. The respondent is a binge drinker and periodically leaves the home and goes off for twenty-four to forty-eight hours. In June or early July, 2023, the respondent left the home on an extended absence. No one, including the child, the grandmother, or S, knew where the respondent was. She did not answer text messages or phone calls or otherwise communicate in any way.

Thus, the court found that, as of the adjudication date, the child was neglected, in that she had been abandoned by the respondent; was being denied proper care and attention, physically, educationally, emotionally or morally; and was being permitted to live under conditions, circumstances or associations injurious to her well-being.

The court noted that the respondent had returned by the time of the hearing and had participated fully in the hearing. The court found that the respondent had

entered a detoxification program for approximately one month, had entered an intensive outpatient program, and was taking steps to address her alcohol use. The court also expressed its concern that there may be issues of control and dependency with respect to the relationship between the respondent and S.

The court found that the child had been left by the respondent in the care of S, who had been a caregiver for the child for many years. The court found that S, both at the time the respondent left and at the time of the court's decision, had no legal authority with respect to the child and no ability to address emergencies or her needs. The court expressed the same concern if the respondent were to relapse and leave the home again.

With respect to S, the court found that he is a registered sex offender, had been imprisoned following conviction of a "heinous and violent crime,"[2] was listed on the central registry of the department for physical abuse of a child, and had had his parental rights as to another child terminated. Given his background, the court stated that S may be an inappropriate caregiver, interposed that it could not, at the time of its decision, find him suitable and worthy, and found an element of predictive neglect based on the caregiver in whom the respondent had vested the child's care. The court also expressed concern about the appropriateness of text messages sent by S to the child.[3]

The court sustained the order of temporary custody and adjudicated the child neglected. The court did not enter a disposition, stating that it was ordering psychological examinations of the child, the respondent, and

[2] Caviggia testified that S "had a significant history of intimate partner violence" and that he had sexually assaulted a woman on two occasions, which resulted in criminal convictions for which he had been incarcerated.

[3] Caviggia testified that S sent the child a text message in which he stated something to the effect of, "I woke up this morning and I missed holding you."

S. This appeal, which challenges only the trial court's judgment sustaining the order of temporary custody, followed.

We first set forth some overarching legal principles and discuss our standard of review. General Statutes § 46b-129 "governs petitions to adjudicate a child neglected, uncared for, or abused. This court previously has explained that subsection (b) of § 46b-129 authorizes courts to issue an order ex parte vesting in some suitable agency or person the child's or youth's temporary care and custody if it appears, on the basis of the petition and supporting affidavits, that there is reasonable cause to believe that (1) the child or youth is suffering from serious physical illness or serious physical injury or is in immediate physical danger from the child's or youth's surroundings, and (2) that as a result of said conditions, the child's or youth's safety is endangered and immediate removal from such surroundings is necessary to ensure the child's or youth's safety . . . .

"A preliminary hearing on any ex parte custody order . . . issued by the court shall be held not later than ten days after the issuance of such order. . . . General Statutes § 46b-129 (b). Connecticut law is clear that, in the context of a hearing for an order of temporary custody pursuant to § 46b-129 (b), a finding of immediate physical danger is a prerequisite to the court's entry of a temporary order vesting custody of a child in one other than the child's parents. . . .

"Following the preliminary hearing on an ex parte order of temporary custody, [u]pon request, or upon its own motion, the court shall schedule a hearing on the order for temporary custody . . . to be held not later than ten days after the date of the preliminary hearing. General Statutes § 46b-129 (f). The proper standard of proof in a [contested hearing] on an order of

temporary custody is the normal civil standard of a fair preponderance of the evidence. . . .

"In an appeal taken from a trial court's decision to sustain an ex parte order of temporary custody, the applicable standard of review depends on the nature of the claim raised." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *In re Alizabeth L.-T.*, 213 Conn. App. 541, 551–52, 278 A.3d 547 (2022).

In the present case, the child is not challenging any of the factual findings of the court. The child claims that the court applied the incorrect legal standard in sustaining the order of temporary custody, which raises an issue of law over which we exercise plenary review. *In re Annessa J.*, 343 Conn. 642, 667, 284 A.3d 562 (2022); see also *In re Xavier H.*, 201 Conn. App. 81, 95, 240 A.3d 1087 ("[t]he consideration of whether the court applied an incorrect legal test presents a question of law, which requires our plenary review"), cert. denied, 335 Conn. 981, 241 A.3d 705 (2020), and cert. denied, 335 Conn. 982, 241 A.3d 705 (2020). Moreover, "[t]he interpretation of a trial court's judgment presents a question of law over which our review is plenary. . . . As a general rule, judgments are to be construed in the same fashion as other written instruments. . . . The determinative factor is the intention of the court as gathered from all parts of the judgment. . . . Effect must be given to that which is clearly implied as well as to that which is expressed. . . . The judgment should admit of a consistent construction as a whole. . . . If there is ambiguity in a court's memorandum of decision, we look to the articulations [if any] that the court provides.[4] . . . [W]e are mindful that an opinion must be read as a whole, without particular portions

[4] Counsel for the child did not seek reargument or an articulation of the trial court's decision sustaining the order of temporary custody. See Practice Book § 66-5.

read in isolation, to discern the parameters of its holding. . . . Furthermore, [w]e read an ambiguous trial court record so as to support, rather than contradict, its judgment." (Citation omitted; footnote added; internal quotation marks omitted.) *In re Xavier H.*, supra, 95.

Specifically, the child claims that the court erred in sustaining the order of temporary custody on the basis that it improperly failed to find that the child was in immediate physical danger. She contends that "the only allegation by [the petitioner] concerning an immediate risk of physical danger to [the child] was that she was left in the care of someone unfit to care for her. . . . The trial court applied a legally erroneous standard in analyzing this question, and even under this erroneous analysis, found that [the petitioner] had not adduced sufficient evidence to satisfy its burden." (Emphasis omitted.) We disagree.

We first note that our Supreme Court "has never required the talismanic recital of specific words or phrases if a review of the entire record supports the conclusion that the trial court properly applied the law." (Internal quotation marks omitted.) *In re Annessa J.*, supra, 343 Conn. 677; see also *In re Xavier H.*, supra, 201 Conn. App. 97 ("although the court did not use the talismanic phrasing of the statute, its framing of the legal question before it, and its findings, taken as a whole, nonetheless, satisfy the statute"). Because the court in the present case did not recite the immediate physical danger standard in its oral decision sustaining the order of temporary custody, we look to the entire record to determine whether the court properly applied that standard.

Reading the record as a whole, we conclude that the court properly applied the relevant legal standard and

that its findings satisfy § 46b-129.[5] In its decision, the court made several findings with respect to the respondent's alcohol use, which led to her disappearances from the home. The most recent absence from the home was extensive in length, and no one knew where she was, nor was anyone able to contact her. The court found that, despite the respondent's having taken some steps to address her alcohol use, those steps were insufficient to allow her to return to a full-time caregiving role.

These findings, which are not challenged on appeal, were supported by the evidence. Grayson testified that the respondent has a pending criminal charge of operating a motor vehicle while under the influence of alcohol, stemming from a 2020 incident in which she drove her car into a brick wall while intoxicated. Caviggia testified that the respondent's alcohol use appeared to be increasing over the past couple of years. Grayson testified that the child reported that, although the respondent previously had disappeared for shorter time periods, the child and S typically were able to contact her via text message or telephone. In this most recent instance, however, Caviggia testified that she was concerned because the respondent, without providing any information as to her whereabouts, had left the child for a period of approximately one month with S, who had no legal authority or ability to make medical decisions with respect to the child. Grayson testified that the child told her that the child and S had continued to call the respondent's phone and leave voicemails, but that they were not successful in contacting the

[5] The present case is distinguishable from *In re Chronesca D.*, 126 Conn. App. 493, 13 A.3d 1106 (2011), on which the child relies. In that case, this court reversed the judgment of the trial court committing the minor child to the temporary custody of a cousin of the minor child's father because such order was improper given the trial court's express finding that the minor child was not in immediate physical danger from her surroundings. Id., 494–95.

respondent during her absence. They knew that her phone was turned on, but no calls were returned. Grayson testified that, when the respondent ultimately was located and made aware that the child had been removed from the home, the respondent indicated to the police that she was not going to return home. Grayson testified that, when the respondent spoke to her on the phone, the respondent presented as under the influence of alcohol and, rather than offering to return home to care for the child, stated that she was going to have her son from Ohio come to Connecticut to take care of the child.

Manfredi testified that the child was very worried about the respondent and "very distressed at [the respondent] being gone." Manfredi testified that the child told her that things were better recently because the respondent no longer drinks alcohol in the home and instead leaves the home to drink, but the child reported that she previously had cared for the respondent when she was intoxicated and had picked her up out of the street. The child told Manfredi that she was worried that the respondent could not quit drinking and that, although the respondent will try for a while, she always ends up going back to it.

A review of the entire record provides strong support for the conclusion that the court properly applied the law. In opening the hearing, the court accurately noted the legal standard applicable to sustaining an order of temporary custody, remarking, in overruling the respondent's objection to consolidation, that "[i]t's been my standard policy, with respect to consolidation, to say that if the [order of temporary custody] is sustained, then a neglect adjudication follows on a per se basis. I can't find that the child is *in imminent risk of physical harm* and then not find that they were neglected." (Emphasis added.) Later in the hearing, when the child's attorney questioned the department social worker as

to why the child's school had been changed following her removal from the home, the court asked how that information would be relevant to the order of temporary custody, and explained: "I see it's irrelevant to the issue of whether she's in imminent physical risk unless you're suggesting that she's going to run away unless she's returned to" her previous school.

The child focuses on S and the observation made in one portion of the court's decision as to whether S is "suitable and worthy," in seeking to demonstrate that the court applied the wrong legal standard. Specifically, the child contends that, "[i]n using this terminology, the trial court appears to have been alluding to its power, under [§] 46b-129 (j),[6] to vest guardianship of a child in any suitable and worthy person *after the child is adjudicated neglected.*" (Emphasis in original; footnote added.) The petitioner responds that the court mentioned "suitable and worthy" only after it had set forth sufficient findings in support of sustaining the order of temporary custody. We agree with the petitioner that the court's use of the phrase "suitable and worthy" does not lead to the conclusion that the court improperly used that standard in sustaining the order of temporary custody.[7]

[6] General Statutes § 46b-129 (j) (2) provides in relevant part: "Upon finding and adjudging that any child . . . is uncared for, neglected or abused the court may . . . (B) vest such child's . . . legal guardianship . . . with any other person . . . found to be suitable and worthy of such responsibility by the court, including, but not limited to, any relative of such child . . . by blood or marriage . . . ."

[7] Because we reject the child's argument that the court applied the "suitable and worthy" standard, we need not address her argument that the evidence did not satisfy that standard. The child also requests this court to hold, "as a matter of substantive due process, [that] the mere allegation that a child was left in the care of an otherwise competent adult who lacked legal authority to consent to medical care, without specific factual allegations tending to show risk factors unique to that child, cannot constitute a basis for sustaining an order of temporary custody." Because the fact that the child was left with a caretaker was not the sole basis for the court's findings underlying its sustaining of the order of temporary custody, we reject the child's request.

We first note that S is not a party in this action, nor was there any motion filed to vest the order of temporary custody in S. Thus, the potential outcomes of the hearing were limited to the court sustaining the order of temporary custody, with the custody of the child being vested in the petitioner, or vacating the order of temporary custody, with the child returning to *the respondent's* care. After setting forth several findings with respect to the respondent's alcohol use and inability to serve as a full-time caretaker, the court also summarized the evidence it had received with respect to S, with whom the respondent left the child when she disappeared. The court observed that S had been convicted of a violent sexual assault, he had his parental rights with respect to another child terminated, the department previously had substantiated allegations of physical abuse by him against a stepson, and he had sent potentially concerning text messages to the child in the present case. The court remarked: "I can't at this point find him suitable and worthy. I'm not saying he's unsuitable or unworthy. I'm saying I cannot find him to be suitable and worthy. So, based on a predictive neglect finding as to the caregiver whom mother had been vesting care, the court finds that there's an element of predictive neglect there, that he may be an inappropriate caregiver given his background."

We are not convinced that these remarks demonstrate that the trial court used the legal standard applicable to the vesting of guardianship, as set forth in § 46b-129, in rendering its decision sustaining the order of temporary custody. As noted previously, the court accurately set forth the relevant legal standard on more than one occasion and made appropriate findings in support of that legal standard. See *In re Xavier H.*, supra, 201 Conn. App. 100 (where court made sufficient factual findings to meet statutory standard and correctly set forth legal standard elsewhere in its memorandum of

decision, imprecision in conclusory statement did not reflect application of incorrect legal standard); see also *In re Averiella P.*, 146 Conn. App. 800, 805, 81 A.3d 272 (2013) (although court used phrase "potential risk of harm" in ruling on motion to transfer guardianship, it did not use it as sole basis for finding transfer of guardianship was in child's best interest). Having considered the challenged portion of the court's decision within the context of the court's overall analysis; see *In re James O.*, 322 Conn. 636, 654, 142 A.3d 1147 (2016); we conclude that the court, in sustaining the order of temporary custody, did not apply an incorrect legal standard.

The judgment is affirmed.

In this opinion the other judges concurred.

Cumulative Table of Cases
Connecticut Appellate Reports
Volume 226

(Replaces Prior Cumulative Table)

Altavista Investments, LLC *v.* Makeeva 175
Summary process; motion to intervene; claim that trial court improperly determined that prospective intervenor, which held note that was secured by mortgage on plaintiff's real property, was not proper party to eviction action related to that property and was not entitled to intervene in postjudgment proceedings pursuant to statute (§ 47a-35b) regarding final distribution of use and occupancy payments made by defendants during pendency of their appeal of trial court's judgment in eviction action.

Angel C. *v.* Commissioner of Correction 837
Habeas corpus; whether habeas court abused its discretion in precluding petitioner's children from testifying at habeas trial; claim that habeas court should have looked to broader record when considering relevance of children's testimony; whether habeas court erred in denying petition for writ of habeas corpus; whether petitioner failed to overcome presumption that trial counsel's performance was within range of reasonable professional assistance and was not deficient; whether failure to investigate potential witness constituted ineffective assistance of counsel.

Best *v.* Commissioner of Correction 649
Habeas corpus; mootness; claim that habeas court erred in refusing to accept for filing petitioner's untimely amended petition; whether, because petitioner filed subsequent habeas action alleging same counts set forth in untimely amended petition, appeal was moot; whether there was any practical relief that could be afforded to petitioner.

Brennan *v.* Board of Assessment Appeals 191
Real estate tax appeal; claim that trial court erroneously determined that plaintiff had abandoned his claim regarding proper valuation of his residential dwelling during trial; claim that trial court improperly considered factors in statute governing classification of land as farmland (§ 12-107c) in its determination that plaintiff's property was no longer being used as farm pursuant to statute (§ 12-504h); claim that trial court erroneously determined that plaintiff had changed use of nonresidential property so as to have lost entitlement to farmland designation previously granted to him by town tax assessor.

C. W. *v.* E. W. 144
Breach of contract; unjust enrichment; quantum meruit; claim that trial court improperly rendered judgment for defendants on plaintiff's breach of contract claim; claim that trial court failed to consider judicial admissions allegedly made by defendants in original answers as to existence of alleged oral contract to sell property to plaintiff; whether trial court, in ruling on plaintiff's unjust enrichment claim, erred in finding that plaintiff's evidence of his labor at property was unreliable.

Czunas *v.* Mancini 256
Dissolution of marriage; postjudgment proceedings; motion to modify child support; whether trial court abused its discretion in denying defendant's motion to modify child support on ground that there had been no change in parties' circumstances since date of previous child support order; whether trial court abused its discretion in ordering defendant to pay plaintiff $10,000 to defend against his appeal.

Demarco *v.* Charter Oak Temple Restoration Assn., Inc.. 335
Employment discrimination; motion to strike; claim that trial court improperly concluded that provision (§ 46a-60 (b) (1)) of Connecticut Fair Employment Practices Act (§ 46a-51 et seq.) did not apply to claims of discrimination arising from employee's association with individual with physical disability.

Edgewood Properties, LLC *v.* Dynamic Multimedia, LLC 583
Summary process; motion to enforce settlement agreement; motion in limine; claim that trial court improperly determined that plaintiff was entitled to judgment of possession of property based on lapse of time; claim that trial court improperly

denied defendants' motion in limine to present evidence of purported settlement agreement between parties; whether trial court improperly denied defendants' motion to summarily enforce purported settlement agreement.

Finocchio Bros., Inc. *v.* 587 CTA, LLC 351

Breach of contract; claim that trial court's finding that defendant properly cancelled contract within time frame required by parties' contract was clearly erroneous.

GHP Media, Inc. *v.* Hughes. 162

Indemnification; motion to strike third-party complaint; claim that trial court improperly granted third-party defendants' motion to strike third-party complaint seeking indemnification; whether third-party plaintiff, rival printing company, and third-party defendants, who were officers of plaintiff printing company, owed identical duties to plaintiff printing company to protect trade secrets and other proprietary information from being used by third-party plaintiff.

Greenwich *v.* Freedom of Information Commission 40

Administrative appeal; claim that trial court improperly substituted its judgment for that of defendant Freedom of Information Commission by concluding that requested records were preliminary drafts exempt from disclosure under statute (§ 1-210 (b) (1)); whether trial court improperly concluded that it was not necessary for town plaintiffs to review requested records to determine that those records were preliminary drafts and that public interest in withholding records outweighed public interest in disclosure pursuant to § 1-210 (b) (1); whether commission's order directing plaintiffs to retrieve requested records and to disclose them to defendant requestor "free of charge" constituted abuse of its discretion; whether plaintiffs' proffered alternative ground for affirmance, that requested records were exempt from disclosure as records of standards, procedures, processes, software and codes under § 1-210 (b) (20), was persuasive.

Haworth Country Club, LLC *v.* United Bank. 665

Breach of fiduciary duty; motion to strike; claim that trial court applied incorrect legal standard in ruling on motion to strike; claim that trial court erred in concluding that plaintiff was not entitled to bring cause of action against defendant bank and that plaintiff's status as noncustomer of defendant was dispositive as to preclude any allegations of liability against defendant; whether plaintiff alleged any circumstance that would give rise to duty owed by defendant; claim that trial court erred in concluding that plaintiff's allegations that defendant violated various banking statutes and regulations in opening account for customer were not allegations of conduct offensive to public policy under Connecticut Unfair Trade Practices Act (CUTPA) (§ 42-110a et seq.); whether statute (§ 35-1) regarding use of fictitious business names was applicable to plaintiff's claims to support per se violation of CUTPA; claim that trial court erred in failing to address that defendant, as of date of service of lawsuit, was on notice that third-party bank account had been opened under improper and fictitious name and that moneys in account were owned by another party.

Iadanza *v.* Toor 736

Summary process; stipulated judgment; claim that trial court improperly concluded that plaintiff landlord's removal of appliances from unoccupied accessory apartment was not material breach of stipulated judgment and thus did not excuse defendant tenant's failure to make deposit for purchase by agreed on deadline.

In re A. H. 1

Termination of parental rights; whether trial court's reliance in adjudicatory phase of termination trial on social studies prepared by Department of Children and Families violated statute (§ 45a-717) and rule of practice (§ 35a-9); reviewability of respondent's unpreserved claim that trial court's use of social studies in adjudicatory phase of termination trial violated his due process rights; whether trial court improperly admitted hearsay evidence; whether respondent demonstrated that he was harmed by admission of alleged hearsay evidence.

In re Javonte B. 651

Termination of parental rights; claim that trial court erred in determining that termination of respondent's parental rights was in best interests of minor children because he had existing relationship with minor children and because he was bonded to them; whether trial court's best interests determination was in error.

In re M. S. 857

Child neglect; ex parte order of temporary custody; claim that trial court applied incorrect legal standard in sustaining order of temporary custody on basis that it improperly failed to find that minor child was at risk of immediate physical danger pursuant to statute (§ 46b-129).

In re P. M. 378
Neglect petition; mootness; whether respondent's claim was reviewable under collateral consequences exception to mootness doctrine; claim that there was insufficient evidence to support trial court's determination that minor child was neglected.

L. K. *v.* K. K. 279
Dissolution of marriage; postjudgment proceedings; motion for modification of unallocated alimony and child support; claim that trial court abused its discretion by failing to address claim that reduction in child support component of defendant's unallocated alimony and child support obligation was warranted because one of parties' three children had reached age of majority; whether trial court abused its discretion in denying defendant's motion to modify by declining to consider certain financial evidence that had been submitted by defendant.

Martinelli *v.* Martinelli 563
Breach of fiduciary duty; conversion; statutory theft; legal malpractice; motion to dismiss; motion for leave to amend complaint; claim that trial court improperly concluded that plaintiff beneficiaries lacked standing to assert claims against defendants for injuries to decedent's estate; claim that trial court improperly declined to grant plaintiffs' request for leave to amend complaint after defendants filed motions to dismiss for lack of subject matter jurisdiction.

Martin *v.* Olson 392
Breach of contract; whether trial court's jury instruction regarding defendant's statute of limitations defense was harmful to plaintiff; whether trial court abused its discretion in admitting certain testimony into evidence; whether trial court abused its discretion in allowing defendant to present surrebuttal evidence during his case-in-chief.

M. C. *v.* A. W. 444
Marital dissolution; whether record was adequate to review defendant's unpreserved claim that trial judge committed error by failing to recuse herself and by demonstrating judicial bias; claim that trial court made clearly erroneous factual findings in support of its financial and property distribution orders; claim that trial court did not adequately consider plaintiff's noncompliance with court's discovery orders in entering its financial and property distribution orders; claim that trial court improperly declined to rule on certain motions for contempt; claim that trial court inequitably distributed parties' assets.

Michel *v.* Hartford 98
Employment discrimination; claim of retaliation in violation of federal statute (42 U.S.C. § 1983) for exercise of rights guaranteed by first amendment to United States constitution; claim of retaliation in violation of state statute (§ 31-51q) for exercise of rights guaranteed by article first of Connecticut constitution; motion to strike; claim that trial court improperly granted defendant city's motion to strike claim alleging retaliation in violation of § 1983 for failure to adequately plead facts to establish that defendant's policies, practices, or customs led to violation of plaintiff's constitutional rights, as required for municipal liability; claim that trial court improperly concluded that plaintiff failed to plead facts that, if proven, would establish that his deposition testimony related to fellow employee's race discrimination claim was speech on matter of public concern pursuant to § 31-51q; claim that trial court erroneously determined that it was plaintiff's burden to allege facts to establish that his speech did not substantially or materially interfere with his job performance or working relationship between him and his employer pursuant to § 31-51q.

M. S. *v.* M. S. 482
Marital dissolution; postjudgment motion for contempt; whether trial court correctly interpreted order setting plaintiff's child support obligation; claim that trial court erred in determining amount of plaintiff's child support arrearage.

Mulvey *v.* Palo 495
Adverse possession; quiet title; claim that trial court improperly concluded that plaintiff failed to establish claim of adverse possession with respect to all areas of disputed property; claim that trial court improperly concluded that plaintiff failed to establish boundaries of disputed property with reasonable certainty.

Nationstar Mortgage, LLC *v.* Giacomi. 467
Foreclosure; claim that trial court improperly rendered default judgment of foreclosure; claim that trial court abused its discretion in denying defendant's motion to open default judgment pursuant to statute (§ 52-212); whether defendant's

failure to timely file pleading was result of mistake, accident or other reasonable cause.

Nedder *v.* Nedder 817

Dissolution of marriage; claim that trial court erred in ordering plaintiff to use specific assets to pay certain expenses and debt; claim that trial court erred in failing to assign value to plaintiff's quasi-pension account prior to dividing parties' property; claim that trial court abused its discretion in fashioning its alimony orders; whether trial court properly considered criteria in statute (§ 46b-82 (a)) in its award of alimony.

914 North Colony, LLC *v.* 99 West, LLC 720

Summary process; subject matter jurisdiction; motion to dismiss; claim that trial court improperly found that plaintiff's actions rendered notice to quit equivocal.

Office of Chief Disciplinary Counsel *v.* Vaccaro. 75

Attorney presentment; whether trial court improperly suspended respondent attorney from practice of law for ninety days after attorney's inaction during representation of client led to dismissal, with prejudice, of client's personal injury lawsuit; claim that trial court erred when it failed to consider respondent's assertion that his due process rights were violated and that he was prejudiced as result of delay in underlying disciplinary proceedings; claim that trial court mistakenly believed it was precluded from considering respondent's due process rights and delay in underlying disciplinary proceedings as mitigating factor in determining punishment for respondent's misconduct; claim that respondent could not have appealed from ruling by reviewing committee of Statewide Grievance Committee denying his motion to dismiss grievance complaint against him; claim that trial court abused its discretion because ninety day suspension was excessive and out of proportion to offense committed.

Palmieri *v.* Cirino 431

Quiet title; postjudgment proceedings; motion for attorney's fees; claim that trial court's award of attorney's fees was improper because affidavit of defendant's counsel in support of attorney's fees was filed beyond thirty day deadline set forth in applicable rule of practice (§ 11-21); claim that defense failed to demonstrate that untimely filing was result of excusable neglect; whether trial court abused its discretion in awarding attorney's fees for expenses incurred by defendant in defending prior actions between parties.

R. G.-R. *v.* S. R. 547

Dissolution of marriage; motion to modify custody; motion for contempt; claim that trial court erred in granting defendant's motions to modify custody; claim that trial court erred in granting motions for contempt filed by defendant; whether plaintiff's challenges to trial court's custody orders were rendered moot when superseded by subsequent custody order; whether collateral consequences exception to mootness doctrine was applicable; whether plaintiff's claim qualified for appellate review under capable of repetition, yet evading review exception to mootness doctrine; whether trial court erred in denying plaintiff's motion for contempt.

Romanelli *v.* Dept. of Social Services. 131

Administrative appeal; claim that trial court erred in determining that defendant Department of Social Services did not abuse its discretion when it included value of property contained in trust in its calculations to determine whether applicant exceeded asset limit for Medicaid eligibility; claim that defendant violated due process by failing to provide notice to applicant that revocability of trust was at issue in calculating his Medicaid eligibility.

Speer *v.* Skaats. 416

Abuse of process; motion to dismiss; claim that trial court erred in granting defendant's motion to dismiss; claim that trial court erred in concluding that it lacked subject matter jurisdiction; whether plaintiff had standing to bring action.

Stoor *v.* Vehs 636

Negligence; breach of contract; claim that trial court improperly awarded plaintiff's former attorney reasonable value of services he provided pursuant to Cole *v.* Myers *(128 Conn. 223) instead of amount provided under contingency fee agreement; whether trial court's finding that attorney was entitled to reasonable value of services he performed on plaintiff's behalf was supported by evidence in record.*

State *v.* Carlson 514

Manslaughter first degree; claim that trial court's jury instructions on consciousness of guilt diluted state's burden to disprove elements of self-defense beyond reasonable doubt; claim that consciousness of guilt instruction burdened defendant to

explain his conduct in violation of his constitutional right not to testify; claim that consciousness of guilt instruction was unwarranted on basis of evidence presented at trial; claim that this court should have exercised its supervisory authority and adopted rule categorically prohibiting consciousness of guilt instructions.

State *v.* Jean-Baptiste 702

Larceny third degree; assault of public safety personnel; interfering with officer; claim that trial court failed to adequately inquire into defense counsel's reasoning behind certain actions taken during trial in violation of defendant's sixth amendment right to counsel.

State *v.* Nichols 359

Sexual assault fourth degree; risk of injury to child; claim that trial court abused its discretion in denying motion for mistrial after victim's outburst in courtroom during defendant's testimony; claim that evidence was insufficient to support conviction of fourth degree sexual assault.

State *v.* Richey 234

Threatening second degree; whether evidence was sufficient to support defendant's conviction; claim that defendant's statements did not constitute true threats; whether trial court properly denied defendant's request to provide jury with instruction on defense of premises.

T. A. *v.* M. L. (Memorandum Decision) 901

T. A. *v.* M. L. (Memorandum Decision) 901

Torrington Tax Collector, LLC *v.* Riley 211

Claim for exemption from bank execution pursuant to statute ((Supp. 2022) § 52-376b); claim that trial court improperly determined that plaintiff's opposition to claim of exemption was barred by doctrine of collateral estoppel or res judicata; claim that trial court improperly failed to hold evidentiary hearing before granting defendant's claim for exemption from execution.

Townsend *v.* Commissioner of Correction 313

Habeas corpus; subject matter jurisdiction; ripeness; unpreserved claim that petitioner should not be required to register as deadly weapon offender pursuant to statute (§ 54-280a) upon his release into community because § 54-280a, enacted in 2013, was inapplicable to him in connection with 2002 conviction; whether phrase "on or after January 1, 2014," in § 54-280a (a) (1) applied to petitioner's date of conviction or only to petitioner's date of release; claim that petitioner's appeal was not ripe because he would not likely have to register and he has not yet been released.

Trent *v.* Trent 791

Dissolution of marriage; claim that trial court improperly granted defendant's postdissolution motion for contempt and denied plaintiff's postdissolution motion for contempt; claim that trial court improperly denied plaintiff's motion to modify alimony and child support.

Wald *v.* Cortland-Wald 752

Dissolution of marriage; whether trial court abused its discretion in deviating from child support guidelines in its child support order without making required findings pursuant to applicable regulation (§ 46b-215a-5c (b) (6) (A)); whether trial court abused its discretion in delaying commencement of child support obligation without making finding on record as required by statute (§ 46b-215b) that application of child support guidelines would be inequitable or inappropriate as determined under deviation criteria; whether trial court abused its discretion in denying defendant's motions for contempt; whether trial court abused its discretion in determining amount of attorney's fees it ordered plaintiff to pay defendant after adjudicating him in contempt for failing to comply with its discovery orders.

Williams *v.* Commissioner of Correction 617

Habeas corpus; whether habeas court abused its discretion in denying petitioner's request to issue capias pursuant to statute (§ 52-143 (e)).

Wylie *v.* APT Foundation, Inc. 267

Public nuisance; motion to strike; claim that trial court improperly concluded that plaintiff failed to allege sufficient facts to support public nuisance claim.

CONNECTICUT APPELLATE REPORTS

Vol. 227

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

FREDERICK J. WALTERS ET AL. *v.* FRANCESCO G. SERVIDIO ET AL.
(AC 46455)

Moll, Westbrook and Flynn, Js.

Syllabus

The plaintiffs and the defendants owned real property on Road A, which intersects with Road B in two locations. The northern intersection was north of the defendants' properties and south of the plaintiffs' properties and was known as the "Y right of way." The only access to the southern intersection was obtained by traveling over an area between the defendants' properties (disputed area), which was rocky, wooded, and unpaved. The Y right of way, which provided the plaintiffs with access to Road B, was much closer to the plaintiffs' properties than the southern intersection. In 1908, before the Y right of way existed, the original subdivision map for the area was recorded on the land records. In 1958, the northern part of the subdivision was resubdivided into larger lots, some of which would later become the plaintiffs' properties, and the resubdivision map recorded on the land records shows the Y right of way. When the defendants purchased their property on Road A, the paving in front of their house that ran from the northern part of the disputed area to the Y right of way was not a road but a driveway nine feet in width, and there was no paving or other physical manifestation of a road in the disputed area. Since the defendants purchased the property on Road A in 1987, with the exception of a short period of time during a sewer project in late 2003 and early 2004, during which time the defendants granted to the town of Greenwich an easement for sewer installation, the disputed area had not been passable to traffic and the defendants had not observed anyone travel through the disputed area for any purpose, including to access the southern intersection. The

plaintiffs filed on the town's land records affidavits of fact against the defendants' properties on Road A and Road B that falsely claimed an easement over the disputed area. The plaintiffs thereafter commenced the present action, seeking, inter alia, a declaratory judgment that they had an express or implied easement over the disputed area and a judgment quieting title to their alleged easement. The defendants asserted several counts in a counterclaim against the plaintiffs, including trespass, slander of title, and nuisance or disturbance of a right pursuant to statute (§ 47-41). Following a trial, the court rendered judgment for the defendants on all counts of the plaintiffs' operative complaint and the defendants' counterclaim. On the plaintiffs' appeal to this court, *held*:

1. The trial court properly determined that the plaintiffs did not have an express easement over the defendants' properties for any purpose: the express language in the plaintiffs' deeds granted to them the right to use Road A from their lots southerly to Road B for the specific purpose of accessing Road B, and there was no express language in the plaintiffs' deeds granting them the right to travel on Road A south of the Y right of way, over and through the disputed area to access Road B at its southern intersection with Road A; moreover, even assuming that there was any ambiguity as to the scope of the plaintiffs' easement over Road A, the court's findings regarding the extrinsic evidence of the surrounding circumstances supported its conclusion that there was no express easement.

2. The plaintiffs could not prevail on their claims that the trial court improperly determined that they did not have an implied easement over the disputed area and that any implied easement rights granted to them by the original subdivision map were extinguished pursuant to the Marketable Record Title Act (§ 47-33b et seq.):

   a. The trial court properly determined that there was no intent to create an easement by implication over the defendants' property when the plaintiffs' predecessors in interest conveyed to the plaintiffs their respective properties, as there was nothing in the language of the plaintiffs' deeds nor in the maps referenced therein that expressly granted to the plaintiffs an easement over the defendants' property, and this court could not imply such intent from the language of the plaintiffs' deeds, from the maps referenced therein, or from the surrounding circumstances; moreover, the court determined that the Y right of way was sufficient for all access to the plaintiffs' properties and therefore that the plaintiffs' use of the disputed area was not reasonably necessary for the use and normal enjoyment of their properties.

   b. Contrary to the plaintiffs' claim, a reference in the defendants' deed to the original subdivision map could not reasonably be construed as granting the plaintiffs an easement to travel over the defendants' property and through the disputed area: to construe the defendants' deed as granting the plaintiffs an easement over all of the defendants' property, including the disputed area, would be contrary to the language of the

defendants' deed, which does not mention the plaintiffs, their respective properties, or an easement over the disputed area; moreover, the original subdivision map does not depict Road A as a continuous street but, rather, depicts a stone fence that crosses and blocks the entirety of Road A just south of where the Y right of way would later be created, which is consistent with the court's finding that the northern portion of Road A is a dead end starting at the defendants' driveway and the southern portion of Road A is a dead end starting at the southernmost part of the disputed area; furthermore, on the basis of the record, the court's finding that there was no physical manifestation of a road was not clearly erroneous and, therefore, the court properly determined that the exceptions to the act in § 47-33h did not apply and that any implied easement rights over the disputed area granted to the plaintiffs by the original subdivision map were extinguished by the act.

3. The trial court properly ruled for the defendants on the plaintiffs' claims of obstruction of an easement, as the trial court properly determined that the defendants were the owners of all right, title, and interest in the disputed area free and clear of any claim by the plaintiffs of any easement, right of way, or other right or interest to pass onto, over, or across the defendants' properties for any purpose, and there can be no impairment of an easement where no easement exists.

4. The plaintiffs could not prevail on their claim that the trial court improperly determined that one of the plaintiffs, F, trespassed on the defendants' property; in the plaintiffs' complaint and during trial, F admitted to entering the defendants' property to clean out the disputed area, and it was clear from the act of clearing out the debris in the disputed area that F had the intent to enter the disputed area, which was sufficient to satisfy the element of intent for the tort of trespass.

5. The trial court improperly rendered judgment for the defendants on the count of their counterclaim alleging slander of title: because the court's ultimate factual conclusion that the plaintiffs acted with malice was fatally inconsistent with the court's subordinate factual finding that the plaintiffs firmly believed the statements in the affidavits, the court's conclusion that the plaintiffs slandered the defendants' title could not stand; moreover, the court awarded no damages to the defendants on their slander of title claim, and pecuniary damages must be shown to prove a claim of slander of title.

6. The plaintiffs could not prevail on their claim that the trial court improperly found for the defendants on the count of their counterclaim alleging that the plaintiffs violated § 47-41: contrary to the plaintiffs' claim, § 47-41 does not require evidence of harassment, negligence, or recklessness, the court made no findings of an unreasonable interference, and the plaintiffs cited no binding authority for their argument that harassment, negligence, or recklessness needed to be shown; moreover, the plaintiffs would have had to show an ownership interest in the land over which they claimed an easement, but the plaintiffs had no ownership interest

in any of the land over which an easement was being claimed and the plaintiffs made no argument that filing affidavits on the land records claiming an easement over real property over which they had no ownership interest failed to constitute a disturbance of the rights of the defendants, the owners of the fee simple.

Argued May 13—officially released July 30, 2024

Procedural History

Action seeking, inter alia, a declaratory judgment that the plaintiffs have an express easement over certain real property owned by the defendants, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the defendants filed a counterclaim; thereafter, the matter was tried to the court, *Clark*, *J.*; judgment for the defendants on the complaint and on the counterclaim, from which the plaintiffs appealed to this court. *Reversed in part*; *judgment directed in part.*

Ryan S. Tougias, with whom, on the brief, was *Michael J. Jones*, for the appellants (plaintiffs).

Scott M. Harrington, for the appellees (defendants).

Opinion

FLYNN, J. In this land use dispute concerning whether the plaintiffs, Frederick J. Walters, Susan M. Walters, Michael S. Mason, and Michele A. Mason, have an easement over an approximately forty-four foot long by forty foot wide dirt section of a private road between 22 Ridge Street and 33 Cognewaugh Road in the Cos Cob section of Greenwich, known as the disputed area, the plaintiffs appeal from the judgment of the trial court rendered in favor of the defendants, Francesco G. Servidio and Rita Servidio. On appeal, the plaintiffs claim that the court improperly determined that (1) they could not prevail on their claims of (a) express easement, (b) easement by implication, and (c) obstruction of a purported easement, and (2) the defendants prevailed on their counterclaims of (a) trespass, (b) (1) slander

of title, and (b) (2) a violation of General Statutes § 47-41. We agree only with the plaintiffs' claim concerning slander of title and, accordingly, reverse in part and affirm in part the judgment of the trial court.

The following facts, as found by the trial court, and procedural history are relevant. Ridge Street, a private road, intersects with Cognewaugh Road, a public road, in two locations. The northern intersection, which lies north of the defendants' properties at 22 Ridge Street and 33 Cognewaugh Road, and south of the plaintiffs' properties at 38 and 40 Ridge Street, is known as the Y right of way. Access to the southern intersection is obtained by traveling over the disputed area, which is where a portion of 22 Ridge Street abuts 33 Cognewaugh Road. The disputed area is rocky, wooded, and unpaved. The Y right of way, which provides the plaintiffs with access to Cognewaugh Road, is much closer to the plaintiffs' properties than is the southern intersection.

In 1908, before the Y right of way existed, map 353 was recorded on the Greenwich land records. Map 353 is the original subdivision map for Highview Park. About fifty years later, in 1958, Joseph DeLuca and William DeLuca (DeLucas), as trustees of the northern part of Highview Park, resubdivided that northern portion of Highview Park into thirteen larger lots, including part of which that would later become the plaintiffs' properties. Map 3965, which was recorded on October 22, 1958, depicts that DeLuca resubdivision and shows the Y right of way, which provides access from Ridge Street to Cognewaugh Road for the thirteen resubdivided lots. The plaintiffs' properties were not developed until after the DeLucas created the Y right of way. Map 3992, which was recorded on December 29, 1958, depicts the Y right of way but shows it as reduced in width from fifty feet, as reflected on map 3965, to twenty feet.

The Walterses acquired real property at 38 Ridge Street by warranty deed (Walters deed), which was recorded in 1987, in book 1742 at page 339 of the land records of the town of Greenwich (town). The Masons acquired 40 Ridge Street by warranty deed (Mason deed), which was recorded in 1997, in book 2952 at page 77 of the town's land records. The defendants own 22 Ridge Street and recorded their warranty deed in 1989, in book 1992 at page 6 of the town's land records. Both the Walters deed and the Mason deed reference map 3965 and map 3992; the deeds do not reference map 353. The plaintiffs do not dispute and admitted in their complaint that the defendants own, in fee simple, Ridge Street in front of and adjoining 22 Ridge Street. The defendants also purchased 33 Cognewaugh Road, which abuts 22 Ridge Street, and recorded that warranty deed in 2006, in book 5306 at page 128 of the town's land records.

When the defendants purchased 22 Ridge Street, the paving in front of their house that ran from the northern part of the disputed area to the Y right of way was not a road but a driveway nine feet in width, and there was no paving or other physical manifestation of a road in the disputed area. When the defendants first viewed 22 Ridge Street with a Realtor, the northern part of Ridge Street was a dead end starting at the driveway to 22 Ridge Street and the southern part of Ridge Street was a dead end starting at the southernmost part of the disputed area. After the defendants purchased 22 Ridge Street, Francesco Servidio parked a pickup truck on his driveway just north of the disputed area. Since the defendants purchased 22 Ridge Street, with the exception of a short period of time during a sewer project in late 2003 and early 2004, during which time the defendants granted to the town an easement for sewer installation, the disputed area was not passable to traffic and the defendants have not observed any of the plaintiffs,

trash collectors, mail carriers, or oil delivery trucks travel through the disputed area for any purpose, including to access the southern intersection. The plaintiffs filed on the town's land records affidavits of fact against the defendants' properties at 22 Ridge Street and 33 Cognewaugh Road that falsely claimed an easement over the disputed area.

The plaintiffs thereafter commenced the present action. In their third amended complaint, the plaintiffs sought a declaratory judgment that they have an express easement over the disputed area (counts one and five); sought a judgment quieting title to their alleged express easement pursuant to General Statutes § 47-31 (counts two and six); sought a declaratory judgment that they have an implied easement over the disputed area (counts three and seven); sought to quiet title to their alleged implied easement pursuant to § 47-31 (counts four and eight); asserted claims arising from the defendants' alleged obstruction of the plaintiffs' purported easements over the disputed area (counts nine and eleven); and asserted claims that the defendants trespassed on the disputed area (counts ten and twelve). The defendants filed an answer and asserted the following four counterclaims against the plaintiffs: an action seeking to quiet title to the disputed area pursuant to § 47-31; trespass; slander of title; and nuisance or disturbance of a right pursuant to § 47-41.

The defendants filed a motion for summary judgment seeking judgment on all twelve counts of the operative complaint and the first count of their counterclaim. On January 12, 2022, the court, *Hon. William F. Clark*, rendered summary judgment in favor of the defendants on the tenth and twelfth counts of the complaint, alleging trespass.[1] Following a later trial, the court, in an

[1] The plaintiffs stated in their operative complaint that the defendants own the disputed area. In rendering summary judgment as to the trespass counts of the complaint, the court noted that the plaintiffs admitted that a trespass onto one's own property is a novel claim and reasoned that the

April 6, 2023 memorandum of decision, rendered judgment in favor of the defendants on counts one through nine and on count eleven of the plaintiffs' operative complaint and rendered judgment in favor of the defendants on all counts of their counterclaim. The court reasoned that, "[b]ased on the credible facts presented and corroborated through credible and reliable witness testimony, including expert testimony . . . the disputed property is rightfully owned by the defendants. While all the properties in question once were held together and while a private road was once planned to run uninterrupted through the property, the court [*Hon. William F. Clark*] finds that the time and manner in which the property was ultimately subdivided and transferred is significant. The word[ing] of the deeds demonstrates to the court that a clear distinction was drawn as to the defendants' property interest versus that of the plaintiff[s] in regard to the disputed area. The creation of the Y intersection, the facts surrounding the sewer project that passed through the disputed area and the credible evidence presented from the defendants and an adjacent property owner demonstrate proof to the court that justifies and support[s] finding for the defendants."

The court determined that the defendants are the owners of all right, title, and interest in the portion of Ridge Street that abuts and adjoins the defendants' property at 22 Ridge Street free and clear of any claim by the plaintiffs of any easement, right of way, or other right or interest to pass into, over, or across 22 Ridge Street or 33 Cognewaugh Road for any purpose. The court permanently enjoined and prohibited the plaintiffs from travelling onto, over, or across any property of the defendants at 22 Ridge Street or 33 Cognewaugh

essence of the plaintiffs' claims of trespass is the defendants' alleged interference with the purported easement, which the plaintiffs' claims of obstruction of the purported easement address.

Road, including, but not limited to, the portion of Ridge Street that abuts and adjoins their property at 22 Ridge Street. The court further ordered that the affidavits of fact filed by the plaintiffs against the defendants' properties at 22 Ridge Street and 33 Cognewaugh Road be discharged and dissolved and that they are of no further effect or force. This appeal followed. Additional facts will be set forth as necessary.

I

The plaintiffs claim that the court improperly rejected their claims of (a) an express easement, (b) implied easement, and (c) an obstruction of their purported easement. We do not agree.

A

The plaintiffs claim that the court improperly determined that they did not have an express easement over 22 Ridge Street or 33 Cognewaugh Road for any purpose. We do not agree.

We begin with a review of some fundamental principles of the law concerning easements. "An express easement is created by an express grant by deed or other instrument satisfying the statute of frauds." *Martin Drive Corp.* v. *Thorsen*, 66 Conn. App. 766, 773, 786 A.2d 484 (2001). "It is well settled that [a]n easement creates a nonpossessory right to enter and use land in the possession of another and obligates the possessor not to interfere with the rules authorized by the easement. . . . [T]he benefit of an easement . . . is considered a nonpossessory interest in land because it generally authorizes limited uses of the burdened property for a particular purpose. . . . [E]asements are not ownership interests but rather privileges to use [the] land of another in [a] certain manner for [a] certain purpose . . . ." (Internal quotation marks omitted.)

Stefanoni v. *Duncan*, 282 Conn. 686, 700, 923 A.2d 737 (2007).

"Our scope of review as to the intent behind language in a deed is plenary. . . . Although the intent to create an easement by deed is therefore a question of law over which our review is plenary . . . if the language of the deed is incomplete or ambiguous regarding the location, scope, or use of the easement, the trial court's resolution of those issues represents a question of fact subject to the clearly erroneous standard of review. . . . In the absence of unambiguous or complete language in the deed, therefore, determining the location, scope, and use of an express easement is a fact-intensive inquiry properly subject to the clearly erroneous standard of review." (Citations omitted.) *Deane* v. *Kahn*, 317 Conn. 157, 167 n.6, 116 A.3d 259 (2015).

"[W]hen faced with a question regarding the construction of language in deeds, the reviewing court does not give the customary deference to the trial court's factual inferences. . . . The meaning and effect of the [language in the deed] are to be determined, not by the actual intent of the parties, but by the intent expressed in the deed, considering all its relevant provisions and reading it in the light of the surrounding circumstances. . . . Our basic rule of construction is that recognition will be given to the expressed intention of the parties to a deed . . . and that it shall, if possible, be so construed as to effectuate the intent of the parties. . . . In arriving at the intent expressed . . . in the language used, however, it is always admissible to consider the situation of the parties and the circumstances connected with the transaction, and every part of the writing should be considered with the help of that evidence. . . . In the construction of a deed or grant, the language is to be construed in connection with, and in reference to, the nature and condition of the subject matter of the grant at the time the instrument is executed, and

the obvious purpose the parties had in view. . . . [I]f the meaning of the language contained in a deed or conveyance is not clear, the trial court is bound to consider any relevant extrinsic evidence presented by the parties for the purpose of clarifying the ambiguity. . . . Furthermore, [a] reference to [a] map in [a] deed, [f]or a more particular description, incorporates [the map] into the deed as fully and effectually as if copied therein. . . . [T]he identifying or explanatory features contained in maps referred to in a deed become part of the deed, and so are entitled to consideration in interpreting the deed as though they were expressly recited therein." (Internal quotation marks omitted.) *Williams* v. *Green Power Ventures, LLC*, 221 Conn. App. 657, 673–74, 303 A.3d 13 (2023), cert. denied, 348 Conn. 938, 307 A.3d 273 (2024).

The plaintiffs argue that their respective deeds grant them the right to use Ridge Street from the northerly line of their lots southerly to Cognewaugh Road, which includes a right to travel south along the entirety of Ridge Street, as it was laid out on map 353 in 1908, to access the southern intersection of Ridge Street with Cognewaugh Road. The defendants dispute that the plaintiffs have any right to traverse southerly over the entirety of Ridge Street to access the disputed area. The court concluded that "[t]he plaintiffs' expansive reading of the rights articulated in their respective deeds is not supported by the clear language of the deeds, the history of the properties in question and the transfers thereof." We agree with the court.

The Walters' 38 Ridge Street deed conveys to them "the right to use Ridge Street from the northerly line of the premises hereby conveyed southerly to Cognewaugh Road for all purposes of travel and for the purpose of laying, maintaining and connecting with public utilities therein. Together with the right to use for all lawful purposes the strip 20 feet in width shown on a

certain map . . . numbered 3992, which strip is shown as lot ' "Y" Right of Way' on said map and runs from Ridge Street to Cognewaugh Road, the grantees agreeing that this right of way is in lieu of any right of way over tract 'Y' as shown on Map No. 3965 on file in the office of the Town Clerk of Greenwich. . . ." The Mason deed to 40 Ridge Street is similar to the Walters deed in all relevant respects.[2]

The Walters' and the Masons' respective deeds (plaintiffs' deeds) specifically grant to them the right to use Ridge Street from their lots "southerly to Cognewaugh Road . . . ." The plaintiffs' deeds do not grant them the right to travel southerly on the entirety of Ridge Street, but, rather, the deeds narrow the scope of the grant of southerly access on Ridge Street to the specific purpose of accessing Cognewaugh Road. Specifically, the plaintiffs' deeds grant them the right to travel southerly on Ridge Street for the purpose of accessing Cognewaugh Road "[*t*]*ogether* with the right to use . . . the strip 20 feet in width shown on a certain map . . . numbered 3992, which strip is shown as lot ' "Y" Right of Way' . . . ." (Emphasis added.) The Y right of way, as referenced in map 3992, connects Ridge Street to Cognewaugh Road south of what would become the plaintiffs' properties and those of others. The plaintiffs' deeds also reference map 3965, which was recorded in October, 1958, and which shows a resubdivision of the

[2] Specifically, the Mason deed conveys to them "the right to use Ridge Street from the northerly line of the premises hereby conveyed southerly to Cognewaugh Road for all purposes of travel and for the purpose of laying, maintaining and connecting with public utilities thereon. TOGETHER with the right to use for all lawful purposes the strip 20 feet in width shown on a certain map . . . numbered 3992, which strip is shown as lot ' "Y" Right of Way' on said map and runs from Ridge Street to Cognewaugh Road, the Grantor agreeing that this right of way is in lieu of any right of way 'Y' as shown on Map No. 3965 on file in the office of the Town Clerk of Greenwich. . . ." The minor differences between the Mason deed and the Walters deed do not impact our analysis.

lots on the northern part of Ridge Street. In addition to the resubdivision that created the lots that would later be the plaintiffs' properties, map 3965 also created the Y right of way from Ridge Street to Cognewaugh Road. Map 3992, which was recorded in December, 1958, shows the Y right of way reduced in width from its depiction on map 3965 and does not show the disputed area.

As we have noted, the express language of the plaintiffs' deeds grants them the right to use Ridge Street southerly to access Cognewaugh Road together with the right to use the Y right of way as depicted on map 3992. There is no express language in the plaintiffs' deeds granting them the right to travel on Ridge Street south of the Y right of way, over and through the disputed area of the defendants' 22 Ridge Street property to access Cognewaugh Road at its southern intersection with Ridge Street. It is clear that the DeLucas created the Y right of way for means of egress and ingress to Cognewaugh Road for the newly resubdivided lots. See, e.g., *Williams* v. *Green Power Ventures, LLC*, supra, 221 Conn. App. 674 (deeds are construed in connection with nature and condition of subject matter of grant at time instrument is executed and in connection with obvious purpose parties had in view).

The plaintiffs argue that their deeds' grant to them of the right to use the Y right of way as depicted on map 3992 is a separate and distinct legal right that does not limit or modify their right to use Ridge Street southerly to access Cognewaugh Road through the disputed area. They contend that "[t]he first easement derives from the rights originally conveyed by Annie Cocks: 'to use the private roads designated on same map in common with others to whom this right has been or may here and after be granted,' 'to use the highways abutting the said lot in common with others,'

and 'with the right to use the private roads as designated on [map 353].' "

Cocks transferred lots, as shown on map 353, to the plaintiffs' predecessors in interest in the early 1900s. The language of these early 1900s deeds from Cocks to the plaintiffs' predecessors in interest is not pertinent to our analysis of an express easement. It is the language of the plaintiffs' deeds that is at issue, and the plaintiffs' deeds do not reference map 353, which was recorded fifty years before the DeLucas resubdivided the northerly lots of Highview Park and created the Y right of way on map 3965, which is referenced in the plaintiffs' deeds. The plaintiffs' deeds provide them with access to Cognewaugh Road through the Y right of way on map 3992, which depicts a portion of real property shown on map 353 together with the Y right of way.

The language of the plaintiffs' deeds is clear: they grant the plaintiffs access to Cognewaugh Road through the Y right of way and do not expressly grant them an easement over the disputed area to reach Cognewaugh Road at the southern intersection. Accordingly, the trial court was not bound to consider extrinsic evidence as to the intention of the grantors. See *Williams* v. *Green Power Ventures, LLC*, supra, 221 Conn. App. 674. Assuming without deciding, however, that there is any ambiguity as to the scope of the plaintiffs' easement over Ridge Street, we note that the court's findings regarding the extrinsic evidence of the surrounding circumstances support its conclusion that there was no express easement. First, the defendants' deeds to 22 Ridge Street and 33 Cognewaugh Road do not contain an express easement in favor of the plaintiffs, or anyone else, to travel southerly on Ridge Street past the Y right of way and through the disputed area to access Cognewaugh Road at the southern intersection. Additionally, the plaintiffs' expert witness on land titles, whom the court found credible, testified that none of

the deeds in the defendants' root title forward contains any express easement in favor of the plaintiffs or any other party to travel over 22 Ridge Street.

Second, during the course of the sewer project that occurred in parts of 2003 and 2004 wherein the town installed a sewer line down the entire length of Ridge Street, the defendants granted a temporary easement to the town. The temporary easement allowed the town to direct traffic to a detour through the disputed area and across the defendants' driveway in front of 22 Ridge Street at times when access to Cognewaugh Road through the Y right of way was blocked for construction. The passage through the disputed area only occurred during daylight hours when the detour was necessary due to open trenches on Cognewaugh Road, which were covered at night, and was overseen by Greenwich police officers detouring the traffic. When the sewer project was complete, the town repaved the northern portion of Ridge Street but did not pave the disputed area. In order to prevent traffic from traveling through the disputed area, consistent with its impassable nature prior to the project, the town installed two large boulders and a silt fence with sandbags in the disputed area. The town later removed the boulders, graded and seeded the disputed area, installed a drainage swale with small gravel and added curbing at the north and sound ends of the disputed area. The small gravel washed out of the drainage swale onto the newly paved portion of the southern part of Ridge Street and the town installed a large six to seven inch riprap in and over the drainage swale.

Sometime in 2004, Michael Mason attempted to have the town pave or otherwise open the disputed area to through traffic, but a representative of the town refused. The town sent a memorandum to Michael Mason detailing that: Ridge Street is a private street that has paved upper and lower sections but has an approximately

forty foot section in between that is not paved; prior to the sewer project, the nonpaved portion of Ridge Street was overgrown with brush; and the easement acquired by the town required the town to restore the road to as reasonably good condition as existed prior to construction. In 2010, Frederick Walters and Michael Mason requested and attended a meeting with the town's first selectman, town manager, town attorney, and representatives of the police and fire departments in an attempt to persuade them to open or pave the disputed area, but the town officials denied the request. The defendants had also entered into a road maintenance agreement in 1989, unrelated to the sewer project, and the court found that that agreement had expired and did not impact the defendants' title to 22 Ridge Street in any way.

The court determined, and we agree, that "it made perfect sense for the 'Y' to be created in order for the lots that would eventually become the plaintiffs' respective lots to have access to Cognewaugh Road. . . . To the extent [that] [the disputed area] was, as the plaintiff[s] suggest, a through lane of travel, then one might expect the sewer project to have updated and corrected any deterioration of the section of road and repaved it once the project was done. By not doing so, in spite of requests for that outcome by the plaintiffs, the town, an otherwise disinterested party to any claims over the disputed area, aligned with the other history available in this case to confirm that Ridge Street does not pass through the disputed area. Additional circumstantial evidence, which the court finds persuasive, is seen through the conduct of postal carriers, delivery drivers, and Realtors who the court finds have engaged in conduct that confirms a break in Ridge Street such that the road dead ends at the defendants' property from both the north and south. This fact was a selling point for the adjacent property owners, as well as the

defendants." Accordingly, even if we were to assume ambiguity in the plaintiffs' deeds regarding intent, the court properly determined that the plaintiffs did not have an express easement over the disputed area.

For the foregoing reasons, we conclude that the court properly rejected the plaintiffs' claims of an express easement.

B

The plaintiffs next claim that the court improperly determined that (1) they did not have an implied easement over the disputed area and (2) any implied easement rights granted to them by map 353 were extinguished pursuant to the Marketable Record Title Act, General Statutes § 47-33b et seq. (act). Again, we disagree.

"The finding of an easement by implication is a question of law. . . . The law adopted in this state regarding the creation of easements by implication is well established. Where . . . an apparently permanent and obvious servitude is imposed on one part of an estate in favor of another, which at the time of severance is in use, and is reasonably necessary for the fair enjoyment of the other, then, upon a severance of such ownership . . . there arises by implication of law a grant or reservation of the right to continue such use. . . . Further, [insofar] as necessity is significant it is sufficient if the easement is highly convenient and beneficial for the enjoyment of the portion granted. . . . The reason that absolute necessity is not essential is because fundamentally such a grant by implication depends on the intention of the parties as shown by the instrument and the situation with reference to the instrument, and it is not strictly the necessity for a right of way that creates it. . . .

"The two principal elements we examine in determining whether an easement by implication has arisen are

(1) the intention of the parties, and (2) if the easement is reasonably necessary for the use and normal enjoyment of the dominant estate. . . . The intent of the grantor to create an easement may be inferred from an examination of the deed, maps and recorded instruments introduced as evidence. . . . A court will recognize the expressed intention of the parties to a deed or other conveyance and construe it to effectuate the intent of the parties. . . . In doing so, it always is permissible to consider the circumstances of the parties connected with the transaction. . . . Thus, if the meaning of the language contained in a deed or conveyance is not clear, the court is bound to consider any relevant extrinsic evidence presented by the parties for the purpose of clarifying the ambiguity." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Utay* v. *G.C.S. Realty, LLC*, 72 Conn. App. 630, 636–37, 806 A.2d 573 (2002).

1

Concerning the first factor of an easement by implication, which concerns the intention of the parties, we conclude that the court properly determined that there was no intent to create an easement by implication over the defendants' property when the plaintiffs' predecessors in interest conveyed to the plaintiffs their respective properties.[3] As detailed in part I A of this opinion, there is nothing in the language of the plaintiffs' deeds nor in the maps referenced therein that expressly grants to the plaintiffs an easement over the defendants' property, which includes the disputed area, to access Cognewaugh Road at the southern intersection. Additionally, we cannot imply such intent from the language of

[3] "[T]he use of intent to find an implied easement long has been disfavored in Connecticut, largely because of the obvious statute of frauds problem, but also because the practical impact is to make land records less reliable. . . . Consequently, implied grants of any interest in land are allowed to a very much more limited extent [in Connecticut] than in many other states." (Citations omitted; internal quotation marks omitted.) *Utay* v. *G.C.S. Realty, LLC*, supra, 72 Conn. App. 638 n.9.

the plaintiffs' deeds, from the maps referenced therein, nor from the surrounding circumstances particularly in light of the fact that the DeLucas created the Y right of way at the time that they resubdivided the northern portion of Highview Park closer to the plaintiffs' real properties.

The plaintiffs further argue that the defendants executed a road maintenance agreement when they purchased 22 Ridge Street in 1989, which provides that the parties are presently using jointly and in common with others a road known as Ridge Street as shown on map 353. They contend that the defendants "ratified an implied easement for Ridge Street when they gave the town the sewer easement in 2004 . . . which shows Ridge Street as a continuous and uninterrupted road fronting on their properties." This argument lacks merit.

As we detailed in part I A of this opinion, at the time of trial the road maintenance agreement had expired and the court found that that agreement did not impact title to the defendants' 22 Ridge Street property in any way. The court also found that the temporary easement that the defendants had granted to the town during the sewer project so that it could detour traffic through the disputed area when necessary was only temporary and had ended.

Regarding the second factor of whether the easement is reasonably necessary for the use and normal enjoyment of the dominant estate, the plaintiffs argue that: the record is clear that an easement by implication over the entirety of Ridge Street is highly convenient and beneficial; when they purchased their properties they expected they would have the benefit of the entirety of Ridge Street; and there are concerns of safety and the ability of police, fire, and emergency services to

timely access the plaintiffs' houses in the case of an emergency. We are not persuaded.

The court determined, regarding whether the plaintiffs' use of the disputed area was reasonably necessary for the use and normal enjoyment of their properties, that "[t]he Y access is sufficient for all access to the plaintiffs' properties. Over the many years since the creation of the Y, virtually all access to the properties north of 22 Ridge Street has been through the Y. Even the defendants use the Y for access [from Cognewaugh Road] to 22 Ridge Street." The court went on to find that, other than the limited and specific circumstances of the sewer project for which the defendants granted the town an easement, the disputed area has not been and is not a travel section of Ridge Street. The plaintiffs argue that access through the disputed area to the southern intersection is highly convenient and beneficial, but, as highlighted by the court, they have access to Cognewaugh Road from the paved Y right of way, which is closer to their properties than the disputed area.

The court additionally found that there was "no emergency access issue in this case relative to the plaintiffs' properties." This finding is not clearly erroneous because emergency vehicles can access the plaintiffs' properties through the Y right of way. To support their argument of the need for emergency vehicles to access Ridge Street from Cognewaugh Road through the disputed area, the plaintiffs highlight evidence at trial supporting a factual finding different from the one reached by the court. The fact that there may be support in the record for a different factual finding than the one reached by the court is irrelevant at this stage in the judicial process. See *Osborn* v. *Waterbury*, 197 Conn. App. 476, 482, 232 A.3d 134 (2020), cert. denied, 336 Conn. 903, 242 A.3d 1010 (2021). "On appeal, we do not review the evidence to determine whether a conclusion

different from the one reached could have been reached. . . . [Instead] [w]e review the totality of the evidence, including reasonable inferences therefrom, to determine whether it could support the trier's decision." (Internal quotation marks omitted.) Id.

The court's finding that access through the southern intersection was not reasonably necessary for the fair enjoyment of the plaintiffs' properties was not clearly erroneous. See, e.g., *Schultz* v. *Barker*, 15 Conn. App. 696, 701–702, 546 A.2d 324 (1988) (court's finding of no easement by implication was not clearly erroneous where defendant had convenient access to beach via alternate routes despite that pathways over plaintiffs' property were convenient and beneficial).

2

The plaintiffs further argue that map 353 "indicates a clear intent by the common grantor, [Cocks], to create a right of access for ingress and egress to the lots shown on the map from Ridge Street" and that Cocks "attempt[ed] to do two things: (1) to sell the properties delineated on map 353; and (2) to grant to the purchasers of those properties the right, in common with others, to access those lots by use of Ridge Street. . . . Therefore, the conveyances by [Cocks], taken together, support the intent memorialized in map 353 to establish a private way known as Ridge Street for access to the lots along Ridge Street." (Citations omitted.) The plaintiffs contend that the court improperly determined that any implied easement rights granted to the plaintiffs by map 353 were extinguished by the act.[4]

[4] The plaintiffs also argue that the defendants did not plead the act as a special defense and, therefore, the court should not have considered it. In *Coughlin* v. *Anderson*, 270 Conn. 487, 853 A.2d 460 (2004), our Supreme Court determined that the act does not always operate in the nature of a special defense that has to be pleaded affirmatively, but, rather, the act only operates as a special defense in the procedural context of cases wherein the act is consistent with the allegations of the complaint but nevertheless tends to extinguish the cause of action. See id., 501–502. In the present case, the defendants denied in their answer the plaintiffs' allegation that,

Pursuant to the act, "any person who has an unbroken record chain of title to an interest in land for a period of forty years, plus any additional period of time necessary to trace the title back to the latest connecting title instrument of earlier record (which is the root of title under the act) has a marketable record title subject only to those pre-root of title matters that are excepted under the statute or are caused to reappear in the latest forty year record chain of title. . . . The act declares null and void any interest in real property not specifically described in the deed to the property which it purports to affect, unless within a forty year period, a notice specifically reciting the claimed interest is placed on the land records in the affected land's chain of title."[5] (Citation omitted; internal quotation marks omitted.) *Il Giardino, LLC* v. *Belle Haven Land Co.*, 254 Conn. 502, 536, 757 A.2d 1103 (2000).

The court determined that the defendants' "root of title to 22 Ridge Street dating back more than forty

by virtue of the deeds from Cocks that reference map 353, the plaintiffs have an implied easement to use the disputed area. They also denied that the disputed area was a road and stated that it is not designed for through traffic. Accordingly, the issue of whether an easement by implication arose from Cocks' initial deeds and from map 353 was in dispute between the parties. Because the act was inconsistent with the allegations in the complaint, it was not a special defense, and the defendants could introduce evidence regarding the act following the general denials in their answers. See id. Even if the act were required to be raised as a special defense in the present case, the plaintiffs cannot prevail on their argument because they failed to identify harm stemming from the defendants' invocation of the act. See id., 503. The fundamental purpose of a special defense is to apprise the court and opposing counsel of the issues to be tried so that basic issues are not concealed until the trial is under way. See id., 501. It would be difficult for the plaintiffs to argue that the defendants' reliance on the act was concealed from them and caused them harm because the plaintiffs' expert discussed the act on direct examination and the plaintiffs discussed the applicability of the act in their posttrial brief. Accordingly, we determine that the court properly considered the act.

[5] General Statutes § 47-33c provides in relevant part that "[a]ny person having the legal capacity to own land in this state, who has an unbroken chain of title to any interest in land for forty years or more, shall be deemed to have a marketable record title to that interest . . . ."

years prior to their 22 Ridge Street deed is contained in a warranty deed from Pasquale Ginise, Frank M. Ginise, Bertha Ginise Durante, Isabella Ginise and James L. Ginise to Leonard Ginise recorded December 14, 1948, in volume 435 at page 28 of the Greenwich land records. Both Attorney Lasnick and Attorney Harvey agreed that this is the [defendants'] root of title. Both experts also agreed, and this court finds, that there is no encumbrance describing the plaintiffs' claimed easement in the root deed of title, or more than forty years thereafter leading up to the [defendants'] receipt of the November 8, 1989, deed to 22 Ridge Street."

The plaintiffs note that the language in Cocks' conveyances in the early 1900s of the right to use Ridge Street "together . . . in common with others to whom this right has been or may . . . hereafter be conveyed" was not carried forward past the forty year root of title for 22 Ridge Street. The plaintiffs contend, however, that because the defendants' 22 Ridge Street deed references map 353, it therefore imposes an obligation on a title searcher to consult that map when determining whether 22 Ridge Street is encumbered. See *McBurney* v. *Cirillo*, 276 Conn. 782, 809, 889 A.2d 759 (2006) (specific reference to map in deed imposes duty on title searcher to examine map incorporated by reference into deed), overruled in part on other grounds by *Batte-Holmgren* v. *Commissioner of Public Health*, 281 Conn. 277, 284–89, 914 A.2d 996 (2007). The defendants' 22 Ridge Street deed conveyed to them "Lots Nos. Fifty-two (52) and Fifty-three (53) on a certain map entitled 'Map of Highview Park, North Mianus, Greenwich, Conn' now on file in the office of the Town Clerk of the Town of Greenwich and therein numbered 353" together with "all right, title and interest in and to the highway, Ridge Street, in front of and adjoining said premises" and "[t]ogether with the right to use in common with others, the access of ingress to and egress from the premises

herein to and from Cognewaugh Road all as shown on a certain map now on file in the Office of the Town Clerk of the Town of Greenwich and therein numbered 3992."

The reference in the defendants' 22 Ridge Street deed to map 353 cannot reasonably be construed as granting the plaintiffs an easement to travel over 22 Ridge Street and through the disputed area to access Cognewaugh Road at the southern intersection. The defendants' 22 Ridge Street deed expressly conveys to the defendants the fee simple to Ridge Street in front of and adjoining 22 Ridge Street and mentions map 353 only for the purpose of describing the placement of the lots conveyed. Additionally, the defendants' 22 Ridge Street deed specifically provides access to Cognewaugh Road as shown on map 3992, which depicts the Y right of way. To construe the 22 Ridge Street deed as granting the plaintiffs an easement over all of 22 Ridge Street, including the disputed area, would be contrary to the language of the defendants' deed, which does not mention the plaintiffs, their respective properties, or an easement over the disputed area. Additionally, map 353 does not depict Ridge Street as a continuous street; rather, the map depicts a line referred to as "stone fence," which crosses and blocks the entirety of Ridge Street just south of where the Y right of way would later be created by the DeLucas. This is consistent with the court's finding that the northern portion of Ridge Street is a dead end starting at the defendants' driveway and the southern portion of Ridge Street is a dead end starting at the southernmost part of the disputed area.

The plaintiffs further argue that the court improperly determined that the exceptions to the act in General Statutes § 47-33h do not apply. Section 47-33h provides in relevant part that the act "shall not be applied to . . . bar or extinguish any easement or interest in the nature of an easement, or any rights granted, excepted or reserved by the instrument creating such easement

or interest, including any right for future use, if (1) the existence of such easement or interest is evidenced by the location beneath, upon or above any part of the land described in such instrument of any pipe, valve, road, wire, cable, conduit, duct, sewer, track, hole, tower or other physical facility and whether or not the existence of such facility is observable . . . .'' Whether a physical manifestation of a road existed that may evidence an easement in the disputed area is a question of fact to which we apply a clearly erroneous standard of review. See *Village Apartments, LLC* v. *Ward*, 169 Conn. App. 653, 664, 152 A.3d 76 (2016), cert. denied, 324 Conn. 918, 154 A.3d 1008 (2017). ''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.'' (Citation omitted; internal quotation marks omitted.) *Circulent, Inc.* v. *Hatch & Bailey Co.*, 217 Conn. App. 622, 630, 289 A.3d 609 (2023).

The court found that ''[t]here was no paving or other physical manifestation of a road in the disputed area when the defendants purchased 22 Ridge Street on November 8, 1989.'' The plaintiffs argue that this finding was clearly erroneous because no evidence was presented at trial that Ridge Street did not physically exist,

there was testimony at trial that Ridge Street was passable to motor vehicle traffic at points during the 1980s and 1990s, and photographic evidence at trial showed Ridge Street being open and passable.[6]

Clearly, the parties disagree as to whether the disputed area contained any physical manifestation of a road. Evidence was presented at trial that the disputed area was unpaved, overgrown with weeds, wooded, full of rocks and ledge, and was not a through street but, rather, the northern part of Ridge Street was a dead end starting at the defendants' driveway and the southern part of Ridge Street was a dead end from the southernmost part of the disputed area. The disputed area was passable only for a brief time during parts of 2003 and 2004 during the sewer project when the defendants temporarily granted an easement to the town. The court found that the defendants have not observed the plaintiffs, trash collectors, mail carriers, or oil delivery trucks travel through the disputed area for any purpose, including accessing the southern intersection. The court further found that, following the sewer project, water flowed down past 22 Ridge Street into the disputed area from the northern part of Ridge Street, bringing leaves and debris with it, causing a buildup at the disputed area and resulting in Francesco Servidio moving leaves and debris to allow the water to flow through the disputed area and into a drainage swale installed by the town.

[6] The plaintiffs also argue that there is a physical manifestation of a road because a 1992 home video of the defendants, which was admitted at trial as defendants' exhibit A, shows a foot path through the disputed area with cars parked to the north and south of the disputed area on the side of the road. The court, however, interpreted that home video differently, and, under a section break in the facts titled "activities by others recognizing that vehicles cannot pass through the disputed area," the court found that "[t]he video of the defendants' family gathering in 1992 showed that another truck was parked on the south part of Ridge Street just south of the disputed area." Evidence that cars were parked where Ridge Street dead ends to the north and south of the disputed area is further evidence that the disputed area did not have any physical markings of a road.

On the basis of the record, we determine that the court's finding that there was no physical manifestation of a road was not clearly erroneous. Accordingly, we conclude that the court properly determined that the exceptions to the act in § 47-33h do not apply and that any implied easement rights over the disputed area granted to the plaintiffs by map 353 were extinguished by the act.

For the foregoing reasons, we conclude that the court properly determined that the plaintiffs do not have an easement by implication over the disputed area.

C

The plaintiffs claim that the court improperly rejected their claim that the defendants obstructed the plaintiffs' alleged easement over the disputed area. They contend that the court improperly determined that they had no easement rights over the defendants' properties and that the defendants obstructed the disputed area with vehicles, wood, building materials, a dumpster, planters, and a tree, thereby obstructing the plaintiffs' ability to make use of their express and implied easement rights. We are not persuaded.

We already have concluded in part I A and B of this opinion that the court properly determined that the defendants are the owners of all right, title, and interest in the portion of Ridge Street that abuts and adjoins their property at 22 Ridge Street free and clear of any claim by the plaintiffs of any easement, right of way, or other right or interest to pass onto, over, or across 22 Ridge Street or 33 Cognewaugh Road for any purpose. The law is settled that it is the obligation of the owner of a servient estate to refrain from doing something or suffering something to be done that results in an impairment of an easement. See *Schwartz* v. *Murphy*, 74 Conn. App. 286, 297, 812 A.2d 87 (2002), cert. denied, 263 Conn. 908, 819 A.2d 841 (2003), cert. denied,

546 U.S. 820, 126 S. Ct. 352, 163 L. Ed. 2d 61 (2005). It is axiomatic that there can be no impairment of an easement where no easement exists. Accordingly, the court properly ruled in favor of the defendants on the plaintiffs' claim of obstruction.

II

The plaintiffs next claim that the court improperly determined that the defendants prevailed on their counterclaims of (a) trespass, (b) (1) slander of title, and (b) (2) a violation of § 47-41. We address each claim in turn.

A

The plaintiffs claim that the court improperly determined that the defendants prevailed on their counterclaim alleging that Frederick Walters trespassed on their property.[7] We disagree.

The following additional facts, as found by the trial court, and procedural history are relevant. In the obstruction counts of the plaintiffs' operative complaint, they alleged that, as a result of the defendants' actions or inactions, debris obstructed the disputed area "which debris the Walters removed on October 19, 2015, and deposited at the Town of Greenwich Transfer

[7] This claim concerns the court's decision regarding the defendants' counterclaim of trespass. The court earlier had decided counts ten and twelve of the plaintiffs' complaint, which sounded in trespass against the defendants, in favor of the defendants on summary judgment. After taking much trial evidence, the court made numerous findings of fact in the April 6, 2023 judgment that also affected the plaintiffs' claim that the defendants had trespassed. The judgment file reflects that, in the court's April 6, 2023 decision, the court decided counts one through nine and eleven of the operative complaint and all counts of the defendants' counterclaim. The plaintiffs' notice of appeal stated only that they were appealing from the later judgment of April 6, 2023. There is no appeal from the earlier grant of summary judgment in favor of the defendants on the plaintiffs' trespass claims, which judgment has become final.

Station." The court found that Frederick Walters admitted to trespassing onto the defendants' 22 Ridge Street property on October 19, 2015, to clean out the disputed area. The court concluded, when ruling in favor of the defendants on their counterclaim of trespass, that, "[w]hile the proven transgressions were relatively nominal and largely efforts to clear the land of overgrowth and debris, the fact of the matter is that it is not the plaintiffs' land to clear or occupy. . . . [T]he plaintiffs may not, without permission or invitation, enter the property of the defendants."

The essential elements of a claim for trespass are: (1) ownership or possessory interest in land by the defendants; (2) invasion, intrusion or entry by the plaintiff affecting the defendants' exclusive possessory interest; (3) done intentionally; and (4) causing direct injury. See *Bristol* v. *Tilcon Minerals, Inc.*, 284 Conn. 55, 87, 931 A.2d 237 (2007).

"[T]he scope of our appellate review depends upon the proper characterization of the rulings made by the trial court. To the extent that the trial court has made findings of fact, our review is limited to deciding whether such findings were clearly erroneous. When, however, the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *FirstLight Hydro Generating Co.* v. *Stewart*, 328 Conn. 668, 677–78, 182 A.3d 67 (2018). "Intent is clearly a question of fact that is ordinarily inferred from one's conduct or acts under the circumstances of the particular case." *Suarez* v. *Dickmont Plastics Corp.*, 229 Conn. 99, 111, 639 A.2d 507 (1994).

The plaintiffs argue that "[t]he court's logic was post hoc: the plaintiffs do not have an easement, therefore,

[Frederick] Walters trespassed. That analysis fails to account for the elements of the tort of trespass, particularly intent, which the evidence did not satisfy." We do not agree.

The court's mention of ownership of the disputed area was relevant because when, as in the present case, an injunction is sought to restrain a trespass, title is an essential element of the tort of trespass. See *McCullough* v. *Waterfront Park Assn., Inc.*, 32 Conn. App. 746, 749, 630 A.2d 1372, cert. denied, 227 Conn. 933, 632 A.2d 707 (1993). To the extent that the plaintiffs argue that the element of ownership of the disputed area was not satisfied, we have determined in part I A and B of this opinion that the court properly determined that the defendants own the disputed area free and clear of any claim by the plaintiffs of an express or implied easement.

The plaintiffs clearly dispute the court's finding of intent. The plaintiffs do not challenge the court's finding that Frederick Walters admitted to cleaning out debris from the disputed area on October 19, 2015. It is clear from the act of clearing out the debris in the disputed area that Frederick Walters had the intent to enter the disputed area, which is sufficient to satisfy the element of intent for the tort of trespass. See *Caciopoli* v. *Lebowitz*, 131 Conn. App. 306, 318–21, 26 A.3d 136 (2011), aff'd, 309 Conn. 62, 68 A.3d 1150 (2013). The intent required is the intent to enter the land in question regardless of the trespasser's subjective belief as to ownership of the land. See id. All that is required to prove intent sufficient to constitute civil trespass is the general intent to enter the land in question; a more specific intent is not required. See id. For the foregoing reasons, we conclude that the court's finding that Frederick Walters intentionally entered the defendants' property is supported by sufficient evidence in the record, that it is not clearly erroneous, and that the

court's findings legally and logically support its conclusion of trespass.

B

The plaintiffs' next claims address the court's rulings regarding the defendants' counterclaim concerning the plaintiffs' filing of false affidavits of fact on the town's land records against the defendants' properties at 22 Ridge Street and 33 Cognewaugh Road. Specifically, the plaintiffs claim that the court improperly determined that the defendants prevailed on their counterclaims against the plaintiffs concerning (1) slander of title and (2) a violation of § 47-41.[8] We agree with the first claim and disagree with the second claim alleging a violation of § 47-41.

The following additional facts, as found by the court, are relevant to our resolution of these claims. In its memorandum of decision, the court found that a November 8, 2018 letter from the plaintiffs' then attorney to the defendants contained multiple affidavits of

[8] The defendants argue that, because the court awarded no money damages when rendering judgment in favor of the defendants on their counterclaims alleging slander of title and a violation of § 47-41, there is no practical relief available to the plaintiffs and, therefore, those claims are moot. "Mootness is a threshold issue that implicates subject matter jurisdiction, which imposes a duty on the court to dismiss a case if the court can no longer grant practical relief to the parties." (Internal quotation marks omitted.) *Centimark Corp.* v. *Village Manor Associates Ltd. Partnership*, 113 Conn. App. 509, 525, 967 A.2d 550, cert. denied, 292 Conn. 907, 973 A.2d 103 (2009). The court ordered that the plaintiffs were permanently enjoined from travelling onto the defendants' properties and also ordered that the affidavits of fact filed by the plaintiffs against the defendants' properties were discharged, dissolved, and had no further force or effect. Although such equitable remedies reasonably could flow from more than one of the court's resolutions of the plaintiffs' claims and the defendants' counterclaim, the plaintiffs challenged the courts' decision regarding every remaining count of the plaintiffs' complaint and of the defendants' counterclaim. Accordingly, if the plaintiffs were to prevail on the claims from which the court's orders regarding the injunctive relief and relief concerning the affidavits could flow, we could provide the plaintiffs the practical relief of vacating those orders.

fact from each of the plaintiffs and that the plaintiffs caused those affidavits of fact to be recorded on May 6, 2019, on the town's land records against the defendants' properties at 22 Ridge Street and 33 Cognewaugh Road. The court found that those affidavits of fact were legally defective because the affiants had no ownership interest in any of the land over which an easement was claimed and because General Statutes § 47-38 permits only the owner of land over which an easement is being claimed to file such statutory affidavits. The court further found that the affidavits were factually inaccurate because they incorrectly claimed, among other things, that the defendants had no right of access to the Y right of way before 1993; the plaintiffs have a common-law right through map 353 to traverse 22 Ridge Street and the disputed area to travel to and from the southern intersection; from 1993 until May, 2004, the defendants allowed the portion of Ridge Street abutting 22 Ridge Street and 33 Cognewaugh Road to become overgrown with brush, eventually causing the southerly end of Ridge Street to become inaccessible from the northerly end; and the defendants obstructed and/or permitted to be obstructed that same portion of Ridge Street through the placement of boulders, debris, and other materials in that area. The defendants demanded that the plaintiffs record correcting affidavits, but the plaintiffs refused. The court found that, in filing the affidavits, the plaintiffs acted maliciously to disparage and cloud the defendants' title to 22 Ridge Street and 33 Cognewaugh Road. We now address the plaintiffs' claims in turn.

1

We begin with the plaintiffs' claim that the court improperly rendered judgment in favor of the defendants on their counterclaim of slander of title despite the fact that there was no evidence of malice. We agree.

"[O]ur standard of review when the legal conclusions of the trial court are challenged is plenary, and requires us to determine whether the conclusions reached are legally and logically correct and whether they find support in the facts set forth in the memorandum of decision. . . . To establish a case of slander of title, a party must prove the uttering or publication of a false statement derogatory to the plaintiff's title, with malice, causing special damages as a result of diminished value of the plaintiff's property in the eyes of third parties. The publication must be false, and the plaintiff must have an estate or interest in the property slandered. Pecuniary damages must be shown in order to prevail on such a claim.

* * *

[A]ctual malice requires a showing that a statement was made with knowledge that it was false or with reckless disregard for its truth. . . . A negligent misstatement of fact will not suffice; the evidence must demonstrate a purposeful avoidance of the truth. . . . Further, proof that a defamatory falsehood has been uttered with bad or corrupt motive or with an intent to inflict harm will not be sufficient to support a finding of actual malice . . . although such evidence may assist in drawing an inference of knowledge or reckless disregard of falsity." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Fountain Pointe, LLC* v. *Calpitano*, 144 Conn. App. 624, 652–56, 76 A.3d 636, cert. denied, 310 Conn. 928, 78 A.3d 147 (2013).

The court's decision that the defendants prevailed on their counterclaim of slander of title cannot stand because its findings are fatally inconsistent. See, e.g., *In re Jacob W.*, 178 Conn. App. 195, 215, 172 A.3d 1274 (2017), aff'd, 330 Conn. 744, 200 A.3d 1091 (2019). Specifically, the court found that the plaintiffs acted with

malice because, by filing and refusing to correct the false affidavits upon being given notice of the falsities contained within them, the plaintiffs acted with the knowledge that the affidavits were illegitimate and/or with reckless disregard of the illegitimacy of the affidavits. These factual findings, however, are inconsistent with the court's subordinate factual findings of intent relative to the slander of title counterclaim. Specifically, the court found that the plaintiffs' conduct underlying the slander of title counterclaim "was consistent with the legal theories forwarded by the plaintiffs in this action and that the plaintiffs firmly believed them." Because the court's ultimate factual conclusion that the plaintiffs acted with actual malice, which requires a showing that a statement was made with knowledge that it was false or with reckless disregard for the truth, is fatally inconsistent with the court's subordinate factual finding that the plaintiffs firmly believed the statements in the affidavits, the court's conclusion that the plaintiffs slandered the defendants' title cannot stand. See *In re Jacob W.*, supra, 217 ("[w]here a court's opinion contains fundamental logical inconsistencies, it may warrant reversal"). Additionally, the court awarded no damages to the defendants on their slander of title counterclaim. Pecuniary damages must be shown to prove a claim of slander of title. See *Fountain Pointe, LLC* v. *Calpitano*, supra, 144 Conn. App. 652. Accordingly, we conclude that the court improperly rendered judgment in favor of the defendants on their counterclaim of slander of title.

2

Our review of the plaintiffs' claim that the court improperly found in favor of the defendants on their counterclaim that the plaintiffs violated § 47-41 is limited by the fact that the court did not engage in a legal analysis of that counterclaim. The plaintiffs did not seek an articulation or a rectification of the court's decision

pursuant to Practice Book § 66-5. "Where an appellant has failed to avail himself of the full panoply of articulation and review procedures, and absent some indication to the contrary, we ordinarily read a record to support, rather than to contradict, a trial court's judgment. . . . [O]ur appellate courts often have recited, in a variety of contexts, that, in the face of an ambiguous or incomplete record, we will presume, in the absence of an articulation, a trial court acted correctly, meaning that it undertook a proper analysis of the law and made whatever findings of fact were necessary. . . . This court will neither speculate with regard to the rationale underlying the court's decision nor, in the absence of a record that demonstrates that error exists, presume that the court acted erroneously. . . . It is well settled that [we] do not presume error; the trial court's ruling is entitled to the reasonable presumption that it is correct unless the party challenging the ruling has satisfied its burden demonstrating the contrary." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *White* v. *Latimer Point Condominium Assn., Inc.*, 191 Conn. App. 767, 778–81, 216 A.3d 830 (2019).

The plaintiffs claim on appeal that the court "erred in holding that the plaintiffs violated [§ 47-41] because there was no evidence that the plaintiffs acted to harass the defendants or negligently or recklessly in recording their affidavits of fact." However, § 47-41 does not require harassment, negligence, or recklessness. Rather, § 47-41 provides that "[t]he notice under sections 47-38 and 47-39 shall be considered a disturbance of the right in question which enables the party claiming the right to bring an action as for a nuisance or disturbance for the purpose of trying the right. If the plaintiff in that action prevails, he shall be entitled to full costs, although he recovers only nominal damages." In their operative counterclaim, the defendants alleged nuisance or disturbance of a right pursuant to § 47-41 due

to the plaintiffs' filing of false affidavits of fact on the land records against the defendants' properties concerning the disputed area.

"[Under] a common-law private nuisance cause of action, a plaintiff must show that the defendant's conduct was the proximate cause of an unreasonable interference with the plaintiff's use and enjoyment of his or her property. The interference may be either intentional . . . or the result of the defendant's negligence. . . . [T]he interference must be substantial to be unreasonable." (Citations omitted.) *Pestey* v. *Cushman*, 259 Conn. 345, 361, 788 A.2d 496 (2002). The court made no findings of an unreasonable interference, and it seems unlikely that the court found in favor of the defendants on the ground of nuisance.

Section 47-41 also provides that a notice under § 47-38 shall be considered a disturbance of the right in question, thereby enabling the defendants to bring an action for disturbance of their unencumbered right to 22 Ridge Street and 33 Cognewaugh Road. There is scant case law defining what constitutes a disturbance of a right pursuant to § 47-41, and the plaintiffs cite no binding authority for their argument that harassment, negligence, or recklessness needs to be shown. The only case that the plaintiffs cite for this proposition is *Grass* v. *Mystic Pet Shop, LLC*, Superior Court, judicial district of New London, Docket No. CV-19-6040126-S (July 1, 2021). In that case, the plaintiffs filed a notice on the land records stating that the defendant was exceeding the scope of the easement; the plaintiffs also filed an action seeking a declaratory judgment concerning the scope of the Mystic defendant's easement over their real property. Id. The Mystic defendant filed a counterclaim alleging, inter alia, nuisance pursuant to § 47-41. Id. The court determined that the filing of notice did not constitute a nuisance under § 47-41 because

"[t]his was a lawful act, and their actions do not constitute harassment." Id. It is worth noting that the basis for the Mystic defendant's claim of nuisance in *Mystic Pet Shop*, *LLC*, was, inter alia, that the plaintiffs harassed the Mystic defendant's customers as they tried to park and harassed the Mystic defendant's employees by yelling at them. Id.

Not only is *Mystic Pet Shop*, *LLC*, inapplicable in that it addresses the nuisance portion of § 47-41 and not the disturbance of a right portion, but it is also inapposite. In *Mystic Pet Shop*, *LLC*, the plaintiffs, as the owners of the real property at issue, filed a notice on the land records regarding the defendant having overburdened the easement. In the present case, however, the plaintiffs filed affidavits concerning their claimed easement over the disputed area on the defendants' land records to 22 Ridge Street and 33 Cognewaugh Road. Section 47-38 provides in relevant part that "[t]he owner of land over which a right-of-way or other easement is claimed or used may give notice in writing, to the person claiming or using the privilege, of his intention to dispute the right-of-way . . . ." The plaintiffs would have to show an ownership interest in the land over which they claim an easement. They, however, do not own the disputed area. Additionally, an easement is not an ownership interest in real property. See *Stefanoni* v. *Duncan*, supra, 282 Conn. 700. The court found that the plaintiffs have no ownership interest in any of the land over which an easement is being claimed and concluded that § 47-38 permits only the owner of land over which an easement is being claimed to file such statutory affidavits. The plaintiffs make no argument that filing affidavits on the land records claiming an easement over real property over which the affiants have no ownership interest fails to constitute a disturbance of the rights of the owners of the fee simple. On the basis of the claim presented to this court and on

the limited record before us, we cannot say that the court improperly determined that the plaintiffs violated § 47-41.

The judgment is reversed only with respect to the counterclaim of slander of title and the case is remanded with direction to render judgment in favor of the plaintiffs on that counterclaim; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

GATEWAY DEVELOPMENT/EAST LYME, LLC *v.* ANH DUONG ET AL.
(AC 46505)

Suarez, Clark and Vertefeuille, Js.

Syllabus

The plaintiff subleased certain real property to the defendants. After the defendants failed to make a rent payment, the plaintiff sent the defendants a notice of cancellation of the lease and served them with a notice to quit possession on the ground of nonpayment of rent. When the defendants did not quit possession, the plaintiff served the defendants with a summary process summons and complaint. The sublease agreement contained a clause providing that the agreement could not be modified in any manner except by an instrument in writing executed by the parties. At trial, the plaintiff presented testimony from the plaintiff's lease administrator, who testified that the defendants' rental payments were habitually late, that she typically sent the defendants a notice of default with a ten day right to cure such default, and that she would routinely accept the late payments that followed but that she had lost patience with the defendants. The court found that the defendants had breached the sublease agreement by nonpayment of rent, rejected the defendants' argument that the sublease agreement required the plaintiff to provide the defendants with a pretermination notice and a ten day right to cure, and rendered a judgment of possession for the plaintiff. On the defendants' appeal to this court, *held*:

1. The defendants could not prevail on their claim that the trial court should have considered evidence of the parties' course of performance in its interpretation of the sublease agreement and improperly concluded that the language of the lease controlled; the plain and unambiguous language of the sublease agreement made clear that a pretermination notice and

a ten day cure period were not required in the context of a default for nonpayment of rent and that such notice applied only to other specified events of default.

2. The defendants could not prevail on their claim that the parties' course of performance modified the terms of the sublease agreement; the trial court properly relied on the written terms of the sublease agreement to conclude that the plaintiff was not required to provide the defendants with a pretermination notice and an opportunity to cure their default for nonpayment of rent, as any modification of the agreement by the parties' course of performance was barred by the contractual provision requiring that modifications be in writing.

Argued May 13—officially released July 30, 2024

Procedural History

Summary process action, brought to the Superior Court in the judicial district of New London, where the defendants filed a counterclaim; thereafter, the matter was tried to the court, *Graff, J.*; subsequently, the defendants withdrew their counterclaim; judgment for the plaintiff, from which the defendants appealed to this court. *Affirmed.*

Keith Yagaloff, for the appellants (defendants).

Alexa Massad Powers, with whom, on the brief, was *Jason B. Burdick*, for the appellee (plaintiff).

Opinion

VERTEFEUILLE, J. In this summary process action, the plaintiff, Gateway Development/East Lyme, LLC, leased property located at 295 Flanders Road in East Lyme (premises) and subleased the premises to the defendants, Anh Duong doing business as Daddy's Noodle Bar and Daddy's Noodle Bar 2, LLC. The defendants appeal from the trial court's judgment of possession rendered in favor of the plaintiff. It is undisputed that the defendants failed to pay rent in a timely manner. On appeal, the defendants claim that the court improperly concluded that the plaintiff was not required to provide them with a pretermination notice and an opportunity to cure their default for nonpayment of rent within

ten days of such notice. We disagree and, accordingly, affirm the judgment of the trial court.

The record reveals the following facts and procedural history that are relevant to our resolution of the defendants' appeal. The plaintiff subleased the premises to the defendants beginning in January, 2019.[1] The defendants occupied the premises and agreed to pay $6829.54 per month for rent, due on the first day of each month. The defendants failed to pay the rent due on November 1, 2022. On November 11, 2022, the plaintiff sent the defendants a notice of cancellation of the lease, and, on November 14, 2022, the plaintiff served the defendants with a notice to quit possession on the ground of nonpayment of rent.

Although the notice to quit instructed the defendants to vacate the property by November 22, 2022, the defendants did not quit possession. The plaintiff served the defendants with a summary process summons and complaint on November 28, 2022, seeking immediate possession of the premises. In response, the defendants filed an answer and special defenses to the plaintiff's complaint, asserting, inter alia, that the plaintiff's notice to quit was defective and that they had lawfully tendered rent.[2] Specifically, the defendants argued that the sublease agreement required the plaintiff to afford them a ten day notice to cure their default before serving them with a notice to quit. The defendants further argued that the plaintiff improperly refused to accept a payment of rent that they had tendered on November 16, 2022,

[1] The plaintiff initially subleased the premises only to the defendant Anh Duong doing business as Daddy's Noodle Bar pursuant to a sublease agreement dated January 9, 2019. On September 12, 2022, in a second amendment to the sublease agreement, the parties agreed that the defendant Daddy's Noodle Bar 2, LLC, would become a cosublessee that was jointly and severally liable for the obligations imposed under the sublease agreement.

[2] The defendants also filed a counterclaim, which subsequently was marked "off" by agreement of the parties and is not at issue in this appeal.

which they contended would have been within the ten day cure period.

The defendants specifically relied on paragraph 21 of the sublease agreement, which provides in relevant part: "Any of the following occurrences shall constitute a default under this Sublease . . . Failure of Sublessee to pay any installment of rent, reimbursements, or any other charge within ten (10) days after the same is due and payable . . . Any breach by Sublessee to observe or perform any of its other obligations under this Sublease, which shall continue for ten (10) days after notice in writing to Sublessee of such default, and in connection with which Sublessee shall not have in good faith commenced performance if full performance cannot be reasonably had within the ten (10) day period . . . .

"In the event Sublessee shall fail to pay its rent within ten (10) days after the same shall be due and payable, Sublessor shall have the right, without prior notice to the Sublessee, to immediately initiate any and all legal action to recover possession of the Premises, and to terminate this Sublease in the manner provided by law relating to summary process. Such right shall be in addition to any other rights to which Sublessor is entitled by law or by the other terms of this Sublease.

"Upon the occurrence of any one or more of such events, and upon Sublessor serving a written ten (10) days notice of cancellation of this Sublease upon Sublessee and upon the expiration of such ten (10) days, this Sublease and the terms thereunder shall end and expire as fully and completely as if the date of expiration of such ten (10) day period herein definitely fixed for the end and expiration of this Sublease and Sublessee shall then quit and surrender the Premises to Sublessor, but Sublessee shall remain liable as hereinafter provided. . . ."

In their pretrial brief, the defendants argued that, in addition to the language of the agreement, "[t]he course of performance by the parties demonstrated that [paragraph] 21 required notice and a ten day cure period, including for nonpayment of rent."

A bench trial was held on April 5, 2023. Copies of the sublease agreement and subsequent amendments to that agreement were admitted into evidence. In addition, the plaintiff presented testimony from Mara Henderson King, who worked as the plaintiff's lease administrator. King testified, in relevant part, that the defendants' rental payments were "habitually late" and they had paid rent within the first ten days of the month on only eight occasions since the inception of the lease in January, 2019. She also testified that she typically sent the defendants a "notice of default" with a ten day right to cure such default, and she would routinely accept the late payments that followed. She explained that the plaintiff would "try to be as accommodating to [its] tenants as possible," which is why she typically provided a notice of default with a cure period, regardless of whether it was required under the lease. When the defendants failed to pay their November, 2022 rent in a timely fashion, King sent the notice of cancellation and issued the notice to quit, rather than providing a notice of default with a cure period, because "[p]atience ha[d] been worn way too thin." King further testified as to her understanding of what was required under the terms of the lease. Specifically, she testified that, pursuant to paragraph 21 of the sublease agreement,[3] a pretermination notice was not required when the claimed default was the nonpayment of rent. Instead, a notice of default with a ten day cure period was

[3] The language of paragraph 21 of the sublease agreement is set forth previously in this opinion.

required with respect to the other events of default listed in the lease.[4]

The defendants presented testimony from Peter Tran, who had a personal relationship with Duong. Tran handled communications with King about the lease on behalf of Duong. Tran testified that the plaintiff accepted many late rental payments from the defendants after providing them with a ten day period to cure their default and, on the basis of the notices of default they previously had received, he believed the defendants had a right to cure under the terms of the lease. The defendants also submitted documentary evidence to the court, including two letters sent from King to Duong dated May 11, 2020, and October 31, 2022. The letters provided the defendants with notice of certain prior defaults, including the nonpayment of rent and multiple bounced checks, and gave the defendants ten days to cure such defaults.

At the conclusion of trial, the defendants' counsel argued that the foregoing evidence reflected the parties' course of performance[5] and that such evidence could be used in two ways: (1) it could serve as evidence of the intent of the parties in the court's interpretation of the sublease agreement, and (2) it could demonstrate a modification of the sublease agreement.

In an order dated April 12, 2023, the court, *Graff, J.*, found that the defendants had breached the sublease agreement by nonpayment of rent and rejected the defendants' argument that the sublease agreement required the plaintiff to provide the defendants with a pretermination notice and a ten day right to cure. The

[4] Subsections (a) through (f) of paragraph 21 of the sublease agreement list various events that constitute defaults under the lease.

[5] The defendants have used the terms "course of performance" and "course of conduct" interchangeably both before the trial court and on appeal. For purposes of consistency, we use the term "course of performance" throughout this opinion.

court explained: "It is clear that the terms of the lease in the aforementioned paragraph 21 do not require a ten day notice to cure period for the failure to pay rent. While there is a notice to cure provision, this provision does not apply to the failure to pay rent. The lease permits that when there is a failure to pay rent, the landlord may take possession of the premises as well as take advantage of other legal remedies available.

"A landlord cannot commence an eviction without first complying with the notice and compliance provisions of a lease. . . . Here, the terms of the lease do not require a ten day notice to cure period. Moreover, the court finds that the notice to quit which is dated November 29, 2022, is sufficient. . . . The plaintiff has met its burden of showing that there has been nonpayment of rent in violation of the lease terms." (Citations omitted.) Accordingly, the court rendered a judgment of possession in favor of the plaintiff. This appeal followed.

On appeal, the defendants claim that the court improperly concluded that the plaintiff was not required to provide them with a pretermination notice and a ten day cure period prior to serving them with a notice to quit. Specifically, the defendants contend that the court incorrectly limited its analysis to the terms of the parties' sublease agreement and that it should have considered evidence of the parties' course of performance (1) as evidence of the parties' understanding or intended interpretation of the agreement, or (2) to find that the parties had modified the terms of their agreement through that course of performance.

As an initial matter, we note that the court did not make any specific factual findings regarding whether the defendants had established a course of performance between the parties, and it did not explicitly address the defendants' arguments related to the parties' alleged

course of performance.[6] Nevertheless, in reaching its conclusion, the court necessarily rejected the defendants' arguments concerning course of performance; see *Russo* v. *Thornton*, 217 Conn. App. 553, 567 n.18, 290 A.3d 387 (court "necessarily rejected" argument that it did not explicitly address), cert. denied, 346 Conn. 921, 291 A.3d 608 (2023); *T & M Building Co.* v. *Hastings*, 194 Conn. App. 532, 545–46, 221 A.3d 857 (2019) (same), cert. denied, 334 Conn. 926, 224 A.3d 162 (2020); and "we will presume, in the absence of an articulation, [that the] trial court acted correctly, meaning that it undertook a proper analysis of the law and made whatever findings of the facts were necessary." (Emphasis omitted.) *Zaniewski* v. *Zaniewski*, 190 Conn. App. 386, 396, 210 A.3d 620 (2019). With these principles in mind, we turn to the defendants' claims.

I

First, the defendants contend that the court improperly relied solely on the language of the parties' sublease agreement and failed to consider the evidence of the parties' course of performance in its interpretation of the agreement. Specifically, the defendants argue that paragraph 21 of the sublease agreement was ambiguous as to whether a pretermination notice and a ten day cure period was required in the context of a default for

[6] To the extent that the defendants contend that the court entirely failed to consider their arguments regarding the parties' course of performance, we disagree. We do not presume error on the part of the trial court. See *United Cleaning & Restoration, LLC* v. *Bank of America, N.A.*, 225 Conn. App. 702, 713 n.7, A.3d (2024). In addition, at a hearing held on May 2, 2023, to address the defendants' counterclaim; see footnote 2 of this opinion; the court confirmed that it had considered the defendants' argument regarding the parties' course of performance. Specifically, the defendants' counsel told the court: "The only thing I was going to ask, Your Honor. . . . I think I know the answer, but I just wanted to make sure that the course of performance issues that were addressed in the hearing—the original hearing—were addressed by Your Honor when you made your decision on the merits of the motion. And I believe you did, Your Honor." The court responded: "Yes."

nonpayment of rent and, therefore, the court should have considered the parties' course of performance as evidence of the parties' understanding of the terms of the lease. We are not persuaded.

We begin our analysis with the applicable standard of review. The defendants' claim "presents a question of contract interpretation because a lease is a contract, and, therefore, it is subject to the same rules of construction as other contracts. . . . Although ordinarily the question of contract interpretation, being a question of the parties' intent, is a question of fact . . . [when] there is definitive contract language, the determination of what the parties intended by their . . . commitments is a question of law [over which our review is plenary]." (Internal quotation marks omitted.) *Carroll* v. *Yankwitt*, 203 Conn. App. 449, 487, 250 A.3d 696 (2021).

"The intent of the parties as expressed in [writing] is determined from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction. . . . [T]he intent of the parties is to be ascertained by a fair and reasonable construction of the written words and . . . the language used must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the [writing]." (Internal quotation marks omitted.) *19 Perry Street, LLC* v. *Unionville Water Co.*, 294 Conn. 611, 623, 987 A.2d 1009 (2010).

"Where the language of the [writing] is clear and unambiguous, the [writing] is to be given effect according to its terms." (Internal quotation marks omitted.) *Electrical Contractors, Inc.* v. *50 Morgan Hospitality Group, LLC*, 211 Conn. App. 724, 731, 273 A.3d 726 (2022); see also *Bellini* v. *Patterson Oil Co.*, 156 Conn. App. 158, 163, 111 A.3d 987 (2015) ("[w]hen only one interpretation of a contract is possible, the court need

not look outside the four corners of the contract" (internal quotation marks omitted)). "If, however, the contractual language is found to be ambiguous, [s]uch ambiguity permits the trial court's consideration of extrinsic evidence as to the conduct of the parties." (Internal quotation marks omitted.) *Heyman Associates No. 5, L.P.* v. *FelCor TRS Guarantor, L.P.*, 153 Conn. App. 387, 403, 102 A.3d 87, cert. denied, 315 Conn. 901, 104 A.3d 106 (2014).

An agreement is ambiguous "[w]here the language of [that] agreement is susceptible to more than one reasonable interpretation . . . ." (Internal quotation marks omitted.) *Cody Real Estate, LLC* v. *G & H Catering, Inc.*, 219 Conn. App. 773, 784, 296 A.3d 214, cert. denied, 348 Conn. 910, 303 A.3d 11 (2023). "The court will not torture words to impart ambiguity where ordinary meaning leaves no room for ambiguity. . . . Moreover, the mere fact that the parties advance different interpretations of the language in question does not necessitate a conclusion that the language is ambiguous. . . . [A]ny ambiguity in a contract must emanate from the language used by the parties. . . . The contract must be viewed in its entirety, with each provision read in light of the other provisions . . . and every provision must be given effect if it is possible to do so." (Internal quotation marks omitted.) *Heyman Associates No. 5, L.P.* v. *FelCor TRS Guarantor, L.P.*, supra, 153 Conn. App. 403–404.

In the present case, we conclude that the plain and unambiguous language of paragraph 21 of the sublease agreement makes clear that a pretermination notice and a ten day cure period were not required in the context of a default for nonpayment of rent. Paragraph 21 specifically provides that, if the defendants fail to pay rent within ten days after it is due, the plaintiff may

"immediately initiate" legal action to recover possession of the premises, "without prior notice" to the defendants.

Although paragraph 21 proceeds to require the plaintiff to serve a "written ten (10) days notice of cancellation" before serving the defendants with a notice to quit "[u]pon the occurrence of any one or more of such events [of default]," it is clear that this more general portion of paragraph 21, when viewed in context, does not apply to a default for nonpayment of rent. Instead, given the immediately preceding portion of paragraph 21 that specifically addresses the nonpayment of rent, the notice provision can only be read reasonably to apply to the other events of default listed in paragraph 21.[7] See *Rader* v. *Valeri*, 223 Conn. App. 243, 268–69, 308 A.3d 66 (more specific provisions of agreement control over standardized and more general ones), cert. denied, 348 Conn. 959, 312 A.3d 37 (2024); *Grogan* v. *Penza*, 194 Conn. App. 72, 81, 220 A.3d 147 (2019) ("[i]t has been well settled that the particular language of a contract must prevail over the general" (internal quotation marks omitted)).

[7] In addition to the nonpayment of rent, paragraph 21 provides that the following occurrences shall constitute a default under the sublease: "Any breach by Sublessee to observe or perform any of its other obligations under this Sublease, which shall continue for ten (10) days after notice in writing to Sublessee of such default, and in connection with which Sublessee shall not have in good faith commenced performance if full performance cannot be reasonably had within the ten (10) day period . . . [t]o the extent permitted by law, Sublessee becoming insolvent or bankrupt, or making an assessment for the benefit of creditors, or the commencement of any proceeding under any bankruptcy or insolvency law by or against Sublessee if such proceeding or case is not discharged within sixty (60) days . . . Sublessee vacating or abandoning the Premises (failure to occupy and operate the premises for ten (10) consecutive days shall be deemed an abandonment) or ceasing its use of the Premises for the purpose set forth above . . . [t]he transfer, assignment, encumbrance or sale of this Sublease or Sublessee's right thereunder by Sublessee, except in any manner herein permitted . . . [and] [a]ny breach by the Sublessee to observe or perform its obligation under this Sublease."

Because the language of the sublease agreement is unambiguous with respect to the consequences of default for the nonpayment of rent, the court correctly declined to consider evidence of the parties' course of performance in its interpretation of the agreement and properly concluded that the language of the lease controls. See *19 Perry Street, LLC* v. *Unionville Water Co.*, supra, 294 Conn. 625 (declining to consider conduct of parties in construing contract and concluding that "the language of the lease controls"); *Heyman Associates No. 5, L.P.* v. *FelCor TRS Guarantor, L.P.*, supra, 153 Conn. App. 403 (consideration of parties' conduct permitted in contract interpretation only when contract is ambiguous); see also *Poole* v. *Waterbury*, 266 Conn. 68, 97, 831 A.2d 211 (2003); *Perez* v. *Carlevaro*, 158 Conn. App. 716, 722, 120 A.3d 1265 (2015). Accordingly, the court properly limited its analysis to the written terms of the agreement.

II

We next consider the defendants' contention that the court improperly failed to find that the parties' course of performance modified the terms of their sublease agreement to require the plaintiff to provide the defendants with a pretermination notice and a ten day cure period for the nonpayment of rent. The plaintiff argues that a written modification clause in the parties' agreement precluded a finding of a modification based on any course of performance between the parties. We agree with the plaintiff.

"For a valid modification to exist, there must be mutual assent to the meaning and conditions of the modification and the parties must assent to the same thing in the same sense. . . . *Modification of a contract may be inferred from the attendant circumstances and conduct of the parties.*" (Emphasis in original; internal quotation marks omitted.) *Alarmax*

Distributors, Inc. v. *New Canaan Alarm Co.*, 141 Conn. App. 319, 329, 61 A.3d 1142 (2013). "A modification of an agreement must be supported by valid consideration and requires a party to do, or promise to do, something further than, or different from, that which he is already bound to do." (Internal quotation marks omitted.) *Harley* v. *Indian Spring Land Co.*, 123 Conn. App. 800, 822, 3 A.3d 992 (2010).

"The question of whether the parties to a contract agreed to a modification of its terms is ordinarily an issue of fact." *RBC Nice Bearings, Inc.* v. *SKF USA, Inc.*, 146 Conn. App. 288, 298, 78 A.3d 195 (2013), rev'd in part on other grounds, 318 Conn. 737, 123 A.3d 417 (2015). "The resolution of conflicting factual claims falls within the province of the trial court. . . . The trial court's findings are binding upon this court unless they are clearly erroneous in light of the evidence and the pleadings in the record as a whole. . . . We cannot retry the facts or pass on the credibility of the witness." (Internal quotation marks omitted.) *Alarmax Distributors, Inc.* v. *New Canaan Alarm Co.*, supra, 141 Conn. App. 329–30.

The question of whether the parties' agreement limited their ability to make a modification without a writing, however, presents a legal issue subject to plenary review. See *RBC Nice Bearings, Inc.* v. *SKF USA, Inc.*, supra, 146 Conn. App. 298. As indicated previously in this opinion, "[a] contract must be construed to effectuate the intent of the parties, which is determined from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction. . . . Where the language of the contract is clear and unambiguous, the contract is to be given effect according to its terms. . . . Although ordinarily the question of contract interpretation, being a question of the parties' intent, is a question of fact . . . [w]here there is definitive contract language, the determination

of what the parties intended by their contractual commitments is a question of law. . . . When . . . the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct . . . .'' (Internal quotation marks omitted.) Id., 298–99.

In the present case, the court did not make a finding that the parties intended to modify their agreement. The defendants argue that it was ''clearly erroneous for the trial court to fail to find that the plaintiff's conduct gave rise to a modification of the lease'' on the basis of the ''uncontroverted evidence establishing the course of performance . . . .''

In support of their argument, the defendants rely on *RBC Nice Bearings, Inc.* v. *SKF USA, Inc.*, 318 Conn. 737, 123 A.3d 417 (2015). That decision, however, undermines, rather than supports, the defendants' position. In that case, the trial court concluded that the evidence presented clearly demonstrated that an annual minimum purchase requirement set forth in an agreement between the parties had been modified by the conduct of the parties. Id., 745. In the alternative, the court found that, for certain years, the plaintiffs waived their right to enforce that minimum purchase requirement. Id. On appeal, this court reversed the judgment of the trial court, concluding in relevant part that (1) modification based on the parties' course of performance was barred by a written modification clause in the parties' agreement, and (2) the trial court's finding of waiver was clearly erroneous. Id., 746. Our Supreme Court reversed in part the judgment of this court on the issue of waiver, concluding that ''[t]he parties' undisputed course of performance and course of dealing . . . adequately support[ed] the trial court's finding of continuing waiver.'' Id., 757. As to the issue of modification, however, our Supreme Court agreed with this court's analysis, explaining: ''The Appellate Court properly rejected

[the trial court's finding that the parties modified their agreement], concluding, as a matter of law, that any modification of the . . . agreement by the parties' course of performance was barred by the contractual provision requiring that modifications be in writing." Id., 758.

In the present case, the defendants do not claim that the plaintiff waived its right to enforce any of the terms of the sublease agreement governing the payment or nonpayment of rent.[8] Instead, the defendants contend that the parties modified their agreement through their course of performance, which claim was unavailing in *RBC Nice Bearings*, *Inc.* See id.; see also id., 750–51 (explaining differences between waiver and modification). As in *RBC Nice Bearings*, *Inc.*, the parties' sublease agreement in the present case contains a written modification clause. Specifically, paragraph 43 of the sublease agreement sets forth that "[t]his Sublease contains the entire agreement between the parties and shall not be modified in any manner except by an instrument in writing executed by the parties, their administrators, executors, successors or assigns." Thus, like in *RBC Nice Bearings*, *Inc.*, "any modification of the . . . agreement by the parties' course of performance was barred by the contractual provision requiring that modifications be in writing."[9] *RBC Nice Bearings*, *Inc.* v.

[8] The defendants' appellate briefs contain some discussion of waiver in the context of summarizing *RBC Nice Bearings*, *Inc.* v. *SKF USA*, *Inc.*, supra, 318 Conn. 737. At oral argument before this court, however, the defendants' counsel confirmed that the defendants' claim is one of modification, not waiver.

In addition, we note that subsection (d) of paragraph 3 of the sublease agreement in the present case contains a waiver clause, which provides: "Any extension of time for the payment of any installment of rent *shall not be a waiver* of the rights of [the plaintiff] to insist on having all other payments of rent made in the manner and the time herein specified. . . ." (Emphasis added.)

[9] The defendants do not argue that the letters from King to Duong—or any other writing—would satisfy the written modification clause.

SKF USA, Inc., supra, 318 Conn. 758. Accordingly, the trial court properly relied on the written terms of the sublease agreement to conclude that the plaintiff was not required to provide the defendants with a pretermination notice and an opportunity to cure their default.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* TIMOTHY BRELSFORD (AC 46093)

Elgo, Cradle and Westbrook, Js.

Syllabus

The defendant, who had previously been convicted, following a guilty plea, of the crimes of kidnapping in the second degree with a firearm, attempt to commit murder, robbery in the first degree with a deadly weapon, and two counts of risk of injury to a child, filed a motion for sentence modification pursuant to statute (§ 53a-39). In his motion, the defendant provided evidence of, inter alia, his completion of several rehabilitative programs during his incarceration. In denying the defendant's motion, the court stated that it had considered the factors set forth in the statute (§ 54-125a (f) (4)) governing parole eligibility and suitability and concluded that the defendant had not established good cause to modify his sentence pursuant to § 53a-39 when balanced against the facts and harm created by the serious crimes he had committed. On the defendant's appeal to this court, *held* that the defendant could not prevail on his claim that the trial court abused its discretion in finding that he had failed to establish good cause to modify his sentence pursuant to § 53a-39: although the defendant argued that the weight and value that the court assigned to the statutory parole framework when assessing good cause pursuant to § 53a-39 was inappropriate, he conceded that the trial court was free to consider the factors in § 54-125 in arriving at its conclusion; moreover, the court did not limit its consideration of the defendant's motion to the factors enumerated in § 54-125, and, although the defendant argued that the court should have relied more heavily on his rehabilitation and certain other factors, he did not cite any legal authority that governs the degree of weight a court must afford factors that it considers in determining whether good cause has been established.

Argued November 9, 2023—officially released July 30, 2024

Procedural History

Substitute information charging the defendant with the crimes of kidnapping in the second degree with a firearm, attempt to commit murder, criminal use of a firearm during the commission of a felony, carjacking, robbery in the first degree, and two counts of risk of injury to a child, brought to the Superior Court in the judicial district of New Haven, where the defendant was presented to the court, *Devlin*, *J.*, on a plea of guilty to kidnapping in the second degree, attempt to commit murder, robbery in the first degree with a deadly weapon, and two counts of risk of injury to a child; judgment of guilty in accordance with the plea; thereafter, the state entered a nolle prosequi as to the remaining charges; subsequently, the court, *Harmon*, *J.*, denied the defendant's motion for sentence modification, and the defendant appealed to this court. *Affirmed.*

James E. Mortimer, assigned counsel, for the appellant (defendant).

Melissa L. Streeto, senior assistant state's attorney, with whom, on the brief, were *John P. Doyle, Jr.*, state's attorney, and *Alexander Beck*, senior assistant state's attorney, for the appellee (state).

Opinion

CRADLE, J. The defendant, Timothy Brelsford, appeals from the judgment of the trial court denying his motion for modification of his sentence pursuant to General Statutes § 53a-39. On appeal, the defendant claims that the court abused its discretion in finding that he had failed to establish good cause to modify his sentence. We disagree and, accordingly, affirm the judgment of the trial court.

The following facts related to the defendant's underlying conviction, as set forth in the trial court's memorandum of decision on the defendant's motion for a sentence modification, and procedural history are relevant to this appeal. "The defendant's conviction stems from an armed robbery in the town of Hamden, of which he was also convicted. The defendant [fled to] . . . New Haven, where a police officer observed the defendant on a corner talking to a young boy. When the officer approached [the defendant], [the defendant] produced a firearm and placed it to the head of the police officer, [ordering] him to drive his motorcycle, with [the defendant] as a passenger, to Bridgeport in an attempt to flee from the criminal activity and the pursuit of other officers. The police officer rolled the motorcycle while [the defendant] was a passenger. Both parties fell off the motorcycle and a gun battle between [the defendant] and the police officer ensued. [The defendant] fired shots at the police officer on a crowded street and subsequently ran to a vehicle where there were two adult females and two children [inside]. The defendant ordered the two adults out of the vehicle and carjacked the vehicle, [continuing] to fire shots at police officers while the two children were in the rear seat of the vehicle. The defendant subsequently crashed the vehicle and was apprehended when he attempted to flee on foot. The two minor children suffered minor injuries in the crash, [including] a bullet wound to the wrist of one of the children."

The defendant subsequently was arrested and, on September 15, 1995, pleaded guilty to kidnapping in the second degree with a firearm in violation of General Statutes § 53a-94a, attempt to commit murder in violation of General Statutes §§ 53a-49 and 53a-54a, robbery in the first degree with a deadly weapon in violation of General Statutes § 53a-134 (a) (2), and two counts of risk of injury to a child in violation of General Statutes

§ 53-21. On November 20, 1995, the court, *Devlin*, *J.*, sentenced the defendant to a total effective sentence of forty years of incarceration.[1]

On November 16, 2021, the defendant filed the present motion for sentence modification as a self-represented party, seeking to suspend execution of the remaining unexecuted portion of his term of incarceration. The defendant attached to his motion exhibits highlighting his medical conditions and completion of several rehabilitative programs. The state did not oppose a hearing on the motion.

On August 30, 2022, the court, *Harmon*, *J.*, held a hearing on the defendant's motion. The defendant, a victim's advocate, and the state addressed the court. The defendant argued that, having been incarcerated for almost twenty-eight years, he is "a changed person" and "a better person," that he is "very, very sorry for what happened back then," and that "[d]rug addiction [had] compelled [him]" to commit the crimes at issue in this case. He explained that he now has various health concerns and that he just wants to "finish this."

The victims did not take a position with respect to the defendant's motion for sentence modification. The

[1] The defendant is currently serving a sentence of forty-six years and six months of incarceration. The record reflects that the defendant had other cases pending at the time of his sentencing in the present case. At the defendant's sentencing hearing on November 20, 1995, State's Attorney James Clark noted that the defendant had "committed armed robberies in Hamden on that same day . . . within an hour or so of the beginning of this sequence of events, and a day earlier in Guilford. In addition to that, he has pending, I believe, seven felony and two misdemeanor cases in other jurisdictions, which we know as a practical matter are going to be wrapped up into this sentence once this sentence is imposed . . . ."

In its memorandum of decision, issued on September 16, 2022, the court, *Harmon*, *J.*, found that, at that time, the defendant had a maximum release date of December 28, 2027, noting that the defendant earns statutory good time credit, seven day job credit, and outstanding meritorious performance award credit, all of which have reduced his maximum release date.

victim's advocate, however, shared a statement from the mother of the children in the car that "the carjacking . . . had an effect on [her] entire family [and] on [her] entire family's lives" but that "[she is] a Christian and believe[s] in forgiveness . . . ."

The state highlighted the defendant's extensive criminal history and asked the court "not to modify the sentence . . . based on the seriousness of all these offenses [at issue in the present case] and . . . the long-term, lifelong effect upon the victims of these crimes."

In a memorandum of decision dated September 16, 2022, the court denied the defendant's motion for sentence modification. The court noted that, although § 53a-39 does not define "good cause," it has been commonly defined as " 'a legally sufficient reason.' " The court explained that "it is with this understanding and standard, considering the accepted objectives of sentencing as well, that this court reviews the information presented to determine whether good cause, 'a legally sufficient reason,' has been established by the defendant to modify his sentence." The court then reviewed the evidence presented by the defendant, recounting the age of the defendant when he was sentenced, his current age, and the "training and efforts at rehabilitation" the defendant had made during his twenty-eight years of incarceration. The court further noted that the defendant personally addressed the court, apologized to the victims for his actions, addressed his drug addiction and discussed "the good he could perform for the community and his family if granted early release."

The court stated that, "[i]n analyzing whether 'a legally sufficient reason' exists to warrant a modification of the defendant's sentence, the court has considered whether the defendant has demonstrated substantial rehabilitation since the date the crime was committed."

The court further reasoned that, "[w]hile not directly applicable to . . . § 53a-39, the statute governing parole eligibility and suitability, General Statutes § 54-125a (f) (4),[2] provides an instructive and useful framework in assessing the existence of 'good cause' sufficient to modify a sentence . . . particularly since the factors enumerated must be . . . evaluated with the objective of being consistent with the factors set forth in [General Statutes] § 54-300."[3] (Footnote added.) Accordingly, the court explained that "[f]actors that have been examined include, but are not limited to: (1)

[2] General Statutes § 54-125a (f) (4) provides in relevant part: "After [a] hearing [to determine eligibility for parole release], the [Board of Pardons and Paroles] may allow [a] person to go at large on parole with respect to any portion of a sentence that was based on a crime or crimes committed while such person was under eighteen years of age if the board finds that such parole release would be consistent with the factors set forth in subdivisions (1) to (4), inclusive, of subsection (c) of section 54-300 and if it appears, from all available information . . . that [among other things] . . . (C) such person has demonstrated substantial rehabilitation since the date such crime or crimes were committed considering such person's character, background and history, as demonstrated by factors, including, but not limited to, such person's correctional record, the age and circumstances of such person as of the date of the commission of the crime or crimes, whether such person has demonstrated remorse and increased maturity since the date of the commission of the crime or crimes, such person's contributions to the welfare of other persons through service, such person's efforts to overcome substance abuse, addiction, trauma, lack of education or obstacles that such person may have faced as a child or youth in the adult correctional system, the opportunities for rehabilitation in the adult correctional system, whether the person has also applied for or received a sentence modification and the overall degree of such person's rehabilitation considering the nature and circumstances of the crime or crimes."

[3] General Statutes § 54-300 provides in relevant part: "(c) In fulfilling its mission, the [Connecticut Sentencing Commission] shall recognize that: (1) The primary purpose of sentencing in the state is to enhance public safety while holding the offender accountable to the community, (2) sentencing should reflect the seriousness of the offense and be proportional to the harm to victims and the community, using the most appropriate sanctions available, including incarceration, community punishment and supervision, (3) sentencing should have as an overriding goal the reduction of criminal activity, the imposition of just punishment and the provision of meaningful and effective rehabilitation and reintegration of the offender, and (4) sentences should be fair, just and equitable while promoting respect for the law."

the gravity of his crime; (2) correctional record and length of time incarcerated; (3) his age and circumstances at the time of the commission of the crime; (4) whether he has demonstrated remorse and increased maturity since the date of the offense; (5) whether he has contributed to the welfare of other persons through service while incarcerated; and (6) the degree [to] which he has fully availed himself of opportunities for growth, rehabilitation, and contribution within the correctional system considering the nature and circumstances of the crime he committed."

The court concluded that, "after a review and consideration of the information and material presented, and with contemplation of the proper standard," the defendant had not established good cause to modify his sentence "when balanced against the facts and harm created by the serious crime he committed." The court went on to explain that its decision was "not meant to lessen or nullify the positive steps the defendant has taken during his period of incarceration or his ability to succeed once he is released. However, the court felt that, although the defendant showed remorse . . . the gravity of the crime and harm to the victims and society at large requires that the request for sentence modification be denied at this time."

On September 28, 2022, the defendant filed a "motion for rectification," in which he argued that the court, in ruling on his motion for sentence modification, had improperly failed to consider the fact that he had been on mind-altering drugs at the time he committed the underlying offenses. He further contended that "[a] criminal's state of mind . . . must be considered by the court where [the defendant's] motion for release is at issue, and to leave it out is plain error." On September 30, 2022, the court, *Harmon*, *J.*, held a hearing on the defendant's motion, which the court treated as a motion for reconsideration. In a memorandum of decision

dated December 2, 2022, the court denied the defendant's motion for reconsideration, explaining that "when rendering its initial decision [on the motion for sentence modification], [the court] was aware of the drug dependency and the effect it may have had in contributing to the illegal activity by [the defendant]. The court must still consider the gravity of the crime. The offense put both police officers and innocent civilians at risk and resulted in an injury to a young child. Based on the gravity of the offense, the court does not believe a sentence modification is appropriate at this time . . . ." This appeal followed.

On appeal, the defendant claims that the court abused its discretion in finding that he had failed to establish good cause to modify his sentence pursuant to § 53a-39. We disagree.

We begin by setting forth the standard of review and legal principles relevant to this claim. Section 53a-39 provides in relevant part that "the sentencing court or judge may, after hearing and for good cause shown, reduce the sentence, order the defendant discharged, or order the defendant discharged on probation or conditional discharge for a period not to exceed that to which the defendant could have been originally sentenced. . . ."[4]

[4] General Statutes § 53a-39 provides in relevant part: "(a) Except as provided in subsection (b) of this section, at any time during an executed period of incarceration, the sentencing court or judge may, after hearing and for good cause shown, reduce the sentence, order the defendant discharged, or order the defendant discharged on probation or conditional discharge for a period not to exceed that to which the defendant could have been originally sentenced.

"(b) On and after October 1, 2021, at any time during the period of a sentence in which a defendant has been sentenced prior to, on or after October 1, 2021, to an executed period of incarceration of more than seven years as a result of a plea agreement, including an agreement in which there is an agreed upon range of sentence, upon agreement of the defendant and the state's attorney to seek review of the sentence, the sentencing court or judge may, after hearing and for good cause shown, reduce the sentence, order the defendant discharged, or order the defendant discharged on proba-

"[I]n arriving at its sentencing determination, the sentencing court may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information [it] may consider or the source from which it may come. . . . [T]his broad discretion applies with equal force to a sentencing court's decision regarding a sentence modification . . . . Accordingly, we review a court's judgment granting or denying a motion to modify a sentence for abuse of discretion. . . . An abuse of discretion exists when a court could have chosen different alternatives but has decided the matter so arbitrarily as to vitiate logic, or has decided it based on improper or irrelevant factors. . . . As such, [i]n determining whether there has been an abuse of discretion, every reasonable presumption should be given in favor of the correctness of the court's ruling. . . . Generally speaking, under this deferential standard, [w]here the trial court has properly considered all of the offenses proved and imposed a sentence within the applicable statutory limitations, there is no abuse of discretion." (Citations omitted; footnote omitted; internal quotation marks omitted.) *State* v. *Martin G.*, 222 Conn. App. 395, 403–404, 305 A.3d 324 (2023), cert. denied, 348 Conn. 944, 308 A.3d 34 (2024).

The defendant argues that the trial court abused its discretion in determining that he had not established good cause to modify his sentence, in that the court

tion or conditional discharge for a period not to exceed that to which the defendant could have been originally sentenced. . . ."

We note that § 53a-39 has been amended since the events underlying this appeal; see Public Acts 2023, No. 23-47, § 1; those amendments have no bearing on the merits of this appeal. Accordingly, we refer to the current revision of the statute.

We also note that the defendant, in his appellate brief, asserts that the legislative intent behind earlier amendments to § 53a-39 in 2021 and 2022 "appears . . . [to have been] largely directed at ushering the earlier release of rehabilitated inmates." We decline to opine as to the intent of the legislature in amending the statute because it is not necessary to the resolution of the defendant's claim on appeal.

improperly weighed certain factors and failed to consider others. First, the defendant contends that the court improperly relied solely on the severity of the defendant's offense when denying his modification. The court's decision, which plainly reflects that it weighed several factors, belies that contention and does not merit further discussion.

The defendant also argues that "[i]t is inappropriate for the courts to rely upon the statutory parole framework when assessing good cause pursuant to § 53a-39" because that reliance necessarily "constrains the 'unlimited' nature of the appropriate inquiry espoused [in our case law]." Although the defendant argues that "the weight and value that the court assigned to this framework was inappropriate, particularly given the different functions of the trial court and the Board of Pardons and Parole," he concedes that "the trial court was free to consider [the § 54-125 (f) (4)] factors in arriving at its conclusion . . . ." Indeed, this court has held that, "in reviewing applications for sentence modifications of definite sentences, [the sentencing court] performs a function similar to that of a parole board"; *State* v. *Millhouse*, 3 Conn. App. 497, 500–501, 490 A.2d 517 (1985); and has affirmed the consideration of § 54-125 (f) (4) factors when considering sentence modifications. See *State* v. *Martin G.*, supra, 222 Conn. App. 405–406. This is consistent with our well settled law that a sentencing court's broad discretion also applies to its decisions regarding sentence modification and it "may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information [it] may consider or the source from which it may come." (Internal quotation marks omitted.) *State* v. *Dupas*, 291 Conn. 778, 783, 970 A.2d 102 (2009).[5]

[5] The defendant asks this court to "provide guidance to the lower courts regarding proper considerations that should inform the [good cause] standard" in the context of § 53a-39. He cites *Kelsey* v. *Commissioner of Correction*, 202 Conn. App. 21, 31–35, 244 A.3d 171 (2020), aff'd, 343 Conn. 424, 274 A.3d 85 (2022), as an example of the type of guidance this court should

Moreover, the court did not limit its consideration of the defendant's motion to the factors enumerated in the parole statute. Although the defendant argues that the court should have relied more heavily on his rehabilitation and certain other factors,[6] he does not cite any legal authority that governs the degree of weight a court must afford factors that it considers in determining whether good cause has been established, nor are we aware of any. Here, the court expressly considered the steps the defendant has taken toward rehabilitation but concluded that those steps did not outweigh other factors that it considered. The court's consideration of all of these factors was consistent with the broad discretion afforded to courts in ruling on motions for sentence modification.[7] We therefore conclude that the

provide. In response to the defendant's concern, *Martin G.*, and now the present case, provide a nonexclusive list of considerations that may properly inform a court's ruling on a motion for sentence modification in similar cases. We decline, however, to provide further guidance at this time given the broad discretion of the courts in this area; see *State* v. *Martin G.*, supra, 222 Conn. App. 404; and the " 'largely unlimited' " information a court can consider in ruling on a motion for sentence modification. *State* v. *Dupas*, supra, 291 Conn. 783.

[6] The defendant contends that the court should have considered: "(1) whether the defendant's sentence comports with contemporary norms in sentencing, (2) whether and what goals of sentencing will be better met by the defendant's release or continued incarceration, (3) the defendant's life expectancy and ability to contribute to society upon reentry, (4) the likelihood of recidivism, (5) whether the court may impose supervision to better assist with the defendant's reintegration needs or to promote the safety of society, (6) whether scientific advances since the time of the defendant's sentencing place the defendant's original sentence in a different light, (7) whether the 'new' information presented by the defendant since the time that he was sentenced warrants a departure from the original sentence, and (8) input from any victim(s)." (Footnotes omitted.)

[7] The defendant also argues that the court abused its discretion because, even if the court properly considered the factors it used in making its determination as to good cause, those factors weigh in favor of his release and the state's arguments to the contrary are weak. It is axiomatic that, in determining whether there has been an abuse of discretion, this court "[does] not review the evidence to determine whether a conclusion different from the one reached could have been reached." (Internal quotation marks omitted.) *Alder* v. *Alder*, 60 Conn. App. 612, 613, 760 A.2d 1263 (2000).

court did not abuse its discretion in determining that the defendant failed to establish good cause to warrant a sentence modification.

The judgment is affirmed.

In this opinion the other judges concurred.

MEINEKE BRISTOL, LLC *v.* PREMIER AUTO, LLC, ET AL.

MARIAMMA BABU, LLC *v.* PREMIER AUTO, LLC, ET AL.

585 MAIN STREET, LLC *v.* PREMIER AUTO, LLC, ET AL.

PREMIER AUTO, LLC *v.* AMERICAN TRADING COMPANY, INC., ET AL.

(AC 46467)

Cradle, Suarez and Westbrook, Js.

Syllabus

P Co. and F appealed to this court from the judgments rendered by the trial court in four related civil actions that were consolidated for trial and that encompassed various claims by multiple entities concerning the sale of three businesses to P Co. and associated leases, notes, and guarantee agreements. *Held*:

1. This court dismissed the portion of the appeal related to P Co. and F's claim that the trial court abused its discretion when it precluded them from presenting certain evidence at trial; because P Co. and F failed to challenge on appeal each of two independent grounds on which the trial court excluded the evidence, this court could not grant them any practical relief.
2. This court declined to consider the merits of P Co.'s claim that the trial court erred in determining that P Co. failed to prove its breach of contract cause of action, as P Co. failed to provide an adequate record for review.

Argued May 21—officially released July 30, 2024

Procedural History

Action, in the first case, to recover damages for, inter alia, fraudulent transfer, and for other relief, brought to the Superior Court in the judicial district of New Britain, Housing Session, action, in the second case, to recover damages for, inter alia, fraudulent transfer, and for other relief, brought to the Superior Court in the judicial district of Middlesex, action, in a third case, to recover damages for, inter alia, fraudulent transfer, and for other relief, brought to the Superior Court in the judicial district of Fairfield, Housing Session at Bridgeport, and action, in a fourth case, to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of Middlesex; thereafter, the first two cases were transferred to the Superior Court in the judicial district of Fairfield, Housing Session at Bridgeport; subsequently, the cases were consolidated and transferred to the Superior Court in the judicial district of Hartford, Complex Litigation Docket, where the named defendant in the first three cases and the defendants in the fourth case filed various counterclaims; thereafter, Michael J. Flynn was cited in as a defendant in the first three cases, and Patrick Flynn was cited in as a counterclaim defendant in the fourth case; subsequently, the plaintiff in each of the first three cases withdrew its claims as against Michael J. Flynn; thereafter, the cases were tried to the court, *Farley*, *J.*; judgment in each of the first three cases for Patrick Flynn on the counts of the complaints alleging fraudulent transfer, for the plaintiff in each of the first three cases on all remaining counts of the complaints and on the counterclaims, and judgment for the defendants in the fourth case on the complaint and on the counterclaim, from which Premier Auto, LLC, et al. appealed to this court. *Appeal dismissed in part*; *affirmed*.

Paul H. D. Stoughton, for the appellants (named defendant et al. in the first three cases and named plaintiff in the fourth case).

Colin B. Connor, for the appellee (plaintiff in the first case).

Opinion

SUAREZ, J. Premier Auto, LLC (Premier Auto), and Patrick Flynn appeal from the judgments rendered by the trial court in four related civil actions that were consolidated for trial.[1] The actions encompass various

[1] In *Meineke Bristol, LLC* v. *Premier Auto, LLC*, Superior Court, judicial district of Hartford, Docket No. CV-20-5066300-S, Meineke Bristol, LLC, brought an action against Premier Auto, Patrick Flynn, and Michael J. Flynn. Counts one and two of the amended complaint, directed at Premier Auto, sounded in breach of commercial lease and unjust enrichment, respectively. Counts three, four, and five, directed at Patrick Flynn, sounded in breach of personal guarantee, fraudulent transfer, and common-law fraudulent conveyance, respectively. Counts six and seven, directed at Michael J. Flynn, sounded in fraudulent transfer and common-law fraudulent conveyance, respectively. Premier Auto filed a two count counterclaim sounding in intentional misrepresentation and negligent misrepresentation.

In *Mariamma Babu, LLC* v. *Premier Auto, LLC*, Superior Court, judicial district of Hartford, Docket No. CV-20-5066301-S, Mariamma Babu, LLC, brought an action against Premier Auto, Patrick Flynn, and Michael J. Flynn. Counts one and two of the amended complaint, directed at Premier Auto, sounded in breach of commercial lease and unjust enrichment, respectively. Counts three, four, and five, directed at Patrick Flynn, sounded in breach of personal guarantee, fraudulent transfer, and common-law fraudulent conveyance, respectively. Counts six and seven, directed at Michael J. Flynn, sounded in fraudulent transfer and common-law fraudulent conveyance, respectively. Premier Auto filed a two count counterclaim sounding in intentional misrepresentation and negligent misrepresentation.

In *585 Main Street, LLC* v. *Premier Auto, LLC*, Superior Court, judicial district of Hartford, Docket No. CV-20-5066302-S, 585 Main Street, LLC, brought an action against Premier Auto, Patrick Flynn, and Michael J. Flynn. Counts one and two of the amended complaint, directed at Premier Auto, sounded in breach of commercial lease and unjust enrichment, respectively. Counts three, four, and five, directed at Patrick Flynn, sounded in breach of personal guarantee, fraudulent transfer, and common-law fraudulent conveyance, respectively. Counts six and seven, directed at Michael J. Flynn, sounded in fraudulent transfer and common-law fraudulent conveyance, respectively. Premier Auto filed a two count counterclaim sounding in intentional misrepresentation and negligent misrepresentation.

In *Premier Auto, LLC* v. *American Trading Co.*, Superior Court, judicial district of Hartford, Docket No. CV-20-5066305-S, Premier Auto brought an action against American Trading Company, Inc.; Babu & Sons, LLC; Bristol Muffler, Inc.; Vital, Inc.; and Vazhayil Babu. In its revised complaint, Premier

claims by multiple entities concerning the sale by Vazhayil Babu of three businesses as well as associated leases, notes, and guarantee agreements to Premier Auto. On appeal, Premier Auto and Patrick Flynn claim that the trial court abused its discretion when it precluded them from presenting certain evidence. Premier Auto also claims that the court erred in determining that Premier Auto failed to prove its breach of contract cause of action. For the reasons set forth subsequently in this opinion, we conclude that the portion of the appeal concerning the first claim is moot and must be dismissed. With respect to the remaining claim in this appeal, we affirm the judgments of the trial court.

The following facts, as found by the court, *Farley*, *J.*, and procedural history are relevant to the resolution of this appeal. "These four consolidated actions arise out of a purchase and sale agreement for three Meineke auto repair shops, along with two notes associated with the agreement, three commercial leases for the three shop locations in Bristol, Middletown and Monroe, Connecticut, and guarantee agreements associated with the notes and leases. In *Premier Auto, LLC* v. *American Trading Co.*, Superior Court, judicial district of Hartford, Docket No. CV-20-5066305-S, Premier Auto sued several corporate entities[2] that constitute the 'seller' in the purchase and sale agreement as well as the seller's individual 'controlling stockholder'[3] (collectively referred

Auto alleged causes of action sounding in breach of contract, intentional misrepresentation, and negligent misrepresentation. American Trading Company, Inc.; Babu & Sons, LLC; Bristol Muffler, Inc.; Vital, Inc.; and Vazhayil Babu thereafter filed various counterclaims against Premier Auto sounding in breach of contract. On February 18, 2021, Patrick Flynn was cited in as a counterclaim defendant in this action.

In light of the fact that Premier Auto and Patrick Flynn had various party designations at the time of trial, for simplicity we will refer in this opinion to these parties by name, rather than by a party designation.

[2] "The defendant entities are: American Trading Company, Inc.; Babu & Sons, LLC; Bristol Muffler, Inc.; and Vital, Inc. (the 'Babu entities')."

[3] "The individual defendant is Vazhayil Babu ('Babu')."

to as the 'Babu defendants'). The suit alleges a breach of the purchase and sale agreement, intentional misrepresentation, and negligent misrepresentation. The Babu defendants have asserted a counterclaim against Premier Auto and added Patrick Flynn, the guarantor of the notes, as an additional counterclaim defendant. The counterclaim alleges breach of the purchase and sale agreement, the notes and the guarantee. In *Meineke Bristol, LLC* v. *Premier Auto, LLC*, Superior Court, judicial district of Hartford, Docket No. CV-20-5066300-S, *Mariamma Babu, LLC* v. *Premier Auto, LLC*, Superior Court, judicial district of Hartford, Docket No. CV-20-5066301-S, and *585 Main Street, LLC* v. *Premier Auto, LLC*, Superior Court, judicial district of Hartford, Docket No. CV-20-5066302-S, the named plaintiffs (the 'landlord plaintiffs') at the three locations seek to recover past and accelerated rents pursuant to the leases and associated guarantees. They also assert a fraudulent transfer claim against [Patrick] Flynn, the guarantor. Premier Auto and [Patrick] Flynn plead intentional and negligent misrepresentation as a defense and assert counterclaims against the landlord plaintiffs alleging intentional and negligent misrepresentation.

"The case was tried to the court for two days, followed by posttrial briefing. The court finds the issues in favor of the landlord plaintiffs on their claims for breach of the lease agreements and associated guarantees and against Premier Auto and [Patrick] Flynn on the counterclaims asserted in those collection actions. The court finds in favor of [Patrick] Flynn on the fraudulent transfer claims. The court finds in favor of the Babu defendants and against Premier Auto on its breach of contract claim and its intentional and negligent misrepresentation claims in *Premier Auto, LLC* v. *American Trading Co.* and finds in favor of the Babu defendants on their counterclaims in that case for breach of contract against Premier Auto and breach of guarantee

against [Patrick] Flynn."[4] (Footnotes in original.) This

[4] The court set forth its award of damages as follows: "In *Premier Auto, LLC* v. *American Trading Co.*, supra, Superior Court, Docket No. CV-20-5066305-S, the court enters judgment against the plaintiff, Premier Auto, on its complaint and in favor of the defendants against Premier Auto and [Patrick] Flynn as follows on the counterclaims. Judgment enters on count one of the counterclaims against Premier Auto and in favor of American Trading Company, Inc.; Bristol Muffler, Inc.; and Vital, Inc., in the amount of $1 each, plus costs and attorney's fees of $36,727.05. Judgment enters on count one in favor of Babu & Sons, LLC, in the amount of $299,347.08, plus costs and attorney's fees of $36,727.05. Judgment enters on count two of the counterclaims against Premier Auto and in favor of Babu & Sons, LLC, in the amount of $130,368.90. Judgment enters on count three of the counterclaims against Premier Auto and in favor of Babu & Sons, LLC, in the amount of $168,978.18. Judgment enters on count four of the counterclaims against Patrick Flynn and in favor of Babu & Sons, LLC, in the amount of $299,347.08, plus costs and attorney's fees in the amount of $36,727.05. The damages awarded in count four are duplicative of the damages awarded under counts two and three, which, in turn, are duplicative of the damages awarded to Babu & Sons, LLC, on count one. $299,347.08 is the maximum amount Babu & Sons, LLC, may recover from either or both of Premier Auto and [Patrick] Flynn on the counterclaims. The award of attorney's fees is duplicative as to all parties and on all counts and recoverable only once against Premier Auto and/or [Patrick] Flynn.

"In *Meineke Bristol, LLC* v. *Premier Auto, LLC*, supra, Superior Court, Docket No. CV-20-5066300-S, judgment enters in favor of the plaintiff and against the defendants, Premier Auto and Patrick Flynn, on the plaintiff's complaint in the amount of $392,438.45, plus costs and attorney's fees in the amount of $22,196.13, for a total judgment of $414,634.58. The judgment against Premier Auto is duplicative of the judgment against [Patrick] Flynn and may only be recovered up to the amount of $414,634.58 against either or both of them. Judgment enters against Premier Auto on its counterclaims.

"In *Mariamma Babu, LLC* v. *Premier Auto, LLC*, supra, Superior Court, Docket No. CV-20-5066301-S, judgment enters in favor of the plaintiff and against the defendants, Premier Auto and Patrick Flynn, on the plaintiff's complaint in the amount of $647,125.66, plus costs and attorney's fees in the amount of $22,196.13, for a total judgment of $669,321.79. The judgment against Premier Auto is duplicative of the judgment against [Patrick] Flynn and may only be recovered up to the amount of $669,321.79 against either or both of them. Judgment enters against Premier Auto on its counterclaims.

"In *585 Main Street, LLC* v. *Premier Auto, LLC*, supra, Superior Court, Docket No. CV-20-5066302-S, judgment enters in favor of the plaintiff and against the defendants, Premier Auto and Patrick Flynn, on the plaintiff's complaint in the amount of $1,268,213.95, plus costs and attorney's fees in the amount of $22,196.13, for a total judgment of $1,290,410.08. The judgment against Premier Auto is duplicative of the judgment against [Patrick] Flynn

appeal followed. Additional facts and procedural history will be set forth as necessary.

I

Premier Auto and Patrick Flynn first claim that the court abused its discretion when it precluded them from presenting certain evidence at trial. We conclude that this claim is moot.

The following additional facts and procedural history are relevant to this claim. On the second day of trial, Premier Auto attempted to introduce into evidence, through Patrick Flynn's testimony during its case-in-chief, a marketing brochure. Premier Auto and Patrick Flynn represent that this document had been prepared by an agent of the Babu defendants and was given to and relied on by Premier Auto and Patrick Flynn prior to the purchase of the Meineke franchises. It is also undisputed that, contrary to discovery requests and a trial management order, Premier Auto had not produced this document prior to the second day of trial. The Babu defendants and the landlord plaintiffs objected to its admission on several grounds, including lack of authentication, hearsay, and late disclosure. The court sustained the objection.

In its memorandum of decision, the court stated that it excluded the brochure on two grounds: lack of authentication and late disclosure. The court reasoned that "[t]he circumstances under which the brochure was produced, in the middle of the trial even though it ostensibly constituted the heart of the proponents' case, without any authentication by either the Babu [defendants] or [their broker, Ken] Stein, left the authenticity of the materials in question. Principally, however, the court excluded these materials because they should

and may only be recovered up to the amount of $1,290,410.08 against either or both of them. Judgment enters against Premier Auto on its counterclaims."

have been produced long before the trial and, at a minimum, when the parties submitted their compliance with the trial management order. [Patrick] Flynn testified that after the first day of evidence he 'realized the importance of spending additional time trying to locate a copy' of the brochure. He should have realized its importance when responding to discovery and preparing exhibits for trial. The Babu defendants . . . were prejudiced by the failure of Premier Auto and [Patrick] Flynn to locate and produce this material sooner than halfway through the trial. The Babu defendants had no fair and reasonable opportunity to investigate and defend a claim based on this material."

The court expressly relied on two independent legal grounds in precluding the evidence at issue. In their appellate brief, Premier Auto and Patrick Flynn merely assert that their late disclosure of the brochure could not have prejudiced the Babu defendants because it was prepared by a third party on the Babu defendants' behalf. Thus, Premier Auto and Patrick Flynn challenge the court's ruling on only one ground, that the evidence was prejudicial due to its untimely disclosure. Premier Auto and Patrick Flynn do not challenge the court's conclusion that the evidence was not properly authenticated.

"[W]here alternative grounds found by the reviewing court and unchallenged on appeal would support the trial court's judgment, independent of some challenged ground, the challenged ground that forms the basis of the appeal is moot because the court on appeal could grant no practical relief to the complainant." (Internal quotation marks omitted.) *Horenian* v. *Washington*, 128 Conn. App. 91, 99, 15 A.3d 1194 (2011); see also *Bongiorno* v. *J & G Realty, LLC*, 211 Conn. App. 311, 322, 272 A.3d 700 (2022).

Therefore, because the appellants have not challenged on appeal each independent ground for excluding the proffered exhibit, we cannot grant them any practical relief with respect to their first claim. Accordingly, we dismiss the portion of the appeal related to that claim as moot.

II

Premier Auto next claims that the court erred in determining that it failed to prove its breach of contract cause of action. We decline to reach the merits of this claim because Premier Auto has failed to provide an adequate record for review.

The following factual and procedural history is relevant to our resolution of this claim. One of the core factual disputes at trial was whether certain tax returns containing adverse financial information about the Meineke franchises were disclosed to Patrick Flynn. Patrick Flynn testified that there was never any such disclosure from either the Babu defendants or Stein. Premier Auto claimed before the trial court that the failure to disclose these materials amounted to a breach of the purchase and sale agreement. The Babu defendants argued that the records were turned over to Stein with the direction for them to be given to Premier Auto and Patrick Flynn. Stein was not called to testify at trial, and no other evidence as to whether the tax returns were disclosed was presented. In its memorandum of decision, the court "[found] the evidence in equipoise, requiring the conclusion that Premier Auto failed to carry its burden on the issue." Premier Auto now argues that the evidence was not in equipoise and, in actuality, "the evidence of nondisclosure was clear and unequivocal."

"Factual findings are subject to a clearly erroneous standard of review. . . . It is well established that [a] finding of fact will not be disturbed unless it is clearly

erroneous in view of the evidence and pleadings in the whole record. . . . 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 . . . . Our authority, when reviewing the findings of a judge, is circumscribed by the deference we must give to decisions of the trier of fact, who is usually in a superior position to appraise and weigh the evidence. . . . The question for this court . . . is not whether it would have made the findings the trial court did, but whether in view of the evidence and pleadings in the whole record it is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *J. M.* v. *E. M.*, 216 Conn. App. 814, 820–21, 286 A.3d 929 (2022).

"A determination regarding whether the court's finding was clearly erroneous requires that we review all of the evidence presented to the trial court, including the testimony of the witnesses. Thus, the transcript of the trial is necessary on appeal in order to properly evaluate whether the evidence presented to the trial court supports the court's conclusion . . . .

"[An appellant] has the burden of providing this court with a record from which this court can review any alleged claims of error. . . . Practice Book § 61-10 (a) provides: It is the responsibility of the appellant to provide an adequate record for review. . . . The general purpose of [the relevant] rules of practice . . . [requiring the appellant to provide a sufficient record] is to ensure that there is a trial court record that is adequate for an informed appellate review of the various claims presented by the parties. . . . It is not an appropriate function of this court, when presented with an inadequate record, to speculate as to the reasoning of the trial court or to presume error from a silent record."

(Citations omitted; internal quotation marks omitted.) Id., 821–22.

In the present case, on May 18, 2023, Premier Auto and Patrick Flynn, through their counsel, filed with the Office of the Appellate Clerk a certificate regarding transcripts indicating that, "pursuant to Practice Book § 63-4 (3) . . . no transcript is deemed necessary for this appeal." Our rules of practice, nevertheless, permit a party to include "portions of the transcript" in the appendix to their briefs. See Practice Book § 67-8 (a).[5] In the appendix to its principal brief, Premier Auto provided this court with a portion of the trial transcripts from the July 13 and 14, 2022 trial dates.[6] Premier Auto describes these excerpts as being taken from the testimony of Patrick Flynn and Babu. These excerpts, however, do not provide this court with a complete record of the testimony of these witnesses.[7]

In connection with a claim that requires this court to review the evidence presented at trial, we do not merely rely on an appellant's characterization of the evidence or review only the portions of the evidence on which it relies. Instead, we must consider the evidence as a whole, including evidence of a testimonial nature. In the absence of a complete transcript, we would have to resort to speculation to resolve Premier

[5] Practice Book § 67-8 provides in relevant part: "(a) . . . A party appendix may be used: (1) to include excerpts from exhibits; (2) to include excerpts from the transcripts deemed necessary by any parties pursuant to Section 63-4 (a) (3); (3) to provide other items from the proceeding below that a party deems necessary for the proper presentation of the issues on appeal; or (4) to comply with other provisions of the rules of practice that require the inclusion of certain materials in the party appendix. . . ."

[6] Specifically, Premier Auto submitted seven pages of the July 13, 2022 transcript and nine pages of the July 14, 2022 transcript.

[7] We note that Meineke Bristol, LLC, filed an appellee's brief in this appeal and, in the appendix to its brief, also included portions of the trial transcripts of July 13 and 14, 2022. These additional excerpts of the transcripts do not alter our conclusion that the record is inadequate for review.

Auto's claim that the court erred in determining that it failed to prove its breach of contract cause of action. See *Maye* v. *Canady*, 214 Conn. App. 455, 461, 280 A.3d 1270, cert. denied, 345 Conn. 919, 284 A.3d 627 (2022); see also *R & P Realty Co.* v. *Peerless Indemnity Ins. Co.*, 193 Conn. App. 374, 380, 219 A.3d 429 (2019) ("[i]n the absence of transcripts *of the entire trial*, we cannot evaluate the plaintiffs' arguments in support of their appellate claim without resorting to speculation" (emphasis added)). Accordingly, we are unable to address the merits of this claim because Premier Auto has not provided this court with an adequate record for review.

The portion of the appeal challenging the preclusion of certain evidence is dismissed; the judgments are affirmed in all other respects.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* ANTHONY CRUZ
(AC 45685)

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

Syllabus

Convicted of the crimes of assault in the first degree, criminal possession of a firearm and carrying a pistol without a permit, the defendant appealed to this court, claiming that his constitutional rights to confrontation and a fair trial were violated as a result of misrepresentations made by the state in moving to join his case for trial with that of his codefendant, J. The defendant and J had entered an apartment in which C was staying and engaged in an altercation with him, during which the defendant shot C, and C stabbed J with a knife. A police detective, F, interviewed J twice. During trial, the state informed the court that it intended to offer as consciousness of guilt evidence against J a recording of only J's first interview with the police. That recording was admitted into evidence during the state's direct examination of F, and the state did not thereafter question F about the second interview or offer the recording of that interview into evidence. On cross-examination, in response to an open-ended question by defense counsel, F testified that, during the second interview, J had identified the defendant and had

stated that the defendant was in C's apartment at the time of the shooting. The court denied the defendant's motion to strike F's answer but expressed concern about F's reference to the second interview, of which the jury previously had been unaware. The court then approved an agreement between the parties, under which they would each elicit limited testimony from F about the second interview. F further testified that J had later identified the defendant from a photographic array the police had prepared. During closing argument, the state relied on F's testimony as substantive evidence of the defendant's culpability. *Held* that the defendant could not prevail on his unpreserved claim that the joinder of his case with J's case for trial was improper because the state had misrepresented that the evidence in the two cases was cross admissible: it was only after F had referenced J's second interview with the police in a truthful, responsive answer to defense counsel's open-ended question on cross-examination about the police investigation that the state relied on that interview as substantive evidence against the defendant; moreover, at no point prior to that cross-examination did the state use, or suggest an intention to use, the second interview against the defendant, and the defendant abandoned any challenge to the court's denial of his motion to strike F's testimony by failing to brief a claim of error as to that issue; furthermore, defense counsel expressly agreed to the procedure approved by the trial court that permitted the state to introduce limited portions of J's second interview through F's redirect testimony, and defense counsel failed to raise any objection to the agreement on the record.

Argued March 6—officially released July 30, 2024

Procedural History

Substitute information charging the defendant with the crimes of assault in the first degree, conspiracy to commit assault in the first degree, criminal possession of a firearm, criminal use of a firearm, and carrying a pistol without a permit, brought to the Superior Court in the judicial district of Hartford, where the court, *Gold*, *J.*, granted the state's motion to join for trial the defendant's case with that of a codefendant; thereafter, the case was tried to the jury before *Gold*, *J.*; verdict of guilty of assault in the first degree, criminal possession of a firearm, criminal use of a firearm and carrying a pistol without a permit; subsequently, the court vacated the verdict as to the charge of criminal use of a firearm; judgment of guilty of assault in the first degree,

criminal possession of a firearm and carrying a pistol without a permit, from which the defendant appealed to this court. *Affirmed.*

Adele V. Patterson, for the appellant (defendant).

James A. Killen, senior assistant state's attorney, with whom, on the brief, were *Sharmese L. Hodge*, state's attorney, and *Emily Dewey Trudeau*, senior assistant state's attorney, for the appellee (state).

Opinion

MOLL, J. The defendant, Anthony Cruz, appeals from the judgment of conviction, rendered after a jury trial, of assault in the first degree in violation of General Statutes § 53a-59 (a) (5), criminal possession of a firearm in violation of General Statutes (Rev. to 2019) § 53a-217, and carrying a pistol without a permit in violation of General Statutes (Rev. to 2019) § 29-35 (a). On appeal, the defendant claims that the state made certain purported misrepresentations in moving to join his case with a codefendant's case that resulted in an improper joinder of the cases and violated his constitutional rights to confrontation and to a fair trial pursuant to the sixth and fourteenth amendments to the United States constitution. We disagree and, accordingly, affirm the judgment of conviction.

The following facts, which the jury reasonably could have found, and procedural history are relevant to our resolution of the defendant's claim. Sometime prior to September 10, 2019, an incident occurred between the defendant and Marcelo Campos. Specifically, Campos witnessed the defendant attempting to get into Campos' car because the defendant believed that Campos had stolen liquor from him. Campos called the police to report the defendant, but the defendant was not arrested in connection with this incident.

During the early morning hours of September 10, 2019, Campos was at an apartment located at 433 Zion Street in Hartford (apartment), which was situated above a bodega owned by the defendant's family. Campos, who was living out of his car at the time, previously had been permitted by the owner of the building to stay in the apartment; however, Campos did not have permission to be at the apartment that morning.

While on the back porch of the apartment, Campos observed a group of individuals outside, one of whom was carrying a gun. Campos went into the apartment, looked out of a window, and saw the group in front of the building, at which point he recognized the defendant as the individual holding the gun. Thereafter, the group gained entry to the building, ascended the stairs, and entered the apartment. At some point, the defendant told Campos, "you're mine, motherfucker." Two of the other individuals in the group, including Jamal Johnson, approached Campos and started swinging at him. Campos, who was armed with two knives, stabbed Johnson. During this tussle, the defendant shot Campos. Following the gunshot, Johnson and the other individual who had been attacking Campos dispersed, with one of them stating, "not here, Ant." The defendant then shot Campos a second time and fled. Campos managed to call 911 and was taken to Hartford Hospital (hospital) to be treated for his injuries, which resulted, inter alia, in the removal of his spleen and a portion of his small intestine.

That same day, Johnson arrived at the hospital to receive treatment for his stab wounds. While at the hospital, Johnson told a police officer who had been dispatched to investigate his stabbing that he had been stabbed in the vicinity of 465 Zion Street in Hartford, which was approximately four or five buildings north

of the apartment, by an unidentified male who had approached him asking for money.

On September 30, 2019, two members of the Hartford Police Department, including Detective Philip Fuschino, interviewed Johnson (first interview). During the first interview, which was recorded, Johnson initially maintained his narrative that an unidentified male stabbed him in the area of 465 Zion Street. Johnson's account changed as the first interview progressed, with Johnson later stating that (1) an unknown assailant had stabbed him downstairs from the apartment (i.e., 433 Zion Street), (2) he chased the assailant upstairs into the apartment, (3) he fought with the assailant, and (4) he exited the apartment after hearing a gunshot. At no point during the first interview did Johnson name the defendant or identify the shooter.

On October 8, 2019, the defendant was arrested in connection with Campos' shooting. Subsequently, on January 3, 2020, Johnson was arrested vis-à-vis Campos' shooting. On the day of his arrest, Johnson was interviewed for a second time by Fuschino and another detective (second interview). During the second interview, which was also recorded, Johnson stated that (1) he knew the defendant by the nickname "Ant," (2) he and the defendant entered the apartment on September 10, 2019, "to fuck up" Campos, and (3) before they had entered the apartment, the defendant was "talking about all the problems he had with Campos . . . ." Johnson never indicated during the second interview that he saw the defendant with a gun or witnessed the defendant shoot at Campos. Subsequently, Johnson picked the defendant out of a photographic array prepared by the police.

In its operative long form information against the defendant, dated April 11, 2022, the state charged the defendant with (1) assault in the first degree in violation

of § 53a-59 (a) (5), (2) conspiracy to commit assault in the first degree in violation of General Statutes §§ 53a-48 and 53a-59 (a) (5), (3) criminal possession of a firearm in violation of General Statutes (Rev. to 2019) § 53a-217, (4) criminal use of a firearm in violation of General Statutes § 53a-216, and (5) carrying a pistol without a permit in violation of General Statutes (Rev. to 2019) § 29-35 (a). In its operative information against Johnson, dated April 11, 2022, the state charged Johnson with conspiracy to commit assault in the first degree in violation of §§ 53a-48 and 53a-59 (a) (5).[1]

On March 1, 2022, pursuant to Practice Book § 41-19,[2] the state filed a motion for joinder of the defendant's case with Johnson's case for trial. The state asserted in relevant part that (1) the defendant and Johnson were "charged with conspiring to assault the same victim, for the same motive, at the same time and place," (2) "[a]ll evidence against one defendant, to include witness testimony, would be used in an identical manner against the other," and (3) "the proffered defenses raised by [the defendant's trial counsel (defense counsel) and Johnson's trial counsel (Johnson's counsel)] are not in conflict, as [the defendant and Johnson] each alleged to have not been present for the shooting, and

[1] In prior informations read to the jury during the first day of trial on April 7, 2022, the state also charged the defendant and Johnson each with conspiracy to commit assault in the first degree in violation of §§ 53a-48 and 53a-59 (a) (4). On April 11, 2022, the trial court, *Gold*, *J.*, determined that these conspiracy charges were precluded by Wharton's rule, which "provides that [a]n agreement by two persons to commit a particular crime cannot be prosecuted as a conspiracy when the crime is of such a nature as to necessarily require the participation of two persons for its commission." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Jones*, 35 Conn. App. 839, 849, 647 A.2d 43 (1994). Thereafter, the state filed its operative informations, which omitted these conspiracy charges.

[2] Practice Book § 41-19 provides: "The judicial authority may, upon its own motion or the motion of any party, order that two or more informations, whether against the same defendant or different defendants, be tried together."

to have no idea as to the identity of the shooter." On March 3, 2022, the trial court, *Gold*, *J.*, held a hearing on the motion for joinder. The court summarized that the "motion sets forth the fact that the evidence is the same, in many respects, as to both [the defendant and Johnson]. Both [the defendant and Johnson] have been charged in connection with the same incident. The state represents that the defenses that will be raised by . . . Johnson and [the defendant] are not, in any way, antagonistic. Nor will they require the jury to reject one in order to find the other." Defense counsel and Johnson's counsel did not object to the motion. The court further inquired whether there was any concern about the possibility that the defendant's and Johnson's respective defenses would be mutually antagonistic. Defense counsel and Johnson's counsel responded that they did not discern any risk of presenting antagonistic defenses. The court, without objection, granted the motion for joinder.[3]

On March 24, 2022, the court held a hearing to address outstanding pretrial motions. The state requested that the court address any preliminary objections to exhibits set forth in a proposed exhibit list that the state had circulated to the court and to opposing counsel. In response, defense counsel stated: "I can make it easy for you. I don't have objections to anything." The court then inquired whether the state intended to introduce "Johnson's statement . . . ." The state represented that it planned to offer recordings of the first and second interviews as consciousness of guilt evidence, not for

[3] On March 22, 2022, prior to jury selection, the court summarized the hearing on the motion for joinder, stating in relevant part that it had (1) granted the motion without objection and (2) been "assured by [defense counsel and Johnson's counsel] that they saw no potential for [obstacles to joinder] occurring, anything in the nature of inconsistent defenses." Additionally, at the outset of the first day of trial on April 7, 2022, the court iterated that the respective cases against the defendant and Johnson had been joined without objection.

the truth of the matter asserted, against Johnson only. The state further stated that a limiting instruction preceding the playbacks of the first and second interviews "would be appropriate just because of any potential *Crawford*[4] issues as they relate to [the defendant]." (Footnote added.) With regard to the second interview, the state represented that Johnson "maintain[ed] that [the defendant] did not have a weapon and was not the shooter and that [the shooter] was a third party unknown to both of them." In light of that representation, defense counsel did not object to the admission of the second interview as proffered by the state. With the consent of defense counsel and Johnson's counsel, the court indicated that it would review the first and second interviews in advance of trial.

The joined cases were tried to a jury on April 7, 8 and 11, 2022. Prior to the start of evidence on April 7, 2022, and outside of the jury's presence, the following colloquy occurred between the court and defense counsel regarding the second interview:

"The Court: . . . Johnson in [the second interview] could be seen . . . to some degree [to] implicate [the defendant] in the crimes by putting [the defendant] at the scene of the crime at the time of the crime. I did not hear anything specific that . . . Johnson said that [the defendant] was involved in the shooting or that he possessed the handgun. I think, in fact, [Johnson] said he did not see [the defendant] with a handgun. But [Johnson] does say [the defendant] was . . . at the scene of the crime at the time of the shooting. So, to the extent that will assist the state, one might see that

[4] "In *Crawford* v. *Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), the United States Supreme Court held that testimonial hearsay is admissible against a criminal defendant at trial only if the defendant had a prior opportunity for cross-examination and the witness is unavailable to testify at trial." *State* v. *Armadore*, 186 Conn. App. 140, 148, 198 A.3d 586 (2018), aff'd, 338 Conn. 407, 258 A.3d 601 (2021).

as somewhat of a *Bruton*[5] problem that could warrant a severance. But it's my understanding that you have no objection to that statement being played, and you continue to have no objection to the joinder of these cases. Am I correct in my understanding?

"[Defense Counsel]: One hundred percent correct.

"The Court: One hundred percent correct. All right. So, you're not seeking those statements made by Johnson that put [the defendant] at the scene to be redacted. Correct?

"[Defense Counsel]: No, sir.

"The Court: And you are not seeking, because of those statements, to have the matter severed?

"[Defense Counsel]: That's correct." (Footnote added.)

On April 8, 2022, outside of the jury's presence, the state informed the court that it intended to offer the first interview as consciousness of guilt evidence, but it did not plan to offer the second interview. Later that day, the state called Fuschino as a witness. During Fuschino's direct examination, the court, without objection, admitted the first interview in full, which was played for the jury. The state did not question Fuschino

[5] "[I]n [*Bruton* v. *United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968)], the United States Supreme Court held that a defendant is deprived of his rights under the confrontation clause [of the sixth amendment to the United States constitution] when his codefendant's incriminating confession is introduced at their joint trial, even if the jury is instructed to consider that confession only against the codefendant. The *Bruton* court held that the admission of the codefendant's statements added substantial, perhaps even critical weight to the [g]overnment's case [against the defendant] in a form not subject to cross-examining, since [the codefendant] did not take the stand, and therefore, [the defendant] had been denied his rights of confrontation. . . . In *Bruton* . . . the court emphasized that it was dealing with a case in which the hearsay statement inculpating [the defendant] was clearly inadmissible against him under traditional rules of evidence." (Citation omitted; internal quotation marks omitted.) *State* v. *Robertson*, 254 Conn. 739, 765, 760 A.2d 82 (2000).

regarding the second interview or offer the second interview.

On cross-examination, defense counsel questioned Fuschino about the police investigation into Campos' shooting. During cross-examination, the following colloquy occurred between defense counsel and Fuschino:

"[Defense Counsel]: Okay. So, at the end of the day, you have . . . Campos telling you that [the defendant] is responsible for shooting him, right?[6]

"[Fuschino]: Correct.

"[Defense Counsel]: That there is no other independent evidence whatsoever that would support that other than [Campos'] worth?

"[Fuschino]: Well, during the second interview of . . . Johnson, he identified [the defendant]." (Footnote added.)

Defense counsel immediately moved to strike Fuschino's answer. The state objected, arguing that Fuschino's answer was responsive to defense counsel's question. After excusing the jury, the court stated that defense counsel had asked an "open-ended question" regarding evidence that the police had gathered connecting the defendant to Campos' shooting, to which Fuschino had provided a responsive answer. The court then expressed concern about Fuschino's reference to the second interview, of which the jury previously had been unaware, and indicated that additional action was required to address the issue. The court reserved to the next trial date its ruling on the motion to strike and its consideration of how to rectify the issue caused by Fuschino's testimony.

[6] On September 23, 2019, Campos provided a statement to Fuschino identifying the defendant as the shooter.

On April 11, 2022, outside of the jury's presence, the court denied the motion to strike Fuschino's testimony, determining that Fuschino "did respond appropriately to the question that had been posed by [defense counsel]." Nevertheless, the court determined that it was "incumbent upon [the court] to find some way to protect the rights of [the defendant and Johnson] on one hand, [and] the state's on the other by limiting the extent to which there can be follow up to that." The court then delineated, for the record, an off-the-record agreement reached with counsel (agreement), pursuant to which (1) Fuschino would resume the witness stand, (2) the court would repeat the last two questions that defense counsel had posed to Fuschino and Fuschino's attendant answers, (3) the court would explain to the jury that (a) Johnson had participated in a second interview with the police on the day of his arrest, which interview was conducted by Fuschino, along with another detective, largely in the same fashion as the first interview, and (b) the second interview would not be played for the jury, but counsel would be permitted to ask a few narrow questions regarding the second interview, (4) defense counsel would ask two leading questions to Fuschino about the second interview, reflecting that Johnson never indicated that he saw the defendant either (a) with a gun or (b) shoot Campos, and (5) the state would be afforded an opportunity for redirect examination, which, insofar as it delved into the second interview, would be limited to asking leading questions indicating that (a) Johnson and the defendant entered the apartment to " 'fuck . . . Campos up,' " (b) Johnson referred to the defendant by the nickname "Ant," (c) Johnson selected the defendant's photograph out of an array of photographs prepared by the police, and (d) the defendant "had issues" with Campos. The court noted that it was "trying to find a way to almost thread a needle allowing enough evidence in so as to offset

any suggestion that there was no other evidence against [the defendant] but, at the same time, not allowing that single [question] to throw open the door completely to allow, in essence, the whole second interview . . . to come in." Defense counsel affirmed that he did not object to this procedure.

Before recalling the jury, the court reviewed proposed jury instructions with counsel. In discussing a proposed instruction regarding consciousness of guilt with respect to the first interview, the court inquired whether the instruction should also apply to the evidence concerning the second interview that would be adduced pursuant to the agreement. The state responded that it was seeking to use evidence vis-à-vis the second interview as substantive evidence against the defendant because it was defense counsel who had brought the second interview to the jury's attention. The court responded: "Yeah. I mean, I guess that's going to be argued by all sides substantively." Defense counsel did not object or otherwise interject during this discussion.

After the jury had returned to the courtroom, in accordance with the agreement, the court provided the jury with additional information concerning the second interview. Thereafter, Fuschino resumed the witness stand. On cross-examination, Fuschino testified that, during the second interview, Johnson never indicated that he saw the defendant either (1) with a gun or (2) fire a weapon at Campos. On redirect examination, Fuschino testified that, during the second interview, Johnson stated that (1) he knew the defendant by the nickname "Ant," (2) he and the defendant entered the apartment "to fuck up . . . Campos," and (3) before entering the apartment, the defendant "was talking about all the problems he had with Campos . . . ." Fuschino further testified that Johnson later picked out the defendant from a photographic array.

During its closing argument and rebuttal, the state relied on the second interview as substantive evidence incriminating the defendant. Thereafter, in charging the jury, the court provided a consciousness of guilt instruction as to the first interview and instructed the jury that it could not consider that evidence with respect to the charges against the defendant. The court's jury instructions did not expressly refer to the second interview.

On April 12, 2022, the jury found the defendant guilty of the charges of assault in the first degree, criminal possession of a firearm, criminal use of a firearm, and carrying a pistol without a permit; however, the jury acquitted him of the conspiracy to commit assault in the first degree charge. As to Johnson, the jury found him not guilty of the conspiracy to commit assault in the first degree charge. On July 12, 2022, after vacating the defendant's conviction of criminal use of a firearm,[7] the court sentenced the defendant to a total effective sentence of thirteen years of incarceration followed by seven years of special parole. This appeal followed.

On the basis of the defendant's appellate briefs, we decipher the crux of the defendant's claim to be that the joinder of his case with Johnson's case was improper and his constitutional rights to confrontation and to a fair trial were violated as a result of the state's purported misrepresentations, in moving for joinder,

[7] The court vacated the criminal use of a firearm conviction on the basis of its determination that, pursuant to § 53a-216 and *State* v. *Hardy*, 85 Conn. App. 708, 858 A.2d 845 (2004), aff'd, 278 Conn. 113, 896 A.2d 755 (2006), the defendant could not be convicted "on both [the criminal use of a firearm] charge and the underlying charge, which, in this case, would be the assault in the first degree [charge]." See General Statutes § 53a-216 (a) ("[n]o person shall be convicted of criminal use of a firearm . . . and the underlying felony upon the same transaction but such person may be charged and prosecuted for both such offenses upon the same information"); *State* v. *Hardy*, supra, 712–13 (reversing judgment of conviction of criminal use of firearm when defendant was convicted of both criminal use of firearm and underlying felony of robbery in first degree).

that the evidence in the respective cases against the defendant and Johnson was cross admissible. The defendant asserts that, following the grant of the motion for joinder, the state improperly relied on the second interview, which was inadmissible as to the defendant, to support its case against the defendant. The defendant maintains that, in line with its representations in support of the motion for joinder, the state should have taken action to prevent the second interview from being admitted at trial, or to minimize the effect of the admission of any portion thereof, by, for instance, agreeing with defense counsel's motion to strike Fuschino's testimony and requesting a curative instruction.[8]

Conceding that his claim is unpreserved, the defendant seeks review of his unpreserved claim pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). "Pursuant to *Golding*, a [defendant] 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 [defendant] of a fair trial; and (4) if subject to harmless error analysis, the [state] has failed to demonstrate harmlessness of the alleged

[8] The state frames the defendant's appeal as raising a claim of prosecutorial impropriety. See *State* v. *Cusson*, 210 Conn. App. 130, 164, 269 A.3d 828 ("It is well established that [i]n analyzing claims of prosecutorial [impropriety], we engage in a two step analytical process. The two steps are separate and distinct: (1) whether [impropriety] occurred in the first instance; and (2) whether that [impropriety] deprived a defendant of his due process right to a fair trial." (Internal quotation marks omitted.)), cert. denied, 343 Conn. 913, 274 A.3d 114 (2022). The defendant refutes this construction of his claim and clarified during oral argument before this court that he was not specifically raising such a claim. On the basis of this acknowledgment and our interpretation of the defendant's claim, we conclude that the prosecutorial impropriety framework is inapplicable here.

constitutional violation beyond a reasonable doubt. . . . 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 Gabriella M.*, 221 Conn. App. 827, 836, 303 A.3d 319, cert. denied, 348 Conn. 925, 304 A.3d 443 (2023). We conclude that the defendant's unpreserved claim is reviewable, as (1) the record is adequate for review and (2) the claim is of constitutional magnitude alleging violations of fundamental rights. We further conclude, however, that the defendant's claim fails on the merits under the third prong of *Golding* because he has failed to demonstrate that the claimed violations of his constitutional rights occurred.

We begin by setting forth the following principles regarding the joinder of cases pursuant to Practice Book § 41-19, which permits a judicial authority to "order that two or more informations, whether against the same defendant or different defendants, be tried together." "[T]he argument for joinder is most persuasive when the offenses are based [on] the same act or criminal transaction, since it seems unduly inefficient to require the state to resolve the same issues at numerous trials. . . . In contrast, when the cases are not of the same character, the argument for joinder is far less compelling because the state must prove each offense with separate evidence and witnesses [thus] eliminat[-ing] any real savings in time or efficiency which might otherwise be provided by a single trial. . . . Further, [a] joint trial expedites the administration of justice, reduces the congestion of trial dockets, conserves judicial time, lessens the burden [on] citizens who must sacrifice both time and money to serve [on] juries, and avoids the necessity of recalling witnesses who would otherwise be called to testify only once. . . .

"Although joint trials may serve to conserve judicial resources, we note that trials may not be joined if a substantial injustice is likely to result unless a separate trial be accorded. . . . A separate trial will be ordered [when] the defenses of the accused are antagonistic, or evidence will be introduced against one which will not be admissible against others, and it clearly appears that a joint trial will probably be prejudicial to the rights of one or more of the accused. . . . We also note that [t]he phrase prejudicial to the rights of the [accused] means something more than that a joint trial will probably be less advantageous to the accused than separate trials." (Citations omitted; internal quotation marks omitted.) *State* v. *Tyus*, 342 Conn. 784, 796–97, 272 A.3d 132 (2022). "[W]e will reverse a trial court's ruling on joinder only [when] the trial court commits an abuse of discretion that results in manifest prejudice to one or more of the defendants. . . . [I]n deciding whether to [join informations] for trial, the trial court enjoys broad discretion, which, in the absence of manifest abuse, an appellate court may not disturb." (Citation omitted; internal quotation marks omitted.) Id., 797–98.

We conclude that the constitutional violations claimed by the defendant are not supported by the record. Contrary to the defendant's position, the state did not misrepresent its intentions vis-à-vis the second interview in the motion for joinder. The second interview was not referenced expressly either in the motion for joinder or during the March 3, 2022 hearing prior to the court's grant of the motion. During the pretrial hearing on March 24, 2022, the state notified the court and opposing counsel that it planned to offer the first and second interviews at trial; however, per the state's proffer, the first and second interviews would be offered as consciousness of guilt evidence against Johnson only. On the second day of trial, the state represented to the court and opposing counsel that it did not intend to

offer the second interview, and, in accord with that representation, the state neither questioned Fuschino on direct examination about the second interview nor offered the second interview.

The record further reflects that, while questioning Fuschino on cross-examination regarding the police investigation into Campos' shooting, defense counsel elicited testimony from Fuschino that, for the first time, alerted the jury to the existence of the second interview and Johnson's identification of the defendant during that interview. After the state objected to defense counsel's motion to strike Fuschino's testimony on the ground that Fuschino's answer was responsive to the question asked, the state adduced additional portions of the second interview through Fuschino's testimony, as permitted pursuant to the agreement, and substantively relied on the second interview in arguing its case against the defendant.

As the record demonstrates, at no point prior to the cross-examination of Fuschino by defense counsel did the state use, or suggest an intention to use, the second interview as evidence, substantively or otherwise, against the defendant. It was only after Fuschino, in a truthful, responsive answer[9] to defense counsel's question on cross-examination,[10] referenced the second interview that the state sought to rely on the second interview as substantive evidence in prosecuting the

[9] It is undisputed that Fuschino answered defense counsel's question truthfully.

[10] Before setting forth the terms of the agreement on the record on April 11, 2022, the court stated that it "want[ed] to make it clear that the court [was] in no way criticizing . . . Fuschino for responding as he did. As [the court] said, [Fuschino's answer] was responsive to the question that [defense counsel] had posed." The defendant does not claim on appeal that the court improperly determined that Fuschino's testimony was responsive. Indeed, as the defendant's appellate counsel conceded on appeal, the defendant has not briefed a claim of error asserting that the court's denial of the motion to strike was improper.

defendant's case. It cannot reasonably be inferred from the state's reliance on the second interview following defense counsel's cross-examination of Fuschino that it made misrepresentations vis-à-vis the motion for joinder. Instead, we conclude that defense counsel's line of questioning on cross-examination opened the door for the state to utilize the second interview against the defendant. See *State* v. *Mark T.*, 339 Conn. 225, 236, 260 A.3d 402 (2021) ("Generally, a party who delves into a particular subject during the examination of a witness cannot object if the opposing party later questions the witness on the same subject. . . . The party who initiates discussion on the issue is said to have opened the door to rebuttal by the opposing party." (Internal quotation marks omitted.)).

Our conclusion that the state did not make misrepresentations vis-à-vis the motion for joinder is bolstered by two additional considerations. First, by failing to brief a claim of error with regard to the denial of the motion to strike Fuschino's testimony; see footnote 10 of this opinion; the defendant has abandoned any claim challenging the court's decision to allow Fuschino's initial testimony regarding the second interview to remain in evidence. See *White* v. *Latimer Point Condominium Assn., Inc.*, 191 Conn. App. 767, 777 n.6, 216 A.3d 830 (2019) (appellant's failure to brief claim results in abandonment of claim). Second, after having denied the motion to strike, the court set forth the terms of the agreement, which authorized the state, through Fuschino's testimony on redirect examination, to introduce limited portions of the second interview. Defense counsel expressly affirmed that he agreed to the procedure detailed in the agreement, and defense counsel did not raise any objection to the agreement on the record. See *State* v. *Andres C.*, 208 Conn. App. 825, 854, 266 A.3d 888 (2021) ("When a party consents to or

expresses satisfaction with an issue at trial, claims arising from that issue are deemed waived and may not be reviewed on appeal. . . . [W]e do not look with favor on parties requesting, or agreeing to, an instruction or a procedure to be followed, and later claiming that that act was improper." (Internal quotation marks omitted.)), aff'd, 349 Conn. 300, 315 A.3d 1014 (2024). Under these circumstances, the defendant has not asserted a viable claim that his constitutional rights were violated stemming from the state's representations in support of the motion for joinder.

In sum, we conclude that the defendant has failed to demonstrate that violations of his constitutional rights occurred as required under the third prong of *Golding*.[11]

The judgment is affirmed.

In this opinion the other judges concurred.

---

[11] In the alternative, the defendant requests reversal of the judgment of conviction pursuant to the plain error doctrine. "The plain error doctrine is based on Practice Book § 60-5, which provides in relevant part: The court shall not be bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial. The court may in the interests of justice notice plain error not brought to the attention of the trial court. . . . The plain error doctrine is reserved for truly extraordinary situations [in which] the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings. . . . A party cannot prevail under [the] plain error [doctrine] unless [he] has demonstrated that the failure to grant relief will result in manifest injustice." (Internal quotation marks omitted.) *Lafferty* v. *Jones*, 225 Conn. App. 552, 572 n.26, 316 A.3d 742 (2024). For the same reasons that we reject his claim under the third prong of *Golding*, we conclude that the defendant has not "met the stringent standard for relief pursuant to the plain error doctrine." (Internal quotation marks omitted.) Id.

BANK OF NEW YORK MELLON, SUCCESSOR TRUSTEE *v.* WADE H. HORSEY II ET AL.
(AC 46167)

Elgo, Clark and Lavine, Js.

Syllabus

Pursuant to the rule of practice (§ 61-11 (g)), "[i]n any action for foreclosure in which the owner of equity has filed, and the court has denied, at least two prior motions to open or other similar motion, no automatic stay shall arise upon the court's denial of any subsequent contested motion by that party, unless the party certifies under oath, in an affidavit accompanying the motion, that the motion was filed for good cause arising after the court's ruling on the party's most recent motion. . . ."

The substitute plaintiff sought to foreclose a mortgage on certain real property owned by the defendants W and J. The trial court rendered a judgment of strict foreclosure, which W appealed to this court. This court affirmed the judgment and remanded the case for the purpose of setting new law days. W then filed his first motion to open and vacate the judgment of strict foreclosure, which the trial court denied. J appealed to this court, which affirmed the judgment and remanded the case for the purpose of setting new law days. The trial court denied W's second motion, captioned "Motion for Judgment of Dismissal for Lack of Standing and Lack of Subject Matter Jurisdiction," and W appealed to this court, which dismissed the appeal. The trial court denied W's third motion, captioned "Motion for Void Judgment," and reset the law days. W and J then filed a motion to set aside the judgment resetting the law days. On the date the law days were set to commence, W and J filed the present appeal from the trial court's inaction on their motion to set aside the judgment. The next day, the trial court denied that motion, and W and J filed an amended appeal from that decision. *Held* that this court could not grant W and J any practical relief, and, accordingly, the appeal was dismissed as moot: W's first, second and third motions constituted "at least two prior motions to open or other similar motion" under the plain meaning of Practice Book § 61-11 (g) and, accordingly, because no automatic stay arose on the trial court's denial of the motion to set aside the judgment and the filing of the appeal therefrom, the law days had passed, and title to the property had vested absolutely in the substitute plaintiff; moreover, the motion to set aside the judgment did not have an accompanying affidavit, as required by § 61-11 (g), that set forth that the motion was filed for good cause that arose after the trial court's ruling on W's third motion.

Argued February 15—officially released July 30, 2024

Procedural History

Action to foreclose a mortgage on certain real property owned by the named defendant et al., and for other relief, brought to the Superior Court in the judicial district of Hartford, where The Bank of New York Mellon, successor trustee, was substituted as the plaintiff; thereafter, the court, *Dubay, J.*, granted the substitute plaintiff's motion for a judgment of strict foreclosure and rendered judgment thereon, from which the named defendant appealed to this court, *Prescott*, *Elgo* and *Bright*, *Js.*, which affirmed the judgment of the trial court and remanded the case for the purpose of setting new law days; subsequently, the court, *Dubay*, *J.*, denied the named defendant's motion to open the judgment, and the defendant Jacquelyn Costa Horsey appealed to this court, *Prescott*, *Elgo* and *Suarez*, *Js.*, which affirmed the judgment of the trial court and remanded the case for the purpose of setting new law days; thereafter, the court, *Budzik*, *J.*, denied the named defendant's motion for a judgment, and the named defendant appealed to this court, which dismissed the appeal; subsequently, the court, *Baio*, *J.*, denied the named defendant's motion for a void judgment and reset the law days; thereafter, the named defendant et al. appealed to this court from the trial court's inaction on their motion to set aside the judgment of the trial court resetting the law days; subsequently, the court, *Baio*, *J.*, denied the motion to set aside the judgment filed by the named defendant et al., and the named defendant et al. filed an amended appeal. *Appeal dismissed.*

Thomas P. Willcutts, for the appellants (defendants).

Geoffrey K. Milne, for the appellee (substitute plaintiff).

Opinion

LAVINE, J. In this protracted foreclosure matter, the defendants Wade H. Horsey II and Jacquelyn Costa

Horsey[1] appeal from the judgment of the trial court denying their motion to set aside the court's judgment of strict foreclosure rendered in favor of the substitute plaintiff, The Bank of New York Mellon, as Successor Trustee for JPMorgan Chase Bank, N.A., as Trustee for Novastar Mortgage Funding Trust, Series 2005-2 Novastar Home Equity Loan Asset-Backed Certificates, Series 2005-2. The dispositive issue in this appeal is whether the defendants filed "at least two prior motions to open or other similar motion" pursuant to Practice Book § 61-11 (g),[2] such that an automatic appellate stay did not apply to toll the running of the law days. We conclude that no automatic stay was triggered by operation of § 61-11 (g), and, thus, the law days have passed, divesting the defendants of their interest in the property, and title to the property has vested in the substitute plaintiff. Accordingly, this court can provide the defendants no practical relief, and we dismiss this appeal as moot.

In order to place this matter in proper context, a detailed recitation of its procedural history must be provided. The following facts and procedural history, as set forth in this court's decision in *Bank of New York Mellon* v. *Horsey*, 182 Conn. App. 417, 190 A.3d 105, cert. denied, 330 Conn. 928, 194 A.3d 1195 (2018), or as otherwise undisputed, are relevant to our disposition

[1] Sovereign Bank also was named as a defendant in the foreclosure action but has not appealed from the judgment of foreclosure or participated in the present appeal. Because only Wade Horsey and Jacquelyn Horsey have participated in this appeal, all references herein to the defendants are to the Horseys collectively, and we refer to them individually by first name when appropriate.

[2] Practice Book § 61-11 (g) provides in relevant part: "In any action for foreclosure in which the owner of the equity has filed, and the court has denied, at least two prior motions to open or other similar motion, no automatic stay shall arise upon the court's denial of any subsequent contested motion by that party, unless the party certifies under oath, in an affidavit accompanying the motion, that the motion was filed for good cause arising after the court's ruling on the party's most recent motion. . . ."

of the present appeal. "The original plaintiff, The Bank of New York Mellon, as Successor Trustee under Novastar Mortgage Funding Trust 2005-2, commenced this action in September, 2009 . . . [seeking] to foreclose on a mortgage that the defendant[s] had executed in 2005 on property in Avon as security for a note in the principal amount of $390,000.[3] The original plaintiff alleged that it was the holder of the note and mortgage and that the note was in default for nonpayment. . . .

"Foreclosure mediation began and continued through the end of 2010. Over the following year and a half, the parties filed a number of motions related to discovery. On September 26, 2012, the original plaintiff assigned the mortgage to the substitute plaintiff, which the court substituted into the action for the original plaintiff on November 19, 2012." (Citation omitted; footnote in original.) Id., 421–22.

After the defendants filed their answer on October 9, 2013, "[n]o further activity in the action occurred until April 17, 2015, at which time the defendant[s] filed a motion pursuant to Practice Book § 14-3 asking the court to render a judgment of dismissal on the ground that the substitute plaintiff had failed to prosecute the action with reasonable diligence. The court, *Vacchelli*, *J.*, issued an order on May 6, 2015, denying the defendant[s'] motion, but directing the substitute plaintiff to move for summary judgment or to take some other action to advance the case within sixty days. The court

[3] "The note originally was executed by the defendant[s] in favor of Novastar Mortgage, Inc. (Novastar), and the mortgage securing the note was executed in favor of Mortgage Electronic Registration Systems, Inc. (MERS), as nominee for Novastar and its successors and assigns. In October, 2008, MERS assigned the mortgage to the original plaintiff. The note was endorsed from Novastar to JPMorgan Chase Bank, N.A., the original trustee of the Novastar Mortgage Funding Trust 2005-2, and then from JPMorgan Chase Bank, N.A., to the substitute plaintiff as the successor trustee." *Bank of New York Mellon* v. *Horsey*, supra, 182 Conn. App. 421 n.2.

indicated that, if the substitute plaintiff failed to comply, the court would entertain a renewed motion to dismiss.

"The substitute plaintiff filed a motion for summary judgment as to liability only on December 21, 2015. Along with its motion, the substitute plaintiff submitted copies of the note, the mortgage and assignments, and an affidavit averring, inter alia, that the substitute plaintiff was the holder of the note and the mortgagee of record . . . . [Wade] filed an objection to the motion for summary judgment on February 29, 2016. He did not attach an affidavit or any other evidence that disputed factually the summary judgment submissions of the substitute plaintiff. . . .

"The court, *Robaina*, *J.*, heard argument on the motion for summary judgment on March 21, 2016. On April 14, 2016, the court issued orders, without comment . . . overruling [Wade's] objection to the motion for summary judgment. The court also issued the following order granting the motion for summary judgment as to liability only: '[I]t is hereby found that no genuine issue of material fact exists as to the defendants' liability on the note and mortgage. . . . Determination of the amount of indebtedness is deferred until such time as [the substitute] plaintiff seeks a judgment of foreclosure.'

"On April 19, 2016, [Wade] filed an appeal from the court's April 14, 2016 orders granting the motion for summary judgment as to liability and denying his motion for a disciplinary dismissal of the action. The substitute plaintiff filed with this court a motion to dismiss that appeal for lack of a final judgment. The motion was granted on May 25, 2016. . . . On July 20, 2016, the substitute plaintiff reclaimed for the short calendar list its April 23, 2010 motion seeking a judgment of strict foreclosure.

"On August 1, 2016, the parties appeared before the court, *Noble*, *J.*, on the court's dormancy docket. The court had issued a notice to appear and show cause on March 18, 2016, prior to the hearing on the motion for summary judgment, directing the parties to appear to address the status of the case and indicating that 'the court may dismiss this action at the hearing.' The court first heard from counsel for the substitute plaintiff, who indicated that the substitute plaintiff was ready to proceed to judgment but was awaiting the return of the original note and other documents necessary to secure the judgment," as those documents were in the possession of a law firm that the substitute plaintiff had previously hired to represent it in this action. (Citations omitted; footnotes omitted.) Id., 422–25. Wade then "brought to the court's attention that he previously had filed a motion to dismiss for lack of diligence and that the substitute plaintiff had failed to comply with the court's order directing the substitute plaintiff to take some action to advance the case within sixty days. . . . [A]fter confirming that the case had been on the docket since 2009, the court . . . dismissed the action." Id., 425.

The substitute plaintiff filed a motion to open and set aside the judgment of dismissal, arguing that "it had filed and reclaimed a motion for a judgment of strict foreclosure prior to the court's dismissal . . . ." Id. The court granted the motion to open, then considered the motion for a judgment of strict foreclosure. Id., 426. After determining the fair market value of the property and the amount of debt owed, the court rendered a judgment of strict foreclosure and set law days to commence on November 28, 2016. Id., 428.

Wade then appealed to this court, claiming, among other things, that the substitute plaintiff lacked standing to prosecute this action. Id., 440. This court rejected that claim and concluded, on the basis of the record

presented, "that [Wade] failed to rebut the presumption that the substitute plaintiff ha[d] standing to prosecute this action as the holder of the note and mortgage." Id. Accordingly, this court affirmed the judgment of the trial court and remanded the case for the purpose of setting new law days. Id., 445.

On December 20, 2018, the substitute plaintiff filed a motion in the trial court to reset the law days in accordance with this court's remand order. On February 22, 2019, before the court ruled on the motion to reset the law days, Wade filed a motion to open and vacate the judgment of strict foreclosure. In his motion, Wade claimed that the original plaintiff lacked standing at the inception of the case to pursue the foreclosure action. Wade further argued that, when he raised the issue of standing in his objection to the substitute plaintiff's motion for summary judgment, the court should have held an evidentiary hearing to determine whether the original plaintiff was the holder of the note at the time the action was commenced or whether the mortgage loan servicer was otherwise entitled to enforce the note.

On March 26, 2019, the court, *Sheridan*, *J.*, denied Wade's motion to open the judgment because it was "untimely and fail[ed] to demonstrate good cause to open the judgment of strict foreclosure entered on September 12, 2016, which judgment was affirmed by [the] Appellate Court on appeal." Wade filed a motion to reargue and reconsider the denial of the motion to open, which the court, *Dubay*, *J.*, denied. The court then reset the law days to commence on May 28, 2019.

On May 10, 2019, Jacquelyn appealed to this court from the judgment of strict foreclosure and the trial court's denial of Wade's February 22, 2019 motion to open. In a per curiam decision, this court affirmed the judgment of the trial court and remanded the case for

the purpose of setting new law days. *Bank of New York Mellon* v. *Horsey*, 210 Conn. App. 904, 267 A.3d 994, cert. denied, 343 Conn. 909, 273 A.3d 696 (2022).

On June 3, 2022, the substitute plaintiff filed a motion in the trial court to reset the law days in accordance with this court's remand order. That same day, Wade filed a motion captioned "Motion for Judgment of Dismissal for Lack of Standing and Lack of Subject Matter Jurisdiction." In that motion, Wade again argued that the original plaintiff lacked standing at the time the foreclosure action was commenced because it was not the owner of the note or mortgage when the action was initiated. Wade argued that any affidavits attesting otherwise were "fraudulent and forgeries attempting to mislead the Superior Court," and that "[t]he jurisdictional defect resulting from the [original] plaintiff's lack of standing cannot be cured by amending the complaint to add a party having standing." On this basis, Wade requested that the court dismiss the case with prejudice.

The court, *Budzik*, *J.*, denied Wade's motion for judgment on July 11, 2022, "[f]or the reasons stated in the [substitute] plaintiff's objection to the underlying motion"[4] and "because the issues raised by [Wade] in his motion as to standing and fraud have already been decided by the Appellate Court. See *Bank of New York Mellon* v. *Horsey*, [supra, 182 Conn. App. 444–45]."

On July 18, 2022, Wade appealed to this court. This court dismissed the appeal as untimely as to the September 12, 2016 judgment and for lack of a final judgment as to the July 11, 2022 order.[5]

[4] In the memorandum accompanying its objection to Wade's motion, the substitute plaintiff explained how it had standing and raised arguments about the law of the case doctrine, as Wade had already raised multiple, nearly identical prior challenges to subject matter jurisdiction that were resolved by the court in favor of the substitute plaintiff.

[5] The trial court had not yet ruled on the substitute plaintiff's June 3, 2022 motion to reset the law days in accordance with this court's remand order in *Bank of New York Mellon* v. *Horsey*, supra, 210 Conn. App. 904, and, therefore, no law days were scheduled at the time of the appeal from the

On November 4, 2022, Wade filed a motion captioned "Motion for Void Judgment." In the motion, Wade again raised a claim of fraud and a claim of lack of standing, arguing, inter alia, that Novastar Mortgage, Inc., continued to own the note and there was no evidence presented about the circumstances of the alleged transfer of the note to the original plaintiff. On this basis, Wade requested that the court "render any decisions in this case to be consider[ed] void and the case be dismissed."

On November 14, 2022, while that motion was still pending, the trial court, *Baio*, *J.*, reset the law days to commence on January 10, 2023. The court then denied Wade's "Motion for Void Judgment" on November 21, 2022, explaining that "[t]his motion comes well after the judgment was entered in this matter, the judgment affirmed by the Appellate Court and remanded for the sole purpose of resetting the law day . . . and subsequent appeal dismissed by order dated [September 28, 2022] . . . . That new law day was set in accordance with the Appellate Court remand following the denial of the petition for [certification] and by direction upon the remand."

On December 28, 2022, the defendants filed a motion to set aside the November 14, 2022 judgment of the court resetting the law days. The defendants argued that the judgment should be set aside on the basis of our Supreme Court's decision in *Bank of New York Mellon* v. *Tope*, 345 Conn. 662, 286 A.3d 891 (2022), which had been released one week earlier and addressed the issue of establishing standing in a foreclosure action.[6] The defendants, who previously were self-represented, were represented by Thomas P. Willcutts,

July 11, 2022 order. See *Connecticut National Bank* v. *L & R Realty*, 40 Conn. App. 492, 493, 671 A.2d 1315 (1996) (setting of law days is necessary for final judgment in strict foreclosure action).

[6] Specifically, in *Tope*, our Supreme Court explained that, "to establish standing to foreclose on the defendant's property, the plaintiff needed to prove that it was the holder of the note or one who was otherwise entitled to enforce the note." *Bank of New York Mellon* v. *Tope*, supra, 345 Conn.

the attorney for the prevailing party in *Tope*, for the filing of this motion.[7] Significantly, the motion was not accompanied by an affidavit in which the defendants certified under oath that the motion was filed for good cause arising after the court's ruling on Wade's most recent motion, pursuant to Practice Book § 61-11 (g).

On January 10, 2023, the date that the law days were set to commence, the defendants filed the present appeal from "[t]he court's inaction" on their December 28, 2022 motion to set aside the judgment. The following day, the court, *Baio*, *J.*, denied the defendants' motion to set aside the judgment, and the defendants filed an amended appeal from that decision.

On January 5, 2024, this court ordered both parties to submit supplemental briefs "addressing (1) whether, in light of [Wade's] filing of 'at least two motions to open or other similar motion' on February 22, 2019, June 3, 2022, and November 4, 2022, which all were denied by the trial court prior to the filing of the December 28, 2022 motion to set aside that is the subject of this appeal, an automatic appellate stay remained in effect pursuant to Practice Book § 61-11 (g) when the law days were scheduled to commence on January 10,

679–80. The court also explained that "being in possession of the note does not make one a 'holder' of a note when the note has a special endorsement to a different party," and, therefore, if the plaintiff is not the holder of the note, "the plaintiff can enforce the note only if it can demonstrate that it is a nonholder in possession of the note with the rights of a holder. . . . To do so, the plaintiff must prove that the transferor delivered the note to the plaintiff intending to vest in it the right to enforce the instrument." (Citation omitted.) Id., 681. Our Supreme Court concluded that, because the question of the plaintiff's standing in that case "turn[ed] on questions of fact, namely, whether the plaintiff has been vested with the right to enforce the note, the trial court should not have denied the motion to open but should have conducted an evidentiary hearing to determine whether the plaintiff had standing to bring the foreclosure action in the present case." Id., 682–83.

[7] The defendants continue to be represented by Attorney Willcutts on appeal to this court.

2023, and (2) if no appellate stay was in effect at that time, why the present appeal should not be dismissed as moot in light of *Citigroup Global Markets Realty Corp.* v. *Christiansen*, 163 Conn. App. 635, 137 A.3d 76 (2016), and *Barclays Bank of New York* v. *Ivler*, 20 Conn. App. 163, 565 A.2d 252, [cert. denied, 213 Conn. 809, 568 A.2d 792] (1989)."

In its supplemental brief, the substitute plaintiff argues that the present appeal should be dismissed as moot because, pursuant to Practice Book § 61-11 (g), an automatic appellate stay was not in effect to prevent the law days from passing, and, accordingly, title had vested irrevocably in the substitute plaintiff. In the defendants' supplemental brief, they argue that the appeal is not moot. Specifically, the defendants argue that "none of the . . . cited motions satisfy the criteria and stated purpose of a § 61-11 (g) motion," and, therefore, an automatic appellate stay was in effect to prevent the law days from passing. We conclude that the present appeal is moot, and, accordingly, we dismiss the appeal for lack of subject matter jurisdiction.

"Mootness is a question of justiciability that must be determined as a threshold matter because it implicates [this] court's subject matter jurisdiction. . . . Because courts are established to resolve actual controversies, before a claimed controversy is entitled to a resolution on the merits it must be justiciable . . . . Justiciability requires (1) that there be an actual controversy between or among the parties to the dispute . . . (2) that the interests of the parties be adverse . . . (3) that the matter in controversy [is] capable of being adjudicated by judicial power . . . and (4) that the determination of the controversy will result in practical relief to the complainant. . . . A case is considered moot if [the court] cannot grant the appellant any practical relief through its disposition of the merits . . . . Because

mootness implicates this court's subject matter jurisdiction, it raises a question of law over which we exercise plenary review. . . .

"It is a well-settled general rule that the existence of an actual controversy is an essential requisite to appellate jurisdiction; it is not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow. . . . *An actual controversy must exist not only at the time the appeal is taken, but also throughout the pendency of the appeal.* . . . When, during the pendency of an appeal, events have occurred that preclude an appellate court from granting any practical relief through its disposition of the merits, a case has become moot." (Emphasis in original; internal quotation marks omitted.) *Speer* v. *Norwich*, 216 Conn. App. 883, 887–88, 287 A.3d 612 (2022), cert. denied, 346 Conn. 914, 290 A.3d 375 (2023).

This court "ha[s] routinely dismissed appeals by defendants in foreclosure actions as being moot once title to the property had vested in the plaintiff. The dispositive question in those contexts is whether the law days have run so as to extinguish the defendant's equity of redemption and vest title absolutely in the plaintiff. . . . If the law days have run, no practical relief [could] follow from a determination of the merits of [the] case . . . ." (Citation omitted; internal quotation marks omitted.) *DXR Finance Parent, LLC* v. *Theraplant, LLC*, 223 Conn. App. 362, 372, 309 A.3d 347, cert. denied, 348 Conn. 957, 310 A.3d 380 (2024); see also *U.S. Bank National Assn.* v. *Rothermel*, 339 Conn. 366, 375, 260 A.3d 1187 (2021) ("[i]n Connecticut, the passage of the law days in an action for strict foreclosure extinguishes a mortgagor's equitable right of redemption and vests absolute title in the encum-

brancer"). Accordingly, except in limited circumstances,[8] "it is not within the power of appellate courts to resuscitate the mortgagor's right of redemption or otherwise to disturb the absolute title of the redeeming encumbrancer." *Barclays Bank of New York* v. *Ivler*, supra, 20 Conn. App. 166–67; see also *Connecticut National Mortgage Co.* v. *Knudsen*, 323 Conn. 684, 687 n.5, 150 A.3d 675 (2016) ("an appeal from a judgment of strict foreclosure is moot when the law days pass, the rights of redemption are cut off, and title becomes unconditional in the plaintiff" (internal quotation marks omitted)); *DXR Finance Parent, LLC* v. *Theraplant, LLC*, supra, 372 ("once title has vested absolutely in the mortgagee, the mortgagor's interest in the property is extinguished and cannot be revived by a reviewing court" (internal quotation marks omitted)).

An automatic appellate stay may operate to toll the running of the law days. See Practice Book § 61-11 (a). Section 61-11 (g) addresses the issue of how many times a defendant in a strict foreclosure action is entitled to an automatic stay while appealing denials of motions to open or other similar motions. *Deutsche Bank National Trust Co.* v. *Fraboni*, 182 Conn. App. 811, 828, 191 A.3d 247 (2018). Titled "Strict foreclosure—motion rendering ineffective a judgment of strict foreclosure," § 61-11 (g) provides in relevant part: "In any action for foreclosure in which the owner of the equity has filed, and the court has denied, at least two prior motions to open or other similar motion, no automatic stay shall arise

[8] "[O]ur Supreme Court and this court have recognized that [courts possess] inherent powers to provide limited forms of continuing equitable relief after the passage of the law days in 'rare and exceptional' cases . . . ." *U.S. Bank National Assn.* v. *Booker*, 220 Conn. App. 783, 799, 299 A.3d 1215, cert. denied, 348 Conn. 927, 304 A.3d 860 (2023). "The category of claims that fall within this class of cases sound in [f]raud, accident, mistake, and surprise . . . . These are rare exceptions, applicable only in unusual circumstances." (Citations omitted; internal quotation marks omitted.) *DXR Finance Parent, LLC* v. *Theraplant, LLC*, supra, 223 Conn. App. 374–35.

upon the court's denial of any subsequent contested motion by that party, unless the party certifies under oath, in an affidavit accompanying the motion, that the motion was filed for good cause arising after the court's ruling on the party's most recent motion. . . ." The application of § 61-11 (g) may result in the dismissal of an appeal because, "[w]hen no automatic appellate stay is in effect, there is nothing to prevent the law days from passing, rendering a pending appeal from a judgment of strict foreclosure moot." *Connecticut National Mortgage Co.* v. *Knudsen*, supra, 323 Conn. 687; see *Citigroup Global Markets Realty Corp.* v. *Christiansen*, supra, 163 Conn. App. 640 (dismissing appeal on basis of conclusion that no automatic appellate stay was in effect to prevent law days from passing, pursuant to application of § 61-11 (g), which rendered appeal moot).

In the present case, the defendants argue that Wade's February 22, 2019, June 3, 2022, and November 4, 2022 motions did not qualify as "at least two prior motions to open or other similar motion" under Practice Book § 61-11 (g) and, therefore, an automatic appellate stay was in effect to prevent the law days from passing. Specifically, the defendants contend that (1) the prior motions would not have rendered the judgment ineffective, which is required under the plain meaning of § 61-11 (g), and (2) interpreting § 61-11 (g) to include the prior motions at issue would not serve the purpose of that rule, as set forth in our case law, because "none of the . . . motions had the effect of creating an appellate stay, such as would nullify a law day set by the court in its judgment of strict foreclosure," and, thus, they "did not create the repetitive appellate stays that § 61-11 (g) is designed to prevent."[9] We disagree.

[9] The defendants also focus on Wade's self-represented status at the time that he filed the February 22, 2019, June 3, 2022, and November 4, 2022 motions, arguing that "[t]he proposed interpretation of [Practice Book] § 61-11 (g) operates to create both surprise and injustice, particularly when applied to a [self-represented] litigant." Although "[i]t is the established policy of the Connecticut courts to be solicitous of [self-represented] litigants

"The interpretive construction of the rules of practice is to be governed by the same principles as those regulating statutory interpretation. . . . In seeking to determine [the] meaning [of a statute or a rule of practice, we] . . . first . . . consider the text of the statute [or rule] itself and its relationship to other statutes [or rules]. . . . 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 . . . shall not be considered. . . . When [the provision] is not plain and unambiguous, we also look for interpretive guidance to the . . . history and circumstances surrounding its enactment, to the . . . policy it was designed to implement, and to its relationship to existing [provisions] and common law principles governing the same general subject matter . . . . We recognize that terms [used] are to be assigned their ordinary meaning, unless context dictates otherwise. . . . Put differently, we follow the clear meaning of unambiguous rules, because [a]lthough we are directed to interpret liberally the rules of practice, that liberal construction applies only to situations in which a strict adherence to them [will] work surprise or injustice." (Citations omitted; internal quotation marks omitted.) *Meadowbrook Center, Inc.* v. *Buchman*, 328 Conn. 586, 594–95, 181 A.3d 550 (2018).

We first turn to the text of Practice Book § 61-11 (g), which provides in relevant part that, if a defendant in

and when it does not interfere with the rights of other parties to construe the rules of practice liberally in favor of the [self-represented] party"; (internal quotation marks omitted) *Lowthert* v. *Freedom of Information Commission*, 220 Conn. App. 48, 57, 297 A.3d 218 (2023); we note that the defendants were represented by counsel in filing their December 28, 2022 motion to set aside that is the subject of this appeal, and it was at that time that they should have considered the applicability of § 61-11 (g) and whether to file an affidavit of good cause to accompany that motion. Moreover, "[a]lthough we allow [self-represented] litigants some latitude, the right of self-representation provides no attendant license not to comply with relevant rules of procedural and substantive law." (Internal quotation marks omitted.) Id.

a strict foreclosure action has filed, and the court has denied, "at least two prior motions to open or other similar motion, no automatic stay shall arise upon the court's denial of any subsequent contested motion by that party," unless that motion is accompanied by an affidavit of good cause.[10]

Our appellate courts have not yet fully examined the exact parameters of what constitutes a "[motion] to open or other similar motion" for purposes of Practice Book § 61-11 (g). This court has indicated, however, that a motion to reargue or reconsider a denial of a motion to open would qualify as one of the prior motions included under that provision. See *Lending Home Funding Corp.* v. *REI Holdings, LLC*, 214 Conn. App. 703, 719 n.18, 281 A.3d 1 (2022) ("the first motion to reargue/reconsider the court's denial of the first motion to open was only the second 'motion to open or other similar motion' filed subsequent to the judgment of strict foreclosure" pursuant to Practice Book § 61-11 (g)). In addition, Practice Book § 63-1 (c) (1), which governs the creation of new appeal periods, provides guidance as to what types of motions, like a motion to open, would render a judgment ineffective:

[10] Although the defendants focus on the language in the title of Practice Book § 61-11 (g), directed at "motion[s] rendering ineffective a judgment of strict foreclosure," our review of the plain meaning of that rule is not so limited. "Although the title of a statute provides some evidence of its meaning, the title is not determinative of its meaning. . . . Our Supreme Court has stated that boldface catchlines in the titles of statutes . . . are intended to be informal brief descriptions of the contents of the [statutory] sections. . . . These boldface descriptions should not be read or considered as statements of legislative intent since their sole purpose is to provide users with a brief description of the contents of the sections. . . . Moreover, the title of a statute cannot trump an interpretation that is based on an analysis of the statutory . . . language and purpose." (Citation omitted; internal quotation marks omitted.) *Coyle* v. *Commissioner of Revenue Services*, 142 Conn. App. 198, 203, 69 A.3d 310 (2013), appeal dismissed, 312 Conn. 282, 91 A.3d 902 (2014) (certification improvidently granted); see id., 205 (looking to substance of statutory language rather than language of title of statute for purpose of statutory interpretation).

"Motions that, if granted, would render a judgment, decision or acceptance of the verdict ineffective include, but are not limited to, motions that seek: the opening or setting aside of the judgment; a new trial; the setting aside of the verdict; judgment notwithstanding the verdict; reargument of the judgment or decision; collateral source reduction; additur; remittitur; or any alteration of the terms of the judgment. . . ." Practice Book § 63-1 (c) (1).

We conclude that Wade's February 22, 2019, June 3, 2022, and November 4, 2022 motions constitute "at least two prior motions to open or other similar motion" under the plain meaning of Practice Book § 61-11 (g). Wade himself explicitly designated his February 22, 2019 motion as a motion to open, seeking to open and vacate the judgment of strict foreclosure, which clearly falls within the ambit of § 61-11 (g). In addition, although Wade titled his June 3, 2022 motion as a "Motion for Judgment of Dismissal for Lack of Standing and Lack of Subject Matter Jurisdiction" and his November 4, 2022 motion as a "Motion for Void Judgment," our review of the substance of those motions and the relief sought therein leads us to conclude that they are the functional equivalents of motions to open.

"[O]ur case law has recognized that a motion is to be decided on the basis of the substance of the relief sought rather than on the form or the label affixed to the motion. . . . It is the substance of a motion, therefore, that governs its outcome, rather than how it is characterized in the title given to it by the movant." (Internal quotation marks omitted.) *Hebrand* v. *Hebrand*, 216 Conn. App. 210, 219, 284 A.3d 702 (2022); see also *Cocchia* v. *Testa*, 206 Conn. App. 634, 644, 261 A.3d 90 (2021) (evaluating "content and substance" of motion).

In the present case, the substance of the arguments contained within the June 3 and November 4, 2022

motions, like the February 22, 2019 motion to open, was that the trial court lacked subject matter jurisdiction over the present action because the original plaintiff was not the holder of the note and therefore lacked standing to commence the action. In addition, although characterized differently, Wade's prior motions sought essentially the same relief—to "vacate," "void," or "dismiss" the judgment. The content of the motions and the nature of the relief sought is consistent with motions to open filed in other cases. See, e.g., *Bank of New York Mellon* v. *Tope*, supra, 345 Conn. 669–70 (defendant filed motion to open seeking to vacate judgment of foreclosure by sale on basis of claim that court lacked subject matter jurisdiction because plaintiff was not holder of note and did not have standing to commence action); *Deutsche Bank National Trust Co.* v. *Pardo*, 170 Conn. App. 642, 645, 155 A.3d 764 (defendant filed motion to open judgment of strict foreclosure on same basis), cert. denied, 325 Conn. 912, 159 A.3d 231 (2017); see also *U.S. Bank Trust, N.A.* v. *Healey*, 224 Conn. App. 867, 868, 315 A.3d 1112 (2024) (defendants filed motion to open seeking to "dismiss" judgment); *Myrtle Mews Assn., Inc.* v. *Bordes*, 125 Conn. App. 12, 13, 6 A.3d 163 (2010) (defendant filed motion to open judgment of strict foreclosure claiming judgment was "void" because court lacked personal jurisdiction). Because the prior motions at issue are all, in effect, motions to open, they comprise "at least two prior motions to open or other similar motion" under the plain meaning of Practice Book § 61-11 (g).

Moreover, we are not persuaded by the defendants' argument that applying Practice Book § 61-11 (g) to the present case on the basis of the prior motions at issue would not serve the purpose of that rule. Our Supreme Court and this court have explained that § 61-11 (g) was enacted "to put a stop to the ' "perpetual motion

machine" '[11] and accompanying appellate litigation generated when a defendant files serial motions to open a judgment of strict foreclosure and, each time a motion to open is denied, files a new appeal from the judgment denying the motion to open." (Footnote in original.) *Connecticut National Mortgage Co.* v. *Knudsen*, supra, 323 Conn. 687; see also *First Connecticut Capital, LLC* v. *Homes of Westport, LLC*, 112 Conn. App. 750, 762, 966 A.2d 239 (2009). If we accept the defendants' arguments, we would, in effect, be inviting them to submit an endless series of creatively labeled motions, all seeking the same goal—opening the judgment.

Considering the repetitive nature of the February 22, 2019, June 3, 2022, and November 4, 2022 motions, which continued to delay the finality of the judgment, we conclude that they are precisely the types of motions that Practice Book § 61-11 (g) intended to address. In reaching this conclusion, we emphasize that the present action was commenced nearly fifteen years ago and that the judgment of strict foreclosure was rendered nearly eight years ago. The February 22, 2019 and June 3, 2022 motions generated additional appellate litigation,[12] as discussed in *Connecticut National Mortgage*

[11] " 'Prior to [the effective date of Practice Book § 61-11 (g)], a defendant in a foreclosure action could employ consecutive motions to open the judgment in tandem with Practice Book §§ 61-11 and 61-4 "to create almost the perfect perpetual motion machine.' " *Citigroup Global Markets Realty Corp.* v. *Christiansen*, [supra, 163 Conn. App. 639]." *Connecticut National Mortgage Co.* v. *Knudsen*, supra, 323 Conn. 687 n.7.

[12] As explained previously in this opinion, Jacquelyn appealed following the denial of Wade's February 22, 2019 motion, and Wade appealed following the denial of his June 3, 2022 motion.

The defendants did not appeal from the denial of Wade's November 4, 2022 motion, and, thus, that motion did not result in an appellate stay or the resetting of the law days, as the defendants argue. Nevertheless, it was still the type of motion that could have generated the additional appellate litigation discussed in *Connecticut National Mortgage Co.* v. *Knudsen*, supra, 323 Conn. 687, given that it was, in effect, a motion to open, as discussed previously in this opinion.

Co. v. *Knudsen*, supra, 323 Conn. 687, and were followed by the setting of new law days.[13] Indeed, all three motions, which were effectively "serial motions to open a judgment of strict foreclosure," created a "perpetual motion machine" employed by the defendants, which § 61-11 (g) was designed to prevent. (Internal quotation marks omitted.) Id. Accordingly, applying § 61-11 (g) to the present case on the basis of the prior motions at issue serves the purpose of that rule.

Because we conclude that Wade filed, and the trial court denied, "at least two prior motions to open or other similar motion" pursuant to Practice Book § 61-11 (g), we further conclude that no automatic appellate stay arose upon the court's denial of the defendants' December 28, 2022 motion to set aside the judgment and the filing of the appeal therefrom. As noted, the defendants' December 28, 2022 motion to set aside the judgment did not have an accompanying affidavit, and, therefore, the motion did not meet the requirement contained in § 61-11 (g) to set forth a good cause that arose after the court's ruling on Wade's most recent motion. See *Citigroup Global Markets Realty Corp.* v. *Christiansen*, supra, 163 Conn. App. 640. Thus, the law days have passed, and title has vested absolutely in the substitute plaintiff. See id., 642. Accordingly, we cannot grant the defendants any practical relief and must dismiss the appeal as moot.

The appeal is dismissed.

In this opinion the other judges concurred.

[13] The defendants focus on the fact that the appeal following the denial of the June 3, 2022 motion did not result in an appellate stay that automatically suspended or nullified any law days. That is not, however, attributable to the nature or the character of the June 3, 2022 motion. Instead, the trial court delayed resetting the law days that were nullified by the appeal from the February 22, 2019 motion until after the resolution of the June 3, 2022 motion and its accompanying appeal, and, thus, there were no law days scheduled at the time of the appeal from the June 3, 2022 motion.

Cumulative Table of Cases
Connecticut Appellate Reports
Volume 227

Bank of New York Mellon *v.* Horsey 94
Foreclosure; motion to set aside judgment; mootness; whether defendants filed at least two motions to open or similar motions pursuant to applicable rule of practice (§ 61-11 (g)) prior to filing their motion to set aside judgment; whether automatic appellate stay applied to toll running of law days; whether appeal was moot because this court could not provide defendant any practical relief after law days had passed and title to property had vested in plaintiff.
585 Main Street, LLC *v.* Premier Auto, LLC (See Meineke Bristol, LLC *v.* Premier Auto, LLC) 64
Gateway Development/East Lyme, LLC *v.* Duong 38
Summary process; claim that trial court improperly concluded that plaintiff sublessor was not required to provide defendant sublessees with pretermination notice and opportunity to cure default for nonpayment of rent pursuant to terms of sublease agreement; claim that trial court improperly relied on terms of sublease agreement and failed to consider evidence of parties' course of performance in its interpretation of agreement.
Mariamma Babu, LLC *v.* Premier Auto, LLC (See Meineke Bristol, LLC *v.* Premier Auto, LLC) 64
Meineke Bristol, LLC *v.* Premier Auto, LLC 64
Breach of contract; mootness; whether failure to challenge trial court's alternative ground for excluding certain evidence at trial rendered portion of appeal moot; whether plaintiff provided adequate record to review its claim that trial court erred in determining that it failed to prove its breach of contract claim.
Premier Auto, LLC *v.* American Trading Co. (See Meineke Bristol, LLC *v.* Premier Auto, LLC) 64
State *v.* Brelsford 53
Motion for sentence modification; whether trial court abused its discretion in finding that defendant had failed to establish good cause to modify his sentence pursuant to statute (§ 53a-39).
State *v.* Cruz 75
Assault first degree; criminal possession of firearm; carrying pistol without permit; motion for joinder; unpreserved claim that defendant's rights to confrontation and fair trial were violated when state misrepresented in motion to join for trial defendant's case with case against codefendant that evidence in both cases was cross admissible.
Walters *v.* Servidio 1
Express easement; implied easement; obstruction of easement; trespass; slander of title; nuisance or disturbance of right pursuant to statute (§ 47-41); claim that trial court improperly determined that plaintiffs could not prevail on their claims of express easement, easement by implication, or obstruction of purported easement with regard to defendants' property; claim that trial court improperly determined that any implied easement rights granted to plaintiffs by property map were extinguished pursuant to Marketable Record Title Act (§ 47-33b et seq.); claim that trial court improperly determined that defendants prevailed on counts of counterclaim alleging trespass, slander of title, and violation of § 47-41.

SUPREME COURT PENDING CASES

The following appeal is fully briefed and eligible for assignment by the Supreme Court in the near future.

STATE OF CONNECTICUT *v.* JANE DOE, SC 21029
Judicial District of New London at G.A. 21

Criminal; Competency; Whether Confinement at Maximum Security Psychiatric Hospital Was "Least Restrictive Placement" for Restoring Defendant to Competency to Stand Trial for Non-Violent Misdemeanor Charge. In November, 2023, police were dispatched to a hotel to respond to a report of a woman refusing to leave the premises after being denied a room due to lack of a valid form of identification. The defendant attempted to leave the premises upon arrival of the police, but officers detained her and instructed that she would be arrested if she did not provide the officers with identification. The defendant refused, and, as a result, she was arrested and ultimately charged with one count of interfering with an officer in violation of General Statutes § 53a-167a (a), a class A misdemeanor, as well as an infraction for failure to comply with a fingerprint request in violation of General Statutes § 29-17. A subsequent search of her person and belongings yielded no identifying information beyond a hospital bracelet stating "18 year old unidentified" and a document indicating that she had previously been charged in Virginia with failing to provide fingerprints. At her arraignment, the trial court ordered an examination of the defendant to determine whether she was competent to stand trial pursuant to General Statutes § 54-56d and set a bond of $30,000. In January, 2024, following an evidentiary hearing, the court found the defendant incompetent but "restorable," i.e., that there was a substantial probability that she would regain competency if provided with a course of treatment. The court further found that inpatient treatment was the least restrictive placement appropriate and available to restore competency and ordered that the defendant be placed at Whiting Forensic Hospital pursuant to § 54-56d (i). The court also raised the defendant's bond to $50,000. Subsequently, after the defendant declined the administration of psychotropic medication recommended by hospital staff, she was appointed a conservator and forcibly medicated. At the next competency review hearing in March, 2024, the hospital's competency monitor testified that the

defendant was incompetent but restorable, with a diagnosis of schizophrenia. Defense counsel agreed that the defendant was not competent but disagreed that she was restorable. The matter was continued until June, 2024, when the court reconsidered the issue on the basis of an updated report and evaluation. The court again found the defendant incompetent but restorable and continued the matter for another ninety days. Thereafter, the defendant filed an application pursuant to General Statutes § 52-265a seeking certification to appeal to our Supreme Court on the ground that the action involves a matter of substantial public interest in which delay may work a substantial injustice. The defendant's application was granted, and the Supreme Court will decide the following issue: "Did the trial court correctly determine that confinement of the defendant at the Whiting maximum security hospital, including the forced administration of medication, along with the imposition of a bond amount of $50,000,was the 'least restrictive placement' available under General Statutes § 54-56d (i) for the restoration of the defendant to competency to stand trial on nonviolent Class A misdemeanor charges, particularly when there is no indication in the record that the defendant is a danger to herself or others?"

The summaries appearing here are not intended to represent a comprehensive statement of the facts of the case, nor an exhaustive inventory of issues raised on appeal. These summaries are prepared by the Staff Attorneys' Office for the convenience of the bar. They in no way indicate the Supreme Court's view of the factual or legal aspects of the appeal.

Jessie Opinion
Chief Staff Attorney

NOTICES

Notice of Reprimand of Attorney

Pursuant to Practice Book § 2-54, notice is hereby given that on July 22, 2024, this Court reprimanded Attorney Alec A. Rimer, Juris #402793. See UWYCV246076192S, *Office of Chief Disciplinary Counsel* v. *Alec A. Rimer* for the full order of the Court.

Barbara N. Bellis,
Judge

Notice of Reprimand of Attorney

Pursuant to Practice Book § 2-54, notice is hereby given that on July 24, 2024, this Court reprimanded Attorney Joshua O. Balter, Juris #435162. See UWYCV246076398S, *Office of Chief Disciplinary Counsel* v. *Joshua O. Balter* for the full order of the Court.

Patrick L. Carroll III,
Judge Trial Referee