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Table of Contents

CONNECTICUT APPELLATE REPORTS

Benchmark Municipal Tax Services, Ltd. *v.* 899 ETG Associates, LLC, 227 CA 474 . . . 130
Foreclosure; motion for summary judgment; standing; whether appeal should be dismissed as to defendant guarantors for lack of standing; whether trial court properly granted plaintiff's motion for summary judgment as to liability; whether affidavit submitted in opposition to plaintiff's motion for summary judgment sufficiently raised genuine issue of material fact as to defendants' special defense of unclean hands.

Briggs *v.* Briggs, 227 CA 531 187
Dissolution of marriage; claim that trial court erred in awarding defendant entirety of his interest in limited partnership; claim that trial court abused its discretion in establishing parenting schedule that differed from those proposed by parties and guardian ad litem; claim that trial court erred in issuing orders concerning expenses and final decision-making authority related to extracurricular activities of parties' children.

Chelsea Groton Bank *v.* Gates Realty Holdings, LLC, 227 CA 583 239
Writ of error; foreclosure by sale; claim that trial court improperly granted defendant in error's motion to forfeit plaintiff in error's deposit without affording nonparty plaintiff in error notice thereof and opportunity to be heard; whether second writ of error claiming that trial court improperly denied plaintiff in error's motion to intervene as of right was moot.

Dorfman *v.* Liberty Mutual Fire Ins. Co., 227 CA 347 3
Vexatious litigation; Connecticut Unfair Trade Practices Act (CUTPA) (§ 42-110a et seq.); Connecticut Unfair Insurance Practices Act (CUIPA) (§ 38a-815 et seq.); summary judgment; litigation privilege; claim that defendant insurance company's litigation conduct in prior action involving parties gave rise to common-law and statutory (§ 52-568 (1) and (2)) causes of action for vexatious litigation; claim that remedy for untrue or unfounded allegations in complaint alleging vexatious litigation was limited to sanctions under applicable statute (§ 52-99) and rule of practice (§ 10-5); claim that phrase, "asserts a defense," in § 52-568 should not be applied to defendant's answer, denial or plea; claim that trial court improperly rendered summary judgment as to vexatious litigation counts of complaint when court applied improper legal standard in making probable cause determination; claim that trial court, in relying on prior probable cause determination, improperly rendered summary judgment on CUTPA and CUIPA counts of complaint; § 674 of Restatement (Second) of Torts and continuation theory of common-law and statutory vexatious litigation actions, discussed.

LaSalle *v.* Commissioner of Correction, 227 CA 520. 176
Habeas corpus; claim that habeas court abused its discretion in denying petition for certification to appeal; whether habeas court properly exercised its discretion in determining that petitioner had failed to establish good cause to excuse untimely filing of second state habeas petition sufficient to overcome statutory (§ 52-470 (d) and (e)) presumption of unreasonable delay.

Moore *v.* Commissioner of Correction, 227 CA 487 143
Habeas corpus; claim that habeas court erroneously rejected petitioner's claim that state violated his right to due process by failing to disclose alleged cooperation agreement with witness and knowingly soliciting witness' allegedly false and

(continued on next page)

misleading testimony and allowing that testimony to stand uncorrected; request by petitioner that this court revisit prior ruling on motion for review or, alternatively, take judicial notice of certain evidence that was not before habeas court.
Prescott *v.* Gilshteyn, 227 CA 553 209
Application for prejudgment remedy; assault; battery; intentional infliction of emotional distress; intimidation based on bigotry or bias; whether trial court erred in awarding plaintiff prejudgment remedy for emotional distress damages; whether trial court abused its discretion in admitting testimony of witness who was expert in issues related to racism and social justice; whether there was sufficient evidence before trial court to support its determination that there was probable cause to believe that defendant's actions and/or statements were motivated in whole or substantial part by plaintiff's race; claim that it was plain error for trial court to grant application for prejudgment remedy in case involving freedom of speech and first amendment principles.
Volume 227 Cumulative Table of Cases 251

NOTICE OF CONNECTICUT STATE AGENCIES

DOH: Certificate of Affordable Housing Project Completion 1A
CT Paid Family & Medical Leave Insurance Authority: Notice of Intent to Adopt Revisions to Consolidated Policies 2A
CT Paid Family & Medical Leave Insurance Authority: Notice of Intent to Adopt Revisions to Finance and Accounting Policy 3A

MISCELLANEOUS

Office of State Ethics: Advisory Opinion N. 2024-3 . . . . . 1B

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CONNECTICUT APPELLATE REPORTS

Vol. 227

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

TAMARA DORFMAN *v.* LIBERTY MUTUAL FIRE INSURANCE COMPANY
(AC 45389)

Alvord, Elgo and Seeley, Js.

Syllabus

The plaintiff sought to recover damages from the defendant, her automobile insurance provider, claiming, inter alia, that the defendant's pleading conduct in a prior action involving the parties amounted to vexatious litigation. The plaintiff had been involved in a motor vehicle collision with S, who failed to stop his vehicle at a stop sign. During its yearlong investigation of the plaintiff's claim for underinsured motorist benefits, the defendant acquired the police report regarding the collision, the plaintiff's recorded statement and the recorded statement of a witness to the collision who was not listed in the police report. The defendant's claims specialists determined that S was 100 percent liable for the collision and noted their findings in the claim file. The plaintiff commenced the prior action against S, who was underinsured. After citing in the defendant as an additional party, the plaintiff alleged, inter alia, a breach of contract claim against the defendant for its failure to pay her underinsured motorist benefits, as well as claims for breach of the implied covenant of good faith and fair dealing and violation of the Connecticut Unfair Trade Practices Act (CUTPA) (§ 42-110a et seq.) based on alleged violations of the Connecticut Unfair Insurance Practices Act (CUIPA) (§ 38a-815 et seq.). Before the defendant filed an

answer, the plaintiff settled her claim with S for the limit of his insurance policy and withdrew the action against him. The defendant hired attorneys to represent it in connection with the plaintiff's action but deliberately withheld from them its file notes, which included the recorded statement and the identity of the witness to the collision. In the defendant's initial answer to the complaint, which was filed one year after the conclusion of its investigation into the plaintiff's claim, the defendant denied or stated that it did not have sufficient information to admit the plaintiff's allegations regarding the cause of the collision and her injuries, and asserted a special defense of contributory negligence. The defendant provided false responses to the plaintiff's discovery requests, including that it did not know of the existence of a witness to the collision or whether any recorded statements of witnesses existed. In the plaintiff's deposition of the defendant, its designee admitted that the defendant had been aware of the witness to the collision and his recorded statement but failed to disclose that information in its interrogatory responses. Prior to trial, the defendant withdrew its special defense. The defendant then admitted liability at trial on the breach of contract claim, and a jury awarded the plaintiff damages. The trial court then granted in part the defendant's motion to dismiss the plaintiff's other claims. The court dismissed her claim for breach of the implied covenant of good faith and fair dealing on the ground that it was barred by the litigation privilege, as it was predicated on communications and statements filed in the course of and related to a judicial proceeding. The court also dismissed in part her claim for a violation of CUTPA based on the defendant's alleged violation of CUIPA, to the extent that the defendant had a business practice of responding falsely to discovery requests. The court rendered judgment for the plaintiff on the breach of contract claim and for the defendant on the extracontractual claims, and our Supreme Court in *Dorfman* v. *Smith* (342 Conn. 582) affirmed the trial court's judgment. The plaintiff then filed the present action, alleging claims for common-law and statutory (§ 52-568 (1) and (2)) vexatious litigation and violations of CUTPA based on the defendant's alleged violations of CUIPA. Among other things, the plaintiff claimed that, in the prior action, the defendant had asserted its contributory negligence special defense and filed false pleadings without probable cause and with malice, and refused to admit certain allegations of her complaint, despite having had the information gathered during its investigation of the plaintiff's claim. The trial court granted the defendant's motion for summary judgment, in which it contended, inter alia, that all of the plaintiff's claims were barred by the litigation privilege and that its pleadings in the prior action were filed with probable cause and without malice. On the plaintiff's appeal to this court from the judgment of the trial court, *held*:

1. The defendant could not prevail on its claim that a vexatious litigation action cannot be premised on allegedly false answers to a complaint in a prior action, as, under the particular facts of this case, the plaintiff's

allegations concerning the defendant's alleged bad faith pleading in the prior action properly asserted causes of action for vexatious litigation: a. This court determined that Connecticut case law has expressed agreement with § 674 of the Restatement (Second) of Torts, which permits such a cause of action for a party's conduct in continuing litigation without probable cause, and the plaintiff's allegations addressed the defendant's conduct that prolonged the *Smith* action with respect to the breach of conduct count against the defendant, for which the defendant eventually admitted liability; moreover, this court did not believe, contrary to the defendant's contention, that, under the particular circumstances at issue, its decision would open floodgates to litigation or impose unreasonable pleading requirements on parties, as vexatious litigation actions contain inherent safeguards, including a lower threshold to establish probable cause and requirements that plaintiffs demonstrate a lack of probable cause for the prior proceeding, that the prior proceeding terminated in their favor and a showing of malice when treble damages are sought under § 52-568 (2); furthermore, the possibility that a vexatious litigation claim can be based on a bad faith denial in an answer did not mean that the ability of defendants to hold plaintiffs to their proof will be chilled or that an inartfully pleaded answer or mere denial of an allegation in a civil proceeding will subject individuals to vexatious litigation actions, as it typically will be difficult to establish a lack of probable cause when discovery in most cases is conducted after the filing of an answer, and the lack of probable cause requirement acts as a formidable barrier to baseless claims and serves to minimize any chilling effect on zealous advocacy.

b. The defendant's claim that the plaintiff's remedy for untrue or unfounded allegations in a complaint was limited to sanctions under the applicable statute (§ 52-99) and rule of practice (§ 10-5) was unavailing; our Supreme Court in *Smith* stated that a vexatious litigation action was one of many remedies available to the plaintiff in challenging the defendant's conduct, which included a court's inherent authority to sanction parties for litigation misconduct, and neither § 52-99 nor Practice Book § 10-5 include language indicating that they are the exclusive remedy for untrue pleadings.

c. This court concluded that the defendant's denials of allegations in the prior action that it allegedly knew to be true constituted the assertion of a defense within the meaning of § 52-568: contrary to the defendant's claim that the phrase "asserts a defense" in § 52-568 should not be applied to a defendant's answer, denial or plea, this court determined that, although § 52-568 does not define "defense," the commonly used dictionary definition of "defense" includes a denial and, thus, it would have been superfluous for the legislature to add "denial" to the statutory language; moreover, the general denial of a complaint's factual allegations is, in essence, the assertion of a defense to those allegations, and the defendant presented no authority suggesting the contrary or that

"defense" in § 52-568 must be limited to special defenses; furthermore, to conclude that a denial in an answer is not a defense would contravene the purpose of § 52-568 in making clear that it is the strong public policy of the state to discourage dishonesty during the litigation process.

2. The trial court improperly granted the defendant's motion for summary judgment as to the plaintiff's vexatious litigation claims, the court having applied an incorrect legal standard in making its probable cause determination: the court focused on and limited its analysis to whether issues of material fact existed as to the cause of the plaintiff's injuries when it instead should have looked critically at each of the defendant's representations at issue, alongside the information within the defendant's knowledge at the time it made those representations, to determine if issues of material fact existed as to whether there was probable cause for the defendant's denials of allegations unrelated to the plaintiff's injuries and its assertion of contributory negligence as a special defense; moreover, the court did not take into account the defendant's denials of allegations pertaining to how the collision occurred and whether it was caused by S, as well as the assertion of contributory negligence, when the defendant's own internal investigation indicated that S was 100 percent responsible for the collision; furthermore, the court improperly concluded that the defendant met its burden of showing that no issue of material fact existed as to whether it had probable cause for pleading as it did, as the court did not consider that the defendant did not submit documentary evidence or affidavits in support of its summary judgment motion to demonstrate that it lacked knowledge of the contents of the documents and information gathered as part of its investigation, or that it had an objectively reasonable, good faith belief in the facts alleged in its answers and the validity of its special defense; accordingly, because the underlying facts that formed the basis for determining whether the defendant had probable cause to plead as it did were disputed, and the court failed to address the defendant's other arguments in support of its motion for summary judgment, the trial court's judgment was reversed as to the vexatious litigation claims and the case was remanded for further proceedings.

3. The plaintiff's claim that the trial court improperly rendered summary judgment on the CUTPA and CUIPA counts of her complaint was unavailing; although the court applied an incorrect legal standard in concluding that its prior probable cause determination made it unnecessary to address those claims, this court upheld the summary judgment on the alternative ground that those claims were barred by the litigation privilege, as the CUTPA and CUIPA counts were based on the same conduct underlying the vexatious litigation claims, which the court in *Smith* determined were protected by the litigation privilege.

(*One judge concurring in part and dissenting in part*)

Argued September 12, 2023—officially released August 20, 2024

Procedural History

Action to recover damages for, inter alia, vexatious litigation, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Noble, J.*, granted the defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Reversed in part*; *further proceedings*.

David P. Friedman, with whom, on the brief, were *Marilyn B. Fagelson*, *Julie A. Lavoie* and *Leonard M. Isaac*, for the appellant (plaintiff).

Philip T. Newbury, Jr., for the appellee (defendant).

Opinion

SEELEY, J. The plaintiff, Tamara Dorfman, appeals from the summary judgment rendered by the trial court in favor of the defendant, Liberty Mutual Fire Insurance Company, in this action for, inter alia, vexatious litigation. On appeal, the plaintiff claims that the court (1) improperly granted the defendant's motion for summary judgment as to the counts of her complaint alleging vexatious litigation on the basis of its determination that certain pleadings in a prior action between the parties were filed by the defendant with probable cause, (2) misapplied the proper standard of proof in granting the defendant's motion for summary judgment as to the vexatious litigation counts, (3) improperly denied the plaintiff the ability to obtain meaningful discovery related to her claims of vexatious litigation prior to granting the defendant's motion for summary judgment,[1] and (4) did not engage in the proper analysis when it granted the defendant's motion for summary judgment as to the counts of her complaint alleging violations of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., and the

[1] See footnote 37 of this opinion.

Connecticut Unfair Insurance Practices Act (CUIPA), General Statutes § 38a-815 et seq. We agree with the plaintiff's first two claims and, thus, reverse in part the judgment of the court.

The following facts and procedural history, as alleged in the complaint, construed in the light most favorable to the plaintiff as the nonmoving party, and contained in the record or as previously set forth by our Supreme Court in a prior action involving the parties, are relevant to our resolution of this appeal. In 2014, the plaintiff sustained serious bodily injuries when her motor vehicle collided with a vehicle operated by Joscelyn M. Smith, who failed to stop his vehicle at a stop sign. At the time of the collision, the plaintiff had a motor vehicle insurance policy with the defendant, which contained a provision for uninsured-underinsured motorist coverage. By letter dated November 4, 2014, the defendant was notified of the accident and of a potential claim for underinsured motorist benefits by the plaintiff.

"As part of its general business practices, the defendant investigated the collision to determine the cause and legal responsibility. In investigating the plaintiff's claim, the defendant acquired the police report regarding the collision, the plaintiff's recorded statement, and the recorded statement of Birbahadu Guman, a witness to the collision who was not listed in the police report. The report and the statements all noted Smith's failure to stop at the stop sign. Based on this information, two claims specialists employed by the defendant both concluded that Smith was 100 percent liable for the collision and noted their findings in the claim file [file notes]. The defendant notified the plaintiff that her right to pursue her claim was conditioned on her providing an affidavit of no excess insurance." *Dorfman* v. *Smith*, 342 Conn. 582, 586, 271 A.3d 53 (2022).

On September 29, 2015, the plaintiff commenced an action against Smith (*Smith* action), who was underinsured.[2] In December, 2015, the plaintiff moved for and was granted permission to cite in the defendant as an additional party in the *Smith* action for the purpose of seeking underinsured motorist benefits pursuant to her insurance policy with the defendant. The plaintiff alleged a claim against the defendant for breach of contract for failure to pay benefits. Before the defendant filed an answer to the complaint, the plaintiff settled her claim with Smith for the limit of his policy and withdrew her claim against him. The defendant received a signed release of the plaintiff's claim against Smith for his policy limit of $50,000 on January 5, 2016.

"The defendant hired attorneys to represent it in connection with the plaintiff's claim but deliberately withheld from them its file notes regarding the claim, Guman's name and existence, and Guman's recorded statement, even though it knew this information was necessary for its attorneys to prepare accurate responses to the plaintiff's complaint and discovery requests. In answering the complaint [on May 17, 2016], the defendant pleaded that either it denied or did not have sufficient information to admit the allegations that Smith had failed to stop at a stop sign, causing the collision and the plaintiff's resulting injuries. The defendant also asserted a special defense of contributory negligence,[3] even though it knew this to be false. . . .

[2] Smith's insurance policy had a limit of $50,000, and the plaintiff's damages exceeded that amount.

[3] "[A]lthough Connecticut has adopted the doctrine of comparative negligence; see General Statutes § 52-572h (b); our statutes retain the term contributory negligence. See, e.g., General Statutes §§ 52-114 and 52-572h (b)." (Internal quotation marks omitted.) *Stafford* v. *Roadway*, 312 Conn. 184, 185 n.3, 93 A.3d 1058 (2014). Because the parties, the trial court, and our Supreme Court in *Dorfman* v. *Smith*, supra, 342 Conn. 582, all have used the term contributory negligence, we do so as well throughout this opinion. See *Wager* v. *Moore*, 193 Conn. App. 608, 611 n.2, 220 A.3d 48 (2019).

"The plaintiff's attorney then noticed the defendant's deposition to address, in part, the factual basis behind its answer and special defense. . . . Additionally, the defendant provided false responses to the plaintiff's discovery requests, including that it did not know of the existence of any witnesses not listed in the police report and whether any recorded statements existed. In further response to the deposition notice, the defendant's corporate designee testified under oath, admitting that '[t]here was no basis in fact for [the defendant's] accusation that [the plaintiff] was in any way responsible for causing the accident' and that the defendant 'had known that there was nothing [the plaintiff] could have done to avoid the accident . . . .' The defendant's designee also admitted that the defendant was aware that Guman had witnessed the accident and made a recorded statement but failed to disclose this information in its interrogatory responses. On the basis of this conduct, the plaintiff allege[d] that the defendant 'used intentional misstatements, intentional misrepresentations, intentionally deceptive answers, and violated established rules of conduct in litigation,' and 'knowingly and intentionally engaged in dishonest and sinister litigation practices by taking legal positions that were without factual support' to try to prevent the plaintiff from receiving the benefits owed to her under the contract.

"The defendant's designee also testified under oath that, in addition to this misconduct, '[the defendant] did not single out [the plaintiff] for special or unique treatment when it conditioned [her] receipt of [underinsured motorist] benefits [on] the provision of an affidavit of no excess insurance but was instead pursuing conduct that Liberty Mutual Corporation routinely takes in its handling of claims from other policyholders as well.' Similarly, the defendant's designee 'testified under oath that [the defendant] did not single out [the

plaintiff] for special or unique treatment when it responded falsely to [her] discovery requests.'

"Following this deposition, the trial court granted the plaintiff permission to amend her complaint to include claims for breach of the implied covenant of good faith and fair dealing, negligent infliction of emotional distress, and violation of CUTPA based on a violation of CUIPA. The defendant moved to bifurcate the breach of contract claim from the extracontractual claims, which the trial court granted. Prior to trial on the breach of contract claim, the defendant withdrew its special defense of contributory negligence. At trial on the breach of contract claim, the defendant admitted liability, and a jury awarded the plaintiff $169,928.[4]

"After the verdict, the defendant moved to dismiss the remaining claims for lack of subject matter jurisdiction on the ground that the litigation privilege barred those claims. The trial court granted the motion in part and denied it in part. Specifically, as to the plaintiff's claims for breach of the implied covenant of good faith and fair dealing and negligent infliction of emotional distress, the trial court held that, because the claims were predicated on communications and statements filed in the course of and related to a judicial proceeding, the litigation privilege applied. For the same reason, as to the plaintiff's claim for violation of CUTPA based on a violation of CUIPA, the trial court determined that the allegations regarding a business practice of responding falsely to discovery requests also were privileged. The trial court determined, however, that, to the extent the plaintiff's CUTPA claim alleged that the defendant maintained an improper business practice of conditioning receipt of underinsured motorist benefits on the provision of an affidavit of no excess insurance, in violation of General Statutes § 38a-336c (c), the litiga-

[4] After accounting for the $50,000 that the plaintiff had received in settlement from Smith, the court reduced the amount of the jury award to $119,928.

tion privilege did not bar such a claim because this practice did not occur during the judicial proceedings but occurred before the action commenced. Thus, the trial court granted the motion to dismiss except as to the plaintiff's CUTPA claim to the extent it was premised on a violation of § 38a-336c (c).

"The plaintiff appealed from the trial court's decision on the defendant's motion to dismiss, but [this court] dismissed the appeal for lack of a final judgment in light of the continued viability of the CUTPA claim. The plaintiff subsequently requested and received permission to amend her complaint to remove all allegations regarding the alleged violation of § 38a-336c (c). Because the alleged violation of § 38a-336c (c) was the only claim to have survived the motion to dismiss, the trial court determined that the withdrawal of these allegations effectively withdrew this theory of liability. Accordingly, the court rendered judgment in favor of the defendant on all of the plaintiff's extracontractual claims. The plaintiff then appealed to [this court]. The appeal was then transferred to [our Supreme Court] pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1." (Footnotes added.) *Dorfman* v. *Smith*, supra, 342 Conn. 587–90. Our Supreme Court affirmed the judgment dismissing the remaining claims on the ground of the litigation privilege. Id., 586.

After the dismissal of her claims and during the pendency of the appeal in the *Smith* action to our Supreme Court, the plaintiff commenced the present action against the defendant on August 27, 2019. The complaint in the present action, filed September 3, 2019, has five counts. Count one alleges a claim of common-law vexatious litigation based on the following allegations concerning the defendant's pleading conduct in the *Smith* action. Specifically, the plaintiff alleges that, despite the information and documentation the defendant had gathered during its investigation of the collision that

was completed on May 26, 2015, in the *Smith* action, the defendant asserted in its initial answer, filed May 17, 2016, and continued to assert in its subsequent amended answer, filed August 3, 2016, that it lacked sufficient information to admit or deny the allegations of the plaintiff's amended complaint in the *Smith* action that (1) Smith failed to stop or slow his vehicle when he entered the intersection, causing the collision with the plaintiff's vehicle (paragraph 6 *Smith* action complaint), (2) the collision and resulting injuries to the plaintiff were caused by Smith's negligence (paragraph 7 *Smith* action complaint), (3) the plaintiff sustained physical injuries, some of which were permanent in nature, as a direct and proximate cause of Smith's negligence (paragraph 8 *Smith* action complaint), (4) the plaintiff incurred expenses for medical care and treatment as a result of Smith's negligence, lost wages from missing work due to the injuries sustained in the collision and has been permanently impaired in her ability to enjoy life's activities (paragraphs 9 through 11 *Smith* action complaint), (5) Smith was underinsured at the time of the collision (paragraph 15 *Smith* action complaint), (6) the plaintiff complied with her duties under her insurance policy with the defendant (paragraph 16 *Smith* action complaint), and (7) the defendant is liable to the plaintiff under the terms of that policy (paragraph 17 *Smith* action complaint).[5] According to the allegations of count one of the complaint in the present case,

[5] The plaintiff's complaint in the present action alleges in relevant part:

"8. In [the *Smith* action], [the plaintiff] set forth the following factual allegations:

"a. As . . . Smith approached the aforementioned intersection, he failed to stop or slow his vehicle, and collided with [the plaintiff's] vehicle as she proceeded through the intersection, causing the harms and losses set forth below;

"b. Said collision and the resulting injuries, damages and losses sustained by [the plaintiff] were directly and proximately caused by . . . Smith's negligence and/or carelessness in that he:

"1. violated [General Statutes] § 14-301 by failing to stop his vehicle at the intersection;

the defendant refused to admit these allegations in the

"2. violated [General Statutes] § 14-301 by failing to yield the right of way to [the plaintiff];

"3. failed to keep the motor vehicle he was operating under reasonable and proper control;

"4. failed to keep a proper and reasonable lookout for other motor vehicles upon the road;

"5. failed to apply the brakes of the motor vehicle he was operating in time to avoid a collision, although by a proper and reasonable exercise of his faculties, he could have and should have done so;

"6. failed to turn the motor vehicle he was operating to the right or left so as to avoid a collision, although by a proper and reasonable exercise of his faculties, he could have and should have done so;

"c. As a direct and proximate result of said collision, caused by . . . Smith's negligence and/or carelessness, [the plaintiff] suffered physical injuries, some, or all of which are likely to be permanent in nature, including the following:

"1. injury to the cervical spine including bulging discs at C5-6 and C6-7 with nerve root impingement and radicular symptoms;

"2. right forearm injury;

"3. headaches;

"4. shock and trauma to the entire nervous system;

"5. permanent partial disability;

"d. As a further direct and proximate result of . . . Smith's negligence and/or carelessness, [the plaintiff] was forced to expend sums for doctors, X-rays, medicines, diagnostic testing, extensive physical therapy and medical care and treatment, and will be caused to expend further such sums in the future;

"e. As a further direct and proximate result of . . . Smith's negligence and/or carelessness, [the plaintiff] was forced to miss time from work and lose wages, and may miss further time from work in the future, to her financial detriment;

"f. As a further direct and proximate result of the negligence and/or carelessness of . . . Smith, [the plaintiff] has been permanently impaired in her ability to pursue and enjoy life's activities and pleasure, including suffering emotional distress;

"g. At the time of the above-described accident, the other involved operator . . . Smith, was underinsured within the meaning of the law of the state of Connecticut and the contract of insurance between [the plaintiff] and the defendant . . .

"h. [The plaintiff] has complied with her duties under the insurance contract between herself and the defendant . . . and

"i. The defendant . . . is liable to [the plaintiff] pursuant to the terms of the above-mentioned insurance contract for damages resulting from the bodily injury sustained by [the plaintiff] which were not compensated for by the other involved operator's insurance coverage."

Smith action without probable cause and "with a malicious intent to unjustly vex and trouble [the plaintiff] and to force her to incur increased litigation costs."

Count one further alleges that the defendant amended its answer in the *Smith* action yet again on December 15, 2016, this time admitting the allegation in paragraph seven of the amended complaint in the *Smith* action that "the accident was caused by . . . Smith's failure to keep a proper and reasonable lookout for other motor vehicles upon the roadway" and removing the special defense of contributory negligence. In that amended answer, the defendant also admitted certain allegations in paragraphs 3 and 5 of the amended complaint concerning the location and direction of travel of the vehicles driven by the plaintiff and Smith on the day of the collision, as well as the allegation in paragraph 16, stating: "As to the allegations in paragraph 16, the defendant admits that the plaintiff has complied with her duties to date but the policy requires the plaintiff to comply with continuing duties and obligations." That amended answer, however, continued to assert that the defendant lacked sufficient information to admit or deny the remaining allegations outlined in the previous paragraph. Thereafter, on April 12, 2017, the plaintiff filed a second amended complaint in the *Smith* action in which she withdrew count one against Smith and added counts for breach of the implied covenant of good faith and fair dealing, negligent infliction of emotional distress, and a violation of CUTPA based on a violation of CUIPA. Count two of the second amended complaint in the *Smith* action, the breach of contract count against the defendant, remained the same.

On June 14, 2017, the defendant filed an answer to the second amended complaint in the *Smith* action, this time changing its answers to certain allegations in count two from being without sufficient information to admit or deny the allegation to denials. For example,

in its June 14, 2017 answer, the defendant denied the allegation in paragraph 7 that the collision was caused by Smith's negligence, even though, in its December 15, 2016 amended answer, it admitted that "the accident was caused by . . . [Smith's] failure to keep a proper and reasonable lookout . . . ." The defendant also denied allegations that Smith had failed to stop at a stop sign and collided with the plaintiff's vehicle as it proceeded through the intersection, that Smith was underinsured and that the plaintiff had complied with her duties under her insurance contract with the defendant, even though in its previous answer it admitted that the plaintiff had complied with her duties as of that date.[6]

In count one of the complaint in the present case, the plaintiff also alleges that, in the *Smith* action, the defendant "asserted a special defense claiming that [the plaintiff's] injuries were caused by her own negligence, although its own investigation concluded that . . . Smith was '100 [percent] liab[le]' for the accident, noting that 'witnesses confirm' the events and that vehicle photographs were 'very damning' of . . . Smith's responsibility for the accident." The plaintiff further alleges that the defendant asserted its special defense without probable cause to do so and "with a malicious intent to unjustly vex and trouble [the plaintiff] and to force her to incur increased litigation costs." Finally, in count one the plaintiff alleges that the prior proceeding

[6] The record shows that, on December 27, 2017, the plaintiff served the defendant with a request for admissions. The defendant responded on January 25, 2018, admitting allegations that "[t]he September 27, 2014 motor vehicle collision . . . was directly and proximately caused by . . . Smith's negligence, in that he . . . fail[ed] to stop his vehicle at the intersection"; "[t]he subject collision was directly and proximately caused by . . . Smith's negligence, in that he . . . fail[ed] to yield the right-of-way to [the plaintiff]; and "[a]s a direct and proximate result of . . . Smith's negligence in the subject collision, [the plaintiff] suffered 'bodily injury' as defined by her auto insurance policy with [the defendant] . . . ."

terminated in her favor and that the "defendant's prosecution of false pleadings that lacked probable cause . . . was done with malicious intent and caused [her] to suffer . . . damages . . . ."

Count two of the complaint in the present case alleges a claim for statutory vexatious litigation without malice pursuant to General Statutes § 52-568 (1), and count three alleges a claim for statutory vexatious litigation with malice pursuant to § 52-568 (2).[7] The substantive allegations in these counts parallel those of count one, with the exception of the allegations of malice, which are absent from count two. Counts four and five allege violations of CUTPA based on violations of CUIPA.

In September, 2020, the defendant filed a motion for summary judgment as to all counts of the complaint, arguing that there was no genuine issue of material fact as to any of the plaintiff's claims. In its memorandum of law in support of its motion, the defendant argued that, (1) even though counts one through three purport to allege claims for vexatious litigation, they are "nothing more than a regurgitation of the claims that have previously been dismissed," for which the defendant is entitled to absolute immunity under the litigation privilege; (2) because the plaintiff is "rehashing her claim that the pleadings of counsel were improper . . . [a]ny such claim is barred by the doctrine of res judicata"; (3) the vexatious litigation claims are unfounded because the defendant had probable cause for its pleadings in the *Smith* action and there was no malice on its part; (4) it relied on counsel to prepare its answers

[7] General Statutes § 52-568 provides: "Any person who commences and prosecutes any civil action or complaint against another, in his own name or the name of others, or asserts a defense to any civil action or complaint commenced and prosecuted by another (1) without probable cause, shall pay such other person double damages, or (2) without probable cause, and with a malicious intent unjustly to vex and trouble such other person, shall pay him treble damages."

in the *Smith* action; and (5) the CUTPA/CUIPA claims were barred by absolute immunity under the litigation privilege, as determined previously by our Supreme Court. In support of its motion for summary judgment, the defendant submitted an affidavit from Michael DeStefano, a complex claim resolution specialist for the defendant, as well as portions of the transcript of DeStefano's deposition testimony, which deposition was taken in connection with the *Smith* action.[8] In response to the defendant's motion for summary judgment, the plaintiff filed an objection and supporting memorandum of law, along with an affidavit from her attorney, Leonard M. Isaac.

In a memorandum of decision dated March 7, 2022, the court granted the defendant's motion for summary

[8] We note that DeStefano's affidavit references exhibits that were not filed with the affidavit in the present case. Those exhibits include a letter of representation in the *Smith* action from the plaintiff's attorney, indicating that the plaintiff's claim likely would exceed the $50,000 limit of Smith's policy and that her attorney had demanded the full amount of Smith's policy, along with affidavits of no excess insurance; an affidavit from Smith in which he attested that he was involved in the motor vehicle accident with the plaintiff and had no other applicable automobile insurance; the defendant's file notes concerning the plaintiff's claim for underinsured motorist benefits, which indicate that the plaintiff had complied with her duties under the insurance contract, the plaintiff's claimed injuries, that Smith was "100 [percent] liable for failure to obey [a] . . . stop sign" and that "there was nothing [the plaintiff] could have done to avoid this loss"; and the defendant's supplemental responses to the plaintiff's discovery requests in the *Smith* action, in which the defendant corrected a prior mistaken response and indicated the name of a witness who had provided a recorded statement. Those exhibits, which have not been filed in the present action, previously were filed in the *Smith* action. Although the trial court in the present case took judicial notice of the *Smith* action for the purpose of setting forth the factual history of the present case, which stems from the *Smith* action; see footnote 9 of this opinion; the court gave no indication that it took these exhibits from the *Smith* action into consideration in deciding the present motion for summary judgment. Nevertheless, even if we consider these exhibits as evidence submitted by the defendant in support of its motion for summary judgment, they fail to demonstrate the absence of any genuine issue of material fact relating to the issue of probable cause and, in fact, tend to support the plaintiff's allegations.

judgment as to all counts.[9] In doing so, the court concluded that the defendant's pleadings in the *Smith* action "were filed with probable cause."[10] In light of its determination regarding probable cause, the court did not address the defendant's other arguments. With respect to the plaintiff's claim that she was deprived of the opportunity to conduct discovery, the court took judicial notice of an entry in the *Smith* action "in which [the defendant] asserted, without contest, that four depositions of [the defendant's] personnel, with attendant requests for production had been taken. The depositions took over twenty hours. The court rejects this argument." The court rendered summary judgment in the defendant's favor, and this appeal followed. Additional facts and procedural history will be set forth as necessary.

We first set forth our well established standard of review of a court's decision granting a motion for summary judgment. "Practice Book § [17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted

[9] Judge Cesar A. Noble presided over the present action and the *Smith* action. In his memorandum of decision granting the defendant's motion for summary judgment in the present case, he stated that the facts set forth in his decision were "derived from the affidavit of . . . DeStefano, a complex claim resolution specialist employed by [the defendant] familiar with the claim and the court's judicial notice of this file and the . . . file [in the *Smith* action]." "There is no question that the trial court may take judicial notice of the file in another case . . . ." (Internal quotation marks omitted.) *Jewett* v. *Jewett*, 265 Conn. 669, 678 n.7, 830 A.2d 193 (2003). Neither party has taken issue with the court taking judicial notice of the file in the *Smith* action for the purpose of setting forth the undisputed factual history of this case.

[10] Specifically, the court stated: "In the present case, as argued by [the defendant], 'it was necessary to fully substantiate facts and information through the course of discovery and, as that was done, the complaint was amended to address what had been substantiated. Given the intrinsic uncertainty of the nature of a claim of injuries proximately caused by another's negligence, [the defendant] had probable cause to answer the complaint in the manner in which it did."

show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party moving for summary judgment has the burden of showing the absence of any genuine issue of material fact . . . . [T]he party moving for summary judgment is held to a strict standard. [The moving party] must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. . . . A material fact is a fact that will make a difference in the result of the case. . . . Because the court's decision on a motion for summary judgment is a legal determination, our review on appeal is plenary." (Internal quotation marks omitted.) *Barbara* v. *Colonial Surety Co.*, 221 Conn. App. 337, 357–58, 301 A.3d 535, cert. denied sub nom. *Colonial Surety Co.* v. *Phoenix Contracting Group*, 348 Conn. 924, 304 A.3d 443 (2023). "[I]ssue-finding, rather than issue-determination, is the key to the procedure. . . . [T]he trial court does not sit as the trier of fact when ruling on a motion for summary judgment. . . . [Its] function is not to decide issues of material fact, but rather to determine whether any such issues exist. . . .

"It is frequently stated in Connecticut's case law that, pursuant to Practice Book §§ 17-45 and 17-46, a party opposing a summary judgment motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . . [T]ypically [d]emonstrating a genuine issue requires a showing of evidentiary facts or substantial evidence outside the pleadings from which material facts alleged in the pleadings can be warrantably inferred. . . .

"An important exception exists, however, to the general rule that a party opposing summary judgment must provide evidentiary support for its opposition . . . .

On a motion by [the] defendant for summary judgment, the burden is on [the] defendant to negate each claim as framed by the complaint . . . . It necessarily follows that it is only [o]nce [the] defendant's burden in establishing [its] entitlement to summary judgment is met [that] the burden shifts to [the] plaintiff to show that a genuine issue of fact exists justifying a trial. . . . Accordingly, [w]hen documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue." (Citation omitted; internal quotation marks omitted.) *Gibilisco* v. *Tilcon Connecticut, Inc.*, 203 Conn. App. 845, 858–59, 251 A.3d 994, cert. denied, 336 Conn. 947, 251 A.3d 77 (2021).

I

Before we address the plaintiff's claims on appeal, we first must address a claim raised by the defendant in its appellate brief. Specifically, the defendant claims that the plaintiff's remedy for an "untrue or unfounded allegation in a pleading is [General Statutes] § 52-99[11] and Practice Book § 10-5,[12] not an action for vexatious litigation." (Footnotes added.) In making this claim, the defendant asserts that an action for vexatious litigation

[11] General Statutes § 52-99 provides: "Any allegation or denial made without reasonable cause and found untrue shall subject the party pleading the same to the payment of such reasonable expenses, to be taxed by the court, as may have been necessarily incurred by the other party by reason of such untrue pleading; provided no expenses for counsel fees shall be taxed exceeding five hundred dollars for any one offense."

Although § 52-99 was amended by No. 22-26, § 43, of the 2022 Public Acts, that amendment has no bearing on this appeal. For simplicity, we refer to the current revision of the statute.

[12] Practice Book § 10-5 provides in relevant part: "Any allegation or denial made without reasonable cause and found untrue shall subject the party pleading the same to the payment of such reasonable expenses, to be taxed by the judicial authority, as may have been necessarily incurred by the other party by reason of such untrue pleading . . . ."

cannot be based on allegedly false answers to a complaint in a prior action. The defendant's claim does not relate to the portions of the vexatious litigation counts based on the defendant's special defense of contributory negligence in the *Smith* action, as the defendant acknowledges that "[t]he essence of vexatious litigation is that . . . a defendant should not assert a defense to an action without probable cause." (Emphasis omitted.) Because the defendant does not argue that a vexatious litigation action cannot be premised on a special defense filed in a prior action without probable cause, we limit our discussion to the question of whether such an action can be based on allegedly false answers to a complaint in a prior action, which has never previously been addressed by the appellate courts of this state.[13]

[13] Although the defendant never raised this as a ground in support of its motion for summary judgment, after the parties filed their memoranda of law in support of and in opposition to the motion for summary judgment and the trial court heard argument on the motion, the court ordered the parties to file supplemental memoranda pertaining to the following issues: (1) "Does the common-law tort of vexatious litigation require the alleged tortfeasor to have commenced an action or may a defendant be liable by virtue of his or her denial of facts alleged in a prior action?" (2) "Does the denial of facts alleged in a prior action fall within the ambit of liability for one who 'asserts a defense to any civil action' as provided in General Statutes § 52-568?" And (3) "Does the denial of the factual allegations of a paragraph of a complaint, signifying an intention 'to controvert' the allegations; see [Practice Book] § 10-46; constitute grounds for vexatious litigation?" Both parties complied with the court's order. Nevertheless, the trial court never addressed this issue in its decision granting the motion for summary judgment, which rested on its probable cause finding. Following oral argument before this court, we issued an order for the parties to file supplemental appellate briefs on this issue as well, and the parties have so complied. As a general rule, "Connecticut appellate courts will not address issues not decided by the trial court. . . . *Bayview Loan Servicing, LLC* v. *Gallant*, 209 Conn. App. 185, 197 n.7, 268 A.3d 119 (2021). [B]ecause our review is limited to matters in the record, we . . . will not address issues not decided by the trial court. . . . [O]nly in [the] most exceptional circumstances can and will [an appellate court] consider a claim, constitutional or otherwise, that has not been raised *and decided* in the trial court. . . . *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 142, 84 A.3d 840 (2014)." (Citation omitted; emphasis in original; internal quotation marks omitted.) In *Blumberg Associates Worldwide, Inc.*, our Supreme Court explained that, "unless all parties agree to review of the unpreserved claim or the party raising the claim cannot prevail, the

We address this claim first because, if the allegations in the vexatious litigation counts pertaining to the defendant's alleged conduct in filing false answers in the *Smith* action do not properly set forth a cause of action for vexatious litigation, we need not determine whether the court's finding of probable cause related thereto was proper. "This claim requires us to interpret the plaintiff's pleadings, which is a question of law subject to plenary review." *Alpha Beta Capital Partners, L.P.* v. *Pursuit Investment Management, LLC*, 193 Conn. App. 381, 419, 219 A.3d 801 (2019), cert. denied, 334 Conn. 911, 221 A.3d 446 (2020), and cert. denied, 334 Conn. 911, 221 A.3d 446 (2020).

A

We first address this issue with respect to the common-law vexatious litigation claim in count one of the complaint. In her supplemental brief to this court, the plaintiff makes a number of arguments in support of her assertion that a common-law vexatious litigation claim can be premised on a party's answer to a complaint. First, she points to the language in our Supreme Court's decision in the prior appeal in this matter, in which the court stated that "the plaintiff could have brought a lawsuit for vexatious litigation." *Dorfman* v. *Smith*, supra, 342 Conn. 612. Second, she relies on the

reviewing court should provide specific reasons, based on the exceptional circumstances of the case, to justify a deviation from the general rule that unpreserved claims will not be reviewed." *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, supra, 160–61. In the present case, as we stated, we ordered the parties to file supplemental briefs on this issue, and neither party has objected to our consideration of it in deciding this appeal. Moreover, our review in this appeal from the granting of a motion for summary judgment is plenary, this issue involves a question of law, the party raising the claim cannot prevail, and we provided the parties with a meaningful opportunity to address the issue. For those reasons, we proceed to make a determination with respect to this issue without setting forth any exceptional circumstances warranting our review. See *State* v. *Russo*, 221 Conn. App. 729, 755–56, 303 A.3d 279 (2023), cert. denied, 348 Conn. 938, 307 A.3d 273 (2024).

language of the Restatement (Second) of Torts, § 674, in support of her claim that a party who contributes materially to and prolongs or continues litigation without probable cause can be liable for vexatious litigation. See 3 Restatement (Second), Torts § 674, p. 452 (1977). According to the plaintiff, "[a] defendant unnecessarily prolongs litigation by filing an answer in which it denies allegations known to be true, and/or asserts affirmative defenses or counterclaims that lack any basis in fact." In its supplemental brief, the defendant counters that "none of the reported cases hold[s] that mere allegations in a pleading can form the basis of such an action," and that the plaintiff's remedy for untrue pleadings is § 52-99 and Practice Book § 10-5, not a vexatious litigation action. Neither party has directed this court to Connecticut case law squarely on point with the issue, either in support of or against it, nor has our research revealed any such case.[14]

In answering this question, we must determine (1) whether Connecticut follows § 674 of the Restatement (Second) of Torts, and permits a cause of action for common-law vexatious litigation for a party's conduct in continuing litigation without probable cause,[15] (2) if

[14] Our research has uncovered one Superior Court decision that involved claims for statutory vexatious litigation premised on a party's answer and special defenses filed in a prior action. In *Silano* v. *Verespy*, Superior Court, judicial district of Fairfield, Docket No. CV-18-6072543-S (April 30, 2019) (68 Conn. L. Rptr. 436, 436), the court, *Bellis*, *J.*, denied a motion to strike various counts of a complaint alleging claims for statutory vexatious litigation. Specifically, the "action stem[med] from the alleged vexatious litigation by the defendant . . . through which the defendant allegedly engaged in statutory vexatious litigation . . . in a prior action against the plaintiff . . . when he filed his answer and special defenses and his motion for summary judgment." Id. As to the vexatious litigation counts based on the answer and special defenses, the defendant sought to strike those counts on the basis of the doctrine of res judicata, which the court determined was not properly raised by way of a motion to strike. Id., 438. The court in *Silano*, therefore, never addressed the issue before us in this appeal.

[15] We disagree with the concurring and dissenting opinion's conclusion that, by addressing and answering this question, we are violating *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311

so, what type of conduct constitutes a "continuation" of civil proceedings, (3) whether the allegations of the complaint properly assert a cause of action for vexatious litigation with respect to the defendant's alleged

Conn. 123, 160–61, 84 A.3d 840 (2014), because, according to the concurring and dissenting opinion, the defendant was not given notice of the issue and an opportunity to be heard thereon. The plaintiff relied on § 674 of the Restatement (Second) of Torts and the continuation theory set forth therein in raising that claim in her supplemental brief to this court, *and* she did so as well in her supplemental brief to the trial court, which put the defendant on notice that such a claim was being raised. Moreover, "[a]lthough the Restatement (Second) of Torts is not binding precedent, our appellate courts have frequently looked to it in outlining the contours of tort law in this state." (Internal quotation marks omitted.) *Kenneson* v. *Eggert*, 176 Conn. App. 296, 308 n.4, 170 A.3d 14 (2017); see also *Allen* v. *Cox*, 285 Conn. 603, 613, 942 A.2d 296 (2008); *Pestey* v. *Cushman*, 259 Conn. 345, 358, 788 A.2d 496 (2002); *Clohessy* v. *Bachelor*, 237 Conn. 31, 38–39, 46, 675 A.2d 852 (1996); *Northeast Building Supply, LLC* v. *Morrill*, 224 Conn. App. 137, 150, 312 A.3d 138 (2024); *Reiner* v. *Reiner*, 214 Conn. App. 63, 73, 279 A.3d 788 (2022); *Kumah* v. *Brown*, 130 Conn. App. 343, 352 and n.4, 23 A.3d 758 (2011); *Stohlts* v. *Gilkinson*, 87 Conn. App. 634, 654, 867 A.2d 860, cert. denied, 273 Conn. 930, 873 A.2d 1000 (2005). Indeed, as this court recently has stated, "in defining the parameters of a vexatious litigation claim in Connecticut, our Supreme Court has often looked to the Restatement (Second) of Torts, which describes, among other things, torts relating to unjustifiable litigation, including the torts of malicious prosecution, wrongful use of civil proceedings, and abuse of process. See 3 Restatement (Second), [supra, §§ 653 through 682, pp. 406–75]; see also *DeLaurentis* v. *New Haven*, [220 Conn. 225, 256, 597 A.2d 807 (1991)]; *Blake* v. *Levy*, [191 Conn. 257, 264, 464 A.2d 52 (1983)]." (Footnote omitted.) *Northeast Building Supply, LLC* v. *Morrill*, supra, 150. Finally, we gave the defendant a meaningful opportunity to provide a supplemental brief concerning the issue of "whether an action for vexatious litigation can be premised on a party's answer to a complaint in a prior action." The fact that the defendant, in answering that question, did not cite to the Restatement (Second) does not preclude this court from looking to that resource for guidance on the issue, as the Restatements of the law "seek to compile and distill the common law that exists"; *Schwerin* v. *Ratcliffe*, 335 Conn. 300, 326, 238 A.3d 1 (2020); and are not the law. See *Reiner* v. *Reiner*, supra, 76 n.11; see also *Doe* v. *Saint Francis Hospital & Medical Center*, 309 Conn. 146, 179 n.26, 72 A.3d 929 (2013) (even though parties made only passing reference to several Restatement provisions and did not rely expressly on § 302B of Restatement (Second) of Torts, court relied on § 302B because its underlying principles informed arguments parties made on appeal and accurately reflected state of law on issues in case).

bad faith pleading in its answers in the *Smith* action, and (4) whether § 52-99 and Practice Book § 10-5 are a party's exclusive remedy for untrue pleadings. We address these questions in turn.

1

Our determination of whether Connecticut follows § 674 of the Restatement (Second) of Torts must be made with due regard for our well established case law concerning vexatious litigation. "In Connecticut, the cause of action for vexatious litigation exists both at common law and pursuant to statute. . . . [T]o establish a claim for vexatious litigation at common law, one must prove want of probable cause, malice and a termination of suit in the plaintiff's favor. . . . The statutory cause of action for vexatious litigation exists under . . . § 52-568, and differs from a common-law action only in that a finding of malice is not an essential element, but will serve as a basis for higher damages." (Internal quotation marks omitted.) *Elwell* v. *Kellogg*, 220 Conn. App. 822, 835, 299 A.3d 1166, cert. denied, 348 Conn. 927, 304 A.3d 861 (2023); see also *Forsstrom* v. *Smanik*, Superior Court, judicial district of Windham, Docket No. CV-12-6005759-S (November 20, 2014) ("The term 'vexatious litigation' applies to such behavior on the part of a plaintiff in the first suit, as well as to such conduct on the part of a prior defendant—although, as to defendants, the unacceptable conduct is sometimes referred to as 'vexatious defense.' Suits against those who were plaintiffs in the first instance appear to outnumber those against former defendants by some order of magnitude, and few of the latter have yielded lengthy decisions; it is undisputed, nevertheless, that the two categories are mirror images of each other and analytically indistinguishable . . . ." (Citation omitted.)).

"A vexatious suit is a type of malicious prosecution action, differing principally in that it is based upon a

prior civil action, whereas a malicious prosecution suit ordinarily implies a prior criminal complaint."[16] (Internal quotation marks omitted.) *Falls Church Group, Ltd.* v. *Tyler, Cooper & Alcorn, LLP*, 281 Conn. 84, 94, 912 A.2d 1019 (2007). "[T]he purpose of [an] action [for vexatious litigation] is to compensate a wronged individual for damage to his reputation and to reimburse him for the expense of defending against the unwarranted action. . . . *Bernhard-Thomas Building Systems, LLC* v. *Dunican*, 286 Conn. 548, 554, 944 A.2d 329 (2008)." (Internal quotation marks omitted.) *Kazemi* v. *Allen*, 214 Conn. App. 86, 104, 279 A.3d 742 (2022), cert. denied, 345 Conn. 971, 286 A.3d 906 (2023). "Permitting recovery in a suit for vexatious litigation promotes the 'interest in making the courts available for the resolution of disputes while discouraging the use of litigation simply as a means to harm others.' Simply put, liability for vexatious litigation aims to penalize litigants and attorneys who file or defend baseless claims solely with the intention to frustrate the opposing party, monetarily or otherwise." (Footnote omitted.) S. Gruber, "A Lawyer's Guide to Vexatious Litigation in Connecticut," 88 Conn. B.J. 184, 187 (2015).

Pursuant to § 674 of the Restatement (Second) of Torts, "[o]ne who takes an active part in the initiation,

[16] This court recently has noted "that many states, unlike Connecticut, refer to vexatious litigation claims in the civil context as 'malicious prosecution' claims. See, e.g., *Chervin* v. *Travelers Ins. Co.*, 448 Mass. 95, 102–103, 858 N.E.2d 746 (2006) ('[t]he tort [of malicious prosecution] is not confined to the wrongful initiation of criminal proceedings; it may be maintained for the unjustifiable initiation of a civil action' . . .)); *Burt* v. *Smith*, 181 N.Y. 1, 5, 73 N.E. 495 (1905) ('[a]n action for malicious prosecution is usually based upon an arrest in criminal proceedings, although it may be founded upon a civil action when commenced simply to harass and oppress the defendant'), appeal dismissed, 203 U.S. 129, 27 S. Ct. 37, 51 L. Ed. 121 (1906); *Ims* v. *Portsmouth*, 32 A.3d 914, 922 (R.I. 2011) (defining malicious prosecution 'as a suit for damages resulting from a prior criminal or civil legal proceeding that was instituted maliciously and without probable cause, and that terminated unsuccessfully for the plaintiff therein' . . .))." *Northeast Building Supply, LLC* v. *Morrill*, 224 Conn. App. 137, 154 n.9, 312 A.3d 138 (2024).

continuation or procurement of civil proceedings against another is subject to liability to the other for wrongful civil proceedings if (a) he acts without probable cause, and primarily for a purpose other than that of securing the proper adjudication of the claim in which the proceedings are based . . . .''[17] (Emphasis added.) 3 Restatement (Second), supra, p. 452. As comment (c) to § 674 of the Restatement explains, ''one who continues a civil proceeding that has properly been begun or one who takes an active part in its continuation for an improper purpose after he has learned that there is no probable cause for the proceeding becomes liable as if he had then initiated the proceeding.'' Id., comment (c), p. 453. For purposes of this opinion, we refer to this as the continuation theory.[18]

[17] The elements of a claim for wrongful use of civil proceedings under § 674 of the Restatement (Second) of Torts are similar to those of the tort of vexatious litigation. See *Northeast Building Supply, LLC* v. *Morrill*, 224 Conn. App. 137, 150 n.7, 312 A.3d 138 (2024).

[18] Notably, the continuation theory is not a novel one; in fact, a vast majority of American jurisdictions have recognized and adopted it in the context of claims for the malicious prosecution of a prior civil action, malicious abuse of process, and wrongful use of civil proceedings. See *Poff* v. *Hayes*, 763 So. 2d 234, 241 (Ala. 2000); *Greywolf* v. *Carroll*, 151 P.3d 1234, 1241 (Alaska 2007); *McClinton* v. *Rice*, 76 Ariz. 358, 367, 265 P.2d 425 (1953); *Sundeen* v. *Kroger*, 355 Ark. 138, 142, 133 S.W.3d 393 (2003); *Zamos* v. *Stroud*, 32 Cal. 4th 958, 966, 87 P.3d 802, 12 Cal. Rptr. 3d 54 (2004); *Slee* v. *Simpson*, 91 Colo. 461, 465, 15 P.2d 1084 (1932); *Salazar* v. *Public Trust Institute*, 522 P.3d 242, 249 (Colo. App. 2022); *Debrincat* v. *Fischer*, 217 So. 3d 68, 70 (Fla. 2017); *Horne* v. *J.H. Harvey Co.*, 274 Ga. App. 444, 448, 617 S.E.2d 648 (2005); *Arquette* v. *State*, 128 Haw. 423, 431–33, 290 P.3d 493 (2012); *Badell* v. *Beeks*, 115 Idaho 101, 102–104, 765 P.2d 126 (1988); *Dawson* v. *Mead*, 98 Idaho 1, 5, 557 P.2d 595 (1976); *Beaman* v. *Freesmeyer*, 131 N.E.3d 488, 497–98 (Ill. 2019); *Liberty Loan Corp. of Des Moines* v. *Williams*, 201 N.W.2d 462, 466 (Iowa 1972); *Lindenman* v. *Umscheid*, 255 Kan. 610, 624, 875 P.2d 964 (1994); *Lemoine* v. *Wolfe*, 168 So. 3d 362, 367 (La. 2015); *Friedman* v. *Dozorc*, 412 Mich. 1, 34, 312 N.W.2d 585 (1981); *Alpha Gulf Coast, Inc.* v. *Jackson*, 801 So. 2d 709, 721 (Miss. 2001); *Palisades Collection, LLC* v. *Watson*, 375 S.W.3d 857, 861 (Mo. App. 2012); *Farmers Ins. Exchange* v. *Minemyer*, 413 Mont. 60, 75, 532 P.3d 837 (2023); *McKinney* v. *Okoye*, 287 Neb. 261, 271–72, 842 N.W.2d 581 (2014); *O'Brien* v. *Behles*, 464 P.3d 1097, 1110–12 (N.M. 2020); *Cold Spring Advisory Group, LLC* v. *National Securities Corp.*, 226 App. Div. 3d 612, 612, 210 N.Y.S.3d 393 (2024); *Siegel*

In *DeLaurentis* v. *New Haven*, 220 Conn. 225, 248, 597 A.2d 807 (1991), our Supreme Court stated: "Most courts now agree with the Restatement (Second) of Torts, § 680, which permits liability for vexatious 'initiation, *continuation* or procurement of civil proceedings against another before an administrative board that has power to take action adversely affecting the legally protected interests of the other.' " (Emphasis added.) Id.; see 3 Restatement (Second), supra, § 680, p. 468. Although the court in *DeLaurentis* expressed agreement with § 680 of the Restatement (Second) of Torts in recognizing that a vexatious litigation action may be based on a prior administrative, rather than civil, proceeding that terminated in the plaintiff's favor; see *Rioux* v. *Barry*, 283 Conn. 338, 347, 927 A.2d 304 (2007); § 680 includes the identical "initiation, continuation or procurement of civil proceedings" language set forth in § 674 of the Restatement, which is not limited to administrative proceedings.[19] We cannot think of any

v. *O.M. Scott & Sons Co.*, 73 Ohio App. 347, 351, 56 N.E.2d 345 (1943); *Empire Oil & Refinery Co.* v. *Williams*, 184 Okla. 172, 173, 86 P.2d 291 (1938); *Checkley* v. *Boyd*, 170 Or. App. 721, 734–36, 14 P.3d 81 (2000), review denied, 332 Or. 239, 28 P.3d 1174 (2001); *Coatesville* v. *Jarvis*, 902 A.2d 1249, 1251 (Pa. Super.), appeal denied, 591 Pa. 688, 917 A.2d 844 (2006); *Brough* v. *Foley*, 572 A.2d 63, 66 (R.I. 1990); *Pallares* v. *Seinar*, 407 S.C. 359, 366, 756 S.E.2d 128 (2014); *Heib* v. *Lehrkamp*, 704 N.W.2d 875, 884 n.8 (S.D. 2005); *Cordova* v. *Martin*, 677 S.W.3d 654, 659 (Tenn. App. 2023), appeal denied, Tennessee Supreme Court, Docket No. M2021-0142-SC-R11-CV (October 11, 2023); *Texas Beef Cattle Co.* v. *Green*, 921 S.W.2d 203, 207 (Tex. 1996); *Nielson* v. *Spencer*, 196 P.3d 616, 620–21 (Utah 2008), cert. denied, 207 P.3d 432 (Utah 2009); *Bacon* v. *Reimer & Braunstein, LLP*, 182 Vt. 553, 554, 929 A.2d 723 (2007); *Loeffelholz* v. *Citizens for Leaders with Ethics & Accountability Now*, 119 Wn. App. 665, 695, 82 P.3d 1199, review denied, 152 Wn. 2d 1023, 101 P.3d 107 (2004); *Strid* v. *Converse*, 111 Wis. 2d 418, 423, 331 N.W.2d 350 (1983); *Cates* v. *Eddy*, 669 P.2d 912, 917 (Wyo. 1983).

[19] Our Superior Courts have construed our Supreme Court's reference in *DeLaurentis* to the continuation language in § 680 of the Restatement (Second) for administrative proceedings as a statement of its agreement with and adoption of the continuation theory for purposes of the tort of vexatious litigation, whether in an administrative or a civil proceeding. See *Diamond 67, LLC* v. *Oatis*, Superior Court, judicial district of Hartford, Complex Litigation Docket, Docket No. CV-12-6030610-S (September 18,

reason why our Supreme Court, having acknowledged its agreement with this theory for vexatious litigation claims based on prior administrative proceedings, would not do so in the context of such claims based on prior civil proceedings. See *Northeast Building Supply, LLC* v. *Morrill*, 224 Conn. App. 137, 150, 312 A.3d 138 (2024) ("in defining the parameters of a vexatious litigation claim in Connecticut, our Supreme Court has often looked to the Restatement (Second) of Torts"); see also *Blake* v. *Levy*, 191 Conn. 257, 264, 464 A.2d 52 (1983) (referring to comment (j) of § 674 of Restatement (Second) of Torts regarding requirement of vexatious litigation claim that plaintiff allege that prior litigation terminated in plaintiff's favor and purpose that requirement serves).

Moreover, Connecticut case law suggests that this court implicitly has expressed agreement with § 674 of the Restatement (Second) of Torts and/or the continuation theory as a proper basis for an action for vexatious litigation. For example, this court previously applied the continuation theory set forth in § 680 of the

2017) (citing *DeLaurentis* and its application of § 680 of Restatement (Second) of Torts, and holding that "continuation of civil proceedings is sufficient to support a vexatious litigation claim" based on defendants' intervention in mandamus action and administrative appeal); *Infante* v. *Zurich American Ins. Co.*, Docket No. CV-94-327422-S, 1998 WL 310871, *4 (Conn. Super. June 1, 1998) (citing § 674 of Restatement (Second) of Torts for proposition that vexatious suit action "also applies to wrongful continuation of a lawsuit" and holding that question of material fact existed as to whether defendant wrongfully continued civil proceeding); *Levine* v. *Fairfield Fire Dept.*, Superior Court, judicial district of Fairfield, Docket No. CV-89-0255827-S (December 17, 1993) (10 Conn. L. Rptr. 556, 556–57) (explaining that *DeLaurentis* "recognized that a claim of vexatious suit or malicious prosecution was not limited to a prior civil action or prior criminal complaint, but that it extends to an initiation, continuation or procurement of civil proceedings"); *Paul Rebeschi Construction, Inc.* v. *Yates*, Superior Court, judicial district of New Haven, Docket No. 307901 (August 19, 1991) (4 Conn. L. Rptr. 430, 430) (holding that, although administrative proceeding was not initiated by defendants, "its continuation by their taking the appeal [was] sufficient to support" cause of action for common-law vexatious litigation).

Restatement (Second) of Torts in *Diamond 67, LLC* v. *Oatis*, 167 Conn. App. 659, 144 A.3d 1055, cert. denied, 323 Conn. 926, 150 A.3d 230 (2016), and cert. denied, 323 Conn. 927, 150 A.3d 228 (2016), and cert. denied, 323 Conn. 927, 150 A.3d 228 (2016), and cert. denied, 323 Conn. 927, 150 A.3d 229 (2016), and cert. denied, 323 Conn. 927, 150 A.3d 230 (2016). In *Diamond 67, LLC*, the plaintiff commenced an action against the defendants for common-law and statutory vexatious litigation premised on the defendants' conduct in intervening in certain mandamus and administrative actions, which thereby caused a delay in the plaintiff's ability to obtain certain necessary approvals for a development project. Id., 667–68. The trial court rendered summary judgment in favor of the defendants, and, on appeal, this court reversed that judgment. Id., 672, 691. After citing *DeLaurentis* and our Supreme Court's "agree[ment] with the Restatement (Second) of Torts, § 680"; (internal quotation marks omitted) id., 681; this court concluded: "Here, the plaintiff submitted evidence establishing that there is a genuine issue of material fact as to each defendant's participation in the initiation, procurement, and/or continuation of their respective interventions in the plaintiff's administrative and mandamus actions . . . ." Id., 683.

In *Schaeppi* v. *Unifund CCR Partners*, 161 Conn. App. 33, 41, 127 A.3d 304, cert. denied, 320 Conn. 909, 128 A.3d 953 (2015), the plaintiff brought an action for statutory and common-law vexatious litigation based on the defendants' alleged lack of probable cause (1) to continue to prosecute a foreclosure action after being put on notice that the amount of damages had not been determined in an underlying debt collection action; id., 52; and (2) to appeal from the denial of its motion to open the judgment in the foreclosure action. Id., 54. This court quoted the language from *DeLaurentis* that

"there may be liability for vexatious 'initiation, *continuation* or procurement of civil proceedings' " in support of the notion that "[p]robable cause . . . can be lost during the course of an action." (Emphasis in original.) Id., 45 n.6. We ultimately concluded that the defendants "did not lose probable cause to pursue the foreclosure action because of adverse rulings along the way"; id., 53; and that probable cause existed to pursue the appeal. Id., 54. Similarly, in *Rousseau* v. *Weinstein*, 204 Conn. App. 833, 254 A.3d 984 (2021), the plaintiffs brought an action raising common-law and statutory vexatious litigation claims in which they "alleged that the defendants lacked probable cause to commence and to continue [a] civil action" that contained the same allegations as those raised in a prior dissolution action, following the issuance of a decision in the dissolution action. Id., 851. The trial court rendered summary judgment in favor of the defendants, and this court, in affirming the judgment, concluded that the defendants "had probable cause to continue the civil action, move for a stay in that matter, and await the outcome of [an] appeal prior to determining how to proceed." Id., 859; see also *Infante* v. *Zurich American Ins. Co.*, Docket No. CV-94-327422-S, 1998 WL 310871, *4 (Conn. Super. June 1, 1998) (citing 3 Restatement (Second), supra, § 674, and explaining that, "[w]hile a vexatious suit action is usually brought for wrongful initiation of a civil proceeding, it also applies to wrongful continuation of a lawsuit").

Although the precise issue before us in the present case was not at issue in the cases we have cited, what we derive from this case law is that actions for vexatious litigation in Connecticut, both common-law and statutory, have been and can be based on a party's conduct in the continuation of a civil or administrative proceeding without probable cause. A vexatious litigation action must still stem from a prior civil action or administrative

proceeding, and to establish such an action a party must "prove want of probable cause . . . and a termination of suit in the plaintiff's favor." (Internal quotation marks omitted.) *DeLaurentis* v. *New Haven*, supra, 220 Conn. 248. The continuation theory simply relates to a party's conduct within the prior action, whether civil or administrative in nature. Allowing a vexatious litigation action for a party's conduct in prolonging a civil proceeding without probable cause furthers one of the underlying purposes of the doctrine—to reimburse a party for litigation expenses resulting from defending against or responding to unwarranted actions. See *Bernhard-Thomas Building Systems, LLC* v. *Dunican*, supra, 286 Conn. 554.[20]

2

With this in mind, we necessarily must determine what constitutes a "continuation" of a legal proceeding. Pursuant to comment (c) to § 674 of the Restatement (Second) of Torts, "one who continues a civil proceeding that has properly been begun or one who takes an active part in its continuation for an improper purpose after he has learned that there is no probable cause for the proceeding becomes liable as if he had then initiated the proceeding." 3 Restatement (Second), supra, § 674, comment (c), p. 453. Merriam-Webster's Collegiate Dictionary (11th Ed. 2014) p. 270, defines continuation as "the act or fact of continuing in or the prolongation of a state or activity . . . ." Continue is defined in part as "to keep going or add to . . . prolong . . . ." Id. Therefore, one who takes an active part in the continuation of a civil proceeding engages in conduct that prolongs or keeps that proceeding going.

[20] See also *Zamos* v. *Stroud*, 32 Cal. 4th 958, 969, 87 P.3d 802, 12 Cal. Rptr. 3d 54 (2004) ("[c]ontinuing an action one discovers to be baseless harms [a party] and burdens the court system just as much as initiating an action known to be baseless from the outset").

To that end, actions for vexatious litigation in Connecticut alleging a party's continuation of a civil proceeding for an improper purpose have been based on a myriad of ways in which the litigation has been prolonged in the prior action, including the filing of a counterclaim and the assertion of a special defense; see *Rozbicki* v. *Sconyers*, 198 Conn. App. 767, 769, 772, 234 A.3d 1061 (2020) (vexatious litigation count of complaint alleged that defendants asserted special defenses and filed counterclaim in prior action without probable cause); intervening in an action; *Diamond 67, LLC* v. *Oatis*, supra, 167 Conn. App. 683 (common-law and statutory vexatious litigation claims premised on defendants' intervention in mandamus and administrative actions, which caused delay in plaintiff's ability to obtain approvals for development project); filing a motion; *Duse* v. *Carter*, 9 Conn. App. 218, 219, 518 A.2d 74 (1986) (statutory vexatious litigation claim alleging that, in parties' prior marital dissolution action, defendant filed contempt motion without probable cause and "with a malicious intent to vex and trouble [the plaintiff]"); *Nutmeg Financial Holdings, LLC* v. *Bachleda*, Superior Court, judicial district of Hartford, Docket No. CV-21-6142429-S (October 12, 2022) (relying on *Schaeppi* for proposition that "[a] claim for vexatious litigation may be predicated on a complaint or a defense, but also on a motion to open a judgment and a subsequent appeal"); *Silano* v. *Verespy*, Superior Court, judicial district of Fairfield, Docket No. CV-18-6072543-S (April 30, 2019) (68 Conn. L. Rptr. 436, 438) (plaintiff alleged requisite elements for vexatious litigation claim by alleging that summary judgment motion was filed without probable cause in prior action and with malice, and that prior action terminated in plaintiff's favor); filing an appeal; see *Schaeppi* v. *Unifund CCR Partners*, supra, 161 Conn. App. 36 (vexatious litigation action

alleging that defendants lacked probable cause to pursue appeal following denial of motion to open foreclosure judgment); *Woodbury-Correa* v. *Reflexite Corp.*, Superior Court, judicial district of New Britain, Docket No. CV-11-6011794 (December 15, 2014) (genuine issue of material fact existed as to whether defendant had probable cause to appeal decision of Department of Labor); *Paul Rebeschi Construction, Inc.* v. *Yates*, Superior Court, judicial district of New Haven, Docket No. 307901 (August 19, 1991) (4 Conn. L. Rptr. 430, 430) (holding that defendants' continuation of administrative proceeding by taking appeal was sufficient to support action for vexatious litigation and citing § 674 of Restatement (Second) of Torts for support); and the filing of grievance complaints. See *Kaufman, LLC* v. *Feinberg*, Docket No. 3:17cv958 (AVC), 2018 WL 11391732, *4 (D. Conn. August 1, 2018) (holding that grievance complaints could serve as basis for common-law and statutory vexatious litigation claims).

3

Having discussed the types of conduct that can be considered a continuation of a civil proceeding for purposes of vexatious litigation, we next must determine whether a defendant's bad faith response in an answer to an allegation in the plaintiff's complaint, as alleged in the present case, falls within the type of conduct on which a vexatious litigation action can be premised. In light of the particular circumstances of the present case, we conclude that it does.

Black's Law Dictionary defines an answer as "[a] defendant's first pleading that addresses the merits of the case, [usually] by denying the plaintiff's allegations. . . . An answer usually sets forth the defendant's defenses and counterclaims." Black's Law Dictionary (12th Ed. 2024) p. 114. Pursuant to Practice Book § 10-46, "[t]he defendant in the answer shall specially deny

such allegations of the complaint as the defendant intends to controvert, admitting the truth of the other allegations, unless the defendant intends in good faith to controvert all the allegations, in which case he or she may deny them generally." "The pleading of no knowledge or information to . . . allegations [in a complaint] is in effect a denial." (Internal quotation marks omitted.) *Second Exeter Corp.* v. *Epstein*, 5 Conn. App. 427, 429, 499 A.2d 429 (1985), cert. denied, 198 Conn. 802, 502 A.2d 932 (1986). When an action has been commenced against a defendant, the defendant must file an answer within a certain time period or it may be subject to default for failure to plead and monetary penalties. See General Statutes § 52-119; Practice Book §§ 10-8 and 17-32; see also *Kaye* v. *Housman*, 184 Conn. App. 808, 814, 195 A.3d 1168 (2018) ("[o]ur statutes and rules of practice provide penalties for failing to comply with the timely pleading requirements of Practice Book § 10-8").

"Connecticut courts historically have imposed sanctions on parties for untruthful pleading." *Stamford Hospital* v. *Schwartz*, 190 Conn. App. 63, 86, 209 A.3d 1243, cert. denied, 332 Conn. 911, 209 A.3d 644 (2019). If "[a] plea of general denial to material allegations of the complaint that the defendant knew to be true subjects a litigant to pay expenses incurred to establish the truth" under our rules of practice; id.; we can think of no reason why it cannot also subject a litigant to an action for vexatious litigation when that litigant files an answer in which it falsely denies, or asserts that it lacks sufficient information to deny or admit, allegations it allegedly knows to be true, nor have we found any Connecticut authority precluding such an action. Good faith pleading is required in Connecticut, and although the filing of an answer is a required responsive pleading under our rules of practice, a failure to admit, or the denial in the answer of, allegations known to be true

at that time could unnecessarily prolong litigation just as much as filing a motion; see *Duse* v. *Carter*, supra, 9 Conn. App. 219; or filing an appeal.[21] See *Schaeppi* v. *Unifund CCR Partners*, supra, 161 Conn. App. 36. Moreover, the requirement in our rules of practice that "all allegations [in pleadings] . . . be founded on a reasonable basis"; *Somers* v. *Chan*, 110 Conn. App. 511, 535, 955 A.2d 667 (2008); makes no exception for a party's answer.[22]

The allegations in this case present the unique circumstances in which a defendant may be liable for vexatious litigation based on its responses to allegations in the complaint. First, and significantly, we must emphasize the context in which the present action arose. The plaintiff was involved in a motor vehicle accident with an underinsured tortfeasor, Smith. Immediately following the accident, the plaintiff notified the defendant, her insurer, of the accident and of a potential claim for underinsured motorist benefits under her contract of insurance with the defendant. That prompted the defendant to start a file with respect to the plaintiff's accident and to conduct a yearlong investigation into the matter that was concluded on May 26, 2015, before the plaintiff commenced the prior negligence action

[21] We are not suggesting that a failure to plead could be the basis for a claim of vexatious litigation. Although failing to plead does amount to a failure to admit allegations that are not in dispute, a default for failure to plead constitutes an admission of the allegations of the complaint and therefore does not prolong the action.

[22] See Practice Book § 4-2, which provides in relevant part: "(a) Every pleading and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name. A party who is not represented by an attorney shall sign his or her pleadings and other papers. The name of the attorney or party who signs such document shall be legibly typed or printed beneath the signature.

"(b) The signing of any pleading, motion, objection or request shall constitute a certificate that the signer has read such document, that to the best of the signer's knowledge, information and belief there is good ground to support it, that it is not interposed for delay, and that the signer has complied with the requirements of Section 4-7 regarding personal identifying information. . . ."

against Smith in September, 2015. In December, 2015, the defendant was brought into the *Smith* action, and the complaint was amended to allege a claim of breach of contract against the defendant, *not a negligence claim*. Although the plaintiff did not settle that action with Smith until January, 2016, at the time the defendant was brought into the action, the file notes in the defendant's file concerning the plaintiff's accident indicated that Smith was 100 percent liable for the accident, and the defendant did not file its first answer to the complaint until May, 2016, after Smith settled with the plaintiff.

The allegations of the complaint in the present case describe a pattern of bad faith pleading by the defendant during the course of the *Smith* action when the defendant filed not only its initial answer asserting that it lacked information to admit or deny, inter alia, the allegation that Smith was 100 percent liable for the accident, but three subsequent amended answers in which it continued to make that assertion about various allegations it allegedly knew to be true and, ultimately, denied those allegations, despite having previously admitted some of them. This occurred over a period of more than one year. These allegations addressed conduct that prolonged the *Smith* action with respect to the breach of contract count against the defendant, for which the defendant eventually admitted liability. Our jurisprudence on vexatious litigation does not preclude a party from basing a vexatious litigation action on such allegations. Indeed, to permit a plaintiff to hold a defendant accountable by way of a vexatious litigation action for such alleged conduct furthers the purpose of the tort of vexatious litigation.

The defendant and the concurring and dissenting opinion suggest that our decision will open floodgates to litigation.[23] The defendant asserts that "[t]he plaintiff

[23] See *Paul Rebeschi Construction, Inc.* v. *Yates*, supra, 4 Conn. L. Rptr. 430 ("The court is fully aware that 'honest litigants are to be encouraged

would have this court adopt a rule that the mere assertion of contributory negligence by defense counsel in an uninsured or underinsured motorist case can be the basis of a vexatious litigation claim against his or her client. Besides opening the door to a flood of lawsuits, such a rule would have a chilling effect on defense counsel's ability to represent the client competently . . . and to exercise independent professional judgment." (Citation omitted.) The concurring and dissenting opinion echoes these concerns, relying on case law from courts in other states where such actions are disfavored. See, e.g., *Ritter* v. *Ritter*, 381 Ill. 549, 554–55, 46 N.E.2d 41 (1943); *Pope* v. *Pollock*, 46 Ohio St. 367, 370, 21 N.E. 356 (1889); see also footnote 26 of this opinion. We are not persuaded by these arguments for a number of reasons.

First, it is clear from Connecticut case law that an action for vexatious litigation may be based on a counterclaim or special defense that was asserted in a prior action without probable cause. See *Rozbicki* v. *Sconyers*, supra, 198 Conn. App. 791 (trial court improperly granted defendant's motion for summary judgment because genuine issue of material fact existed as to whether defendant had probable cause to assert special defense). Second, the particular factual circumstances of the present case indicate that the defendant had conducted and closed a yearlong investigation into the collision, at the close of which two claims specialists for the defendant determined that Smith was 100 percent liable for the collision and indicated their liability conclusions in the claim file long before the defendant was

to seek justice and not to be deterred by fear of an action in return and . . . that litigation must end somewhere, and that if one counter-action may be brought, so may another and another.' Prosser & Keeton on Torts § 120 (5th Ed.). However, when a party pursues a legal proceeding, without probable cause and for a purpose other than that of securing the proper adjudication of a claim, that person is not an honest litigant seeking justice and should respond to damages for the harm caused by such reckless and costly conduct.").

brought into the *Smith* action. The photographs of the accident, the police report and witness statements collected during that investigation were all consistent with the conclusions of the claims specialists. Additionally, the plaintiff had settled her claim with Smith and withdrew the action against him on January 5, 2016. Significantly, this all occurred *before* the defendant filed its answer and special defense of contributory negligence in the *Smith* action in May, 2016. Third, there are inherent safeguards in actions for vexatious litigation that "balance the need to protect against inappropriate retaliatory litigation while incentivizing the reporting of wrongdoing." *Dorfman* v. *Smith*, supra, 342 Conn. 605; see also *Scholz* v. *Epstein*, 198 Conn. App. 197, 232, 232 A.3d 1155 (2020), aff'd, 341 Conn. 1, 266 A.3d 127 (2021). In fact, there is a lower threshold for establishing probable cause in vexatious litigation cases, which is designed to permit attorneys to pursue novel legal theories, even though they may turn out to be unsuccessful. See *Kazemi* v. *Allen*, supra, 214 Conn. App. 107. Thus, a plaintiff alleging a claim of vexatious litigation will have to demonstrate that the prior civil proceeding terminated in the plaintiff's favor, a lack of probable cause, and, if the plaintiff is seeking treble damages under § 52-568 (2), a showing of malice. For these reasons and under the particular facts of the present case, we do not believe our decision today will open any floodgates to litigation or impose unreasonable pleading requirements on parties.

For similar reasons, we also conclude that the possibility that a claim for vexatious litigation can be based on a bad faith denial in an answer does not mean that the ability of defendants to hold plaintiffs to their proof will be chilled. In a claim for vexatious litigation, a lack of probable cause must be established; that is, the plaintiff must show that the defendant denied allegations that were known to be true at the time of the denial. Furthermore, because discovery in most cases is conducted *after* a party files an answer to a complaint,

it typically will be difficult to establish a lack of probable cause at the time of the filing of the answer denying an allegation. The probable cause requirement, thus, acts as a formidable barrier to baseless vexatious litigation actions, as liability will attach only under narrow circumstances. That determination is further reinforced by the fact that, in addition to lack of probable cause, a party must also establish favorable termination of the prior action and, if bringing a cause of action pursuant to § 52-568 (2), malice, all of which help to distinguish vigorous claims from malicious ones and, thus, serve to minimize any chilling effect on zealous advocacy. Moreover, in light of the "inherent safeguards against inappropriate retaliatory litigation [contained within] claims of vexatious litigation"; *Scholz* v. *Epstein*, supra, 198 Conn. App. 232; we see no merit to the concurring and dissenting opinion's contention that, as a result of our decision, "the mere denial of an allegation in a civil pleading" or "an inartfully or even negligently pleaded answer" will subject individuals to actions for vexatious litigation.

Actions for vexatious litigation have long been a part of Connecticut jurisprudence. See *Frisbie* v. *Morris*, 75 Conn. 637, 637, 55 A. 9 (1903) (explaining that "[vexatious litigation] statute (Rev. 1902, § 1105) . . . appears to have been first enacted in 1672 (Rev. of 1808, p. 671), and with some changes in phraseology has formed part of our law ever since"); *Munson* v. *Wickwire*, 21 Conn. 513, 515 (1852) (action for malicious suit); see also *Sterling* v. *Adams*, 3 Day (Conn.) 411, 432 (1809); *Nichols* v. *Bronson*, 2 Day (Conn.) 211, 216 (1805); *Deming* v. *Taylor*, 1 Day (Conn.) 285, 289–90 (1804); *Ainsworth* v. *Allen*, 1 Kirby (Conn.) 145, 146 (1786). Connecticut, unlike most states, even permits a cause of action for vexatious litigation based on the filing of a special defense without probable cause, which, in effect, is an action based on a vexatious defense. Yet, despite the critics in other states where such actions are not permitted and the concerns raised by the concurring

and dissenting opinion in the present case, there is no indication that permitting such an action has caused the foundations of our courthouses to crack from the flood of lawsuits. History suggests that it also will not do so as a result of our decision today.

For these reasons, we believe that the concurring and dissenting opinion overstates the consequences of our decision and needlessly invokes "the sky is falling" rhetoric. It will be a rare case in which a party's denial of material factual allegations in a complaint will give rise to a vexatious litigation claim. Moreover, our decision will not "reverberate through every civil courthouse in this state," as suggested by the concurring and dissenting opinion, in light of the vast circumstances that Connecticut courts already have recognized as proper grounds for actions for vexatious litigation. Simply put, our decision does not constitute an unwarranted enlargement of the current law in Connecticut regarding vexatious litigation[24] but, rather, logically stems from it and the policies underlying the tort. Those policies are designed to protect the right of an individual to be free from unjustifiable litigation, which applies

[24] The concurring and dissenting opinion characterizes our decision as an expansion of the current law regarding actions for vexatious litigation and, in doing so, notes the "grave implications" resulting from the fact that the novel issue in this case "has not been thoroughly vetted by members of our profession in the form of amicus briefs or proceedings before the Rules Committee of the Superior Court or the General Assembly." These assertions notwithstanding, as we have stated, our decision does not enlarge the current law but logically flows from it. For that reason and in light of our Supreme Court's decision in *Dorfman* v. *Smith*, supra, 342 Conn. 582, we do not believe that amicus briefs are warranted in this matter.

Furthermore, like the concurring and dissenting opinion, we are mindful of the attorneys in this state who practice daily in our civil courts and we agree that general denials are commonplace. When litigation is unnecessarily prolonged by a party who files answers denying factual allegations it knows to be true, however, a civil advocate exceeds the limits of legitimate advocacy and should not be insulated from legal liability for the misuse of the litigation process, while at the same time the inherent safeguards contained within claims of vexatious litigation protect the civil advocate from retaliatory litigation and limit the circumstances in which such a claim may be brought.

equally when litigation is unnecessarily prolonged by a party who abuses the process, and a party should be no less accountable for such wrongful conduct in litigation simply because it occurred in the filing of answers to a complaint, as opposed to a motion, special defense or an appeal.

In disagreeing with our determination, the concurring and dissenting opinion engages in a lengthy analysis of case law from, inter alia, Kansas, California, Illinois, Ohio,[25] and Hawaii[26] rejecting the creation of a cause

[25] Connecticut law differs from that of Ohio in one significant respect: that is, for purposes of an action for vexatious litigation, a plaintiff in Connecticut does not need to show that the defendant initiated the prior action. See *Bhatia* v. *Debek*, 287 Conn. 397, 406, 948 A.2d 1009 (2008) (explaining that initiation of lawsuit or action is not element of vexatious litigation). Instead, all that is required with respect to the prior action requirement is that there was a prior civil or administrative action involving the parties that terminated in the plaintiff's favor. Ohio, on the other hand, requires as an essential element to a cause of action for malicious civil prosecution that the plaintiff allege "malicious institution of prior proceedings against the plaintiff by [the] defendant . . . ." (Internal quotation marks omitted.) *Robb* v. *Chagrin Lagoons Yacht Club, Inc.*, 75 Ohio St. 3d 264, 269, 662 N.E.2d 9 (1996). Because Ohio requires that the party against whom the malicious prosecution claim is brought must have instituted the prior proceeding, it necessarily follows that an action for malicious civil prosecution in Ohio may not be premised on a defense asserted in the prior action without probable cause. Ohio, however, has a vexatious litigator statute, pursuant to which any person deemed to be a vexatious litigator may be prohibited from further filing in various Ohio courts without prior approval. See Ohio Rev. Code Ann. § 2323.52 (West 2017); *State ex rel. Mobley* v. *Franklin County Board of Commissioners*, 173 Ohio St. 3d 568, 570, 231 N.E.3d 1146 (2023). A vexatious litigator is defined as "[a]ny person who has habitually, persistently, and without reasonable grounds engaged in vexatious conduct in a civil action or actions, whether in the court of claims or in a court of appeals, court of common pleas, municipal court, or county court, whether the person or another person instituted the civil action or actions, and whether the vexatious conduct was against the same party or against different parties in the civil action or actions." Ohio Rev. Code Ann. § 2323.52 (A) (3) (West 2017). "Conduct" for purposes of the statute includes "[t]he filing of a civil action, *the assertion of a claim*, *defense*, *or other position in connection with a civil action*, *the filing of a pleading*, motion, or other paper in a civil action, including, but not limited to, a motion or paper filed for discovery purposes, or the taking of any other action in connection with a civil action . . . ." (Emphasis added.) Ohio Rev. Code Ann. § 2323.51 (A) (1) (a) (West 2017).

[26] It is noteworthy that the concurring and dissenting opinion relies on cases from states, namely, Kansas, California, Illinois, Ohio and Hawaii, in

of action for malicious defense. For example, the concurring and dissenting opinion refers to the fact that "California courts repeatedly have resisted attempts to impose liability on defendants who maliciously defend a civil action," as well as the reasoning of other states that agree and have determined that, "[i]f the wrongful conduct of a defendant causing the plaintiff to sue him would give rise to an independent tort and a separate cause of action, there would be no end to the litigation . . . ." (Internal quotation marks omitted.) The flaw in this argument, first and foremost, is that Connecticut clearly permits a cause of action for vexatious litigation, under the common law and pursuant to statute, based on a party's conduct in defending a civil action; we simply do not refer to it as an action for malicious defense. The most common example is an action for vexatious litigation based on a special defense filed or maintained in bad faith and without probable cause in a prior civil action. See *Rozbicki* v. *Sconyers*, supra, 198 Conn. App. 769. The narrow issue in the present case is not whether Connecticut should recognize the tort of malicious defense but, rather, whether under Connecticut law, which allows a cause of action to be based on a party's conduct in defending or unnecessarily continuing a civil action, a party's denial in its answer of a complaint's factual allegations that allegedly are known to be true, which is made without probable cause, can form the basis for a vexatious litigation action. In other words, does such conduct constitute

which actions for malicious prosecution, whether based on prior civil or criminal proceedings, are expressly disfavored. See, e.g., *Zamos* v. *Stroud*, 32 Cal. 4th 958, 966, 87 P.3d 802, 12 Cal. Rptr. 3d 54 (2004) (tort of malicious prosecution is disfavored); *Young* v. *Allstate Ins. Co.*, 119 Haw. 403, 420, 198 P.3d 666 (2008) (same); *Budd* v. *Walker*, 60 Kan. App. 2d 189, 197–98, 491 P.3d 1273 (same), review denied, 314 Kan. 854, P.3d (2021); *Beaman* v. *Freesmeyer*, 131 N.E.3d 488, 494 (Ill. 2019) (same); *Froehlich* v. *Ohio Dept. of Mental Health*, Docket No. 05AP-129, 2005 WL 3557449, *3 (Ohio App. December 30, 2005) (same), aff'd, 114 Ohio St. 3d 286, 871 N.E.2d 1159 (2007). Connecticut courts have not taken this view of actions for vexatious litigation, as discussed previously in this opinion.

continuing or prolonging litigation for purposes of a claim under the common law, or does it constitute "asserting a defense" for purposes of a statutory cause of action for vexatious litigation. The concurring and dissenting opinion's analysis of that issue, therefore, is entirely inapposite to the issue before this court in the present case.

The concurring and dissenting opinion also incorrectly focuses on the concept of general denials of liability, which is not at issue in this case. The *Smith* action did not involve an allegation of negligence *against the defendant*, nor has the plaintiff premised this vexatious litigation action on the defendant's failure to admit its negligence in the *Smith* action. See footnote 33 of this opinion. The plaintiff's vexatious litigation action is based on the defendant's conduct in prolonging the breach of contract action brought against it by denying various material allegations in the *Smith* action it allegedly knew to be true, including, inter alia, that (1) Smith failed to stop or slow his vehicle when he entered the intersection, causing the collision with the plaintiff's vehicle, (2) the collision and resulting injuries to the plaintiff were caused by Smith's negligence, (3) the plaintiff sustained physical injuries, some of which were permanent in nature, as a direct and proximate cause of Smith's negligence, (4) the plaintiff incurred expenses for medical care and treatment as a result of Smith's negligence, lost wages from missing work due to the injuries sustained in the collision and has been permanently impaired in her ability to enjoy life's activities, (5) Smith was underinsured at the time of the collision, (6) the plaintiff complied with her duties under her insurance policy with the defendant, and (7) the defendant is liable to the plaintiff under the terms of that policy.

The allegations in the *Smith* action include language of causation, relating to both the cause of the collision

and the cause and extent of the plaintiff's alleged injuries. As we explain more fully in part II of this opinion, it is without question that a defendant need not accept a plaintiff's allegations regarding causation of injuries. With respect to the allegations concerning the cause of the collision, however, at the time the defendant answered the complaint, it was not disputed, as demonstrated by the defendant's own investigation of the collision and Smith's admission of liability and settlement with the plaintiff, that Smith was responsible for the collision as a result of his failure to stop at a stop sign. The amended complaint in the *Smith* action also includes factual allegations concerning the circumstances of the collision, that Smith was underinsured and that the plaintiff had complied with her duties under her insurance contract. In accordance with our rules of practice, "[t]he defendant in the answer shall specially deny such allegations of the complaint as the defendant intends to controvert, admitting the truth of the other allegations, unless the defendant intends *in good faith* to controvert all the allegations, in which case he or she may deny them generally." (Emphasis added.) Practice Book § 10-46. Evasive denials are addressed by Practice Book § 10-47, which provides: "Denials must fairly meet the substance of the allegations denied. Thus, when the payment of a certain sum is alleged, and in fact a lesser sum was paid, the defendant cannot simply deny the payment generally, but must set forth how much was paid to the defendant; and where any matter of fact is alleged with divers circumstances, some of which are untruly stated, it shall not be sufficient to deny it as alleged, but so much as is true and material should be stated or admitted, and the rest only denied." These provisions instruct that, in Connecticut, "[i]f the allegation is true in part, that part should be admitted and the balance denied. Evasive denials are not to be countenanced." J. Kaye & W. Effron, 2 Connecticut Practice

Series: Civil Practice Forms (4th Ed. 2004) Form 105.3, authors' comment, p. 155.

Indeed, the defendant in the present case exemplified this practice in its December 15, 2016 answer when it admitted the portion of paragraph 7 of the amended complaint in the *Smith* action alleging that the accident was caused by "Smith's failure to keep a proper and reasonable lookout for other motor vehicles upon the roadway," but asserted that it was without sufficient information to either admit or deny the remaining allegations of paragraph 7. Although the defendant admitted the portion of the allegation pertaining to causation, we recognize that, ordinarily, to the extent an allegation in a complaint concerns causation or liability but also makes factual assertions, a defendant may, in good faith, deny the portion relating to causation or liability if it intends to controvert such allegations but must admit any portion which it knows to be true. Therefore, in the present case, even though the allegations of the complaint in the *Smith* action that are at issue in this case pertain, in part, to causation and liability, the defendant was still required to admit those portions of the allegations it knew to be true. Requiring a defendant to do so is entirely consistent with the pleading requirements in this state and will not impose any new or unnecessary burdens on parties.

Accordingly, we conclude, under the particular facts of this case, that the allegations of count one of the complaint concerning the defendant's alleged bad faith pleading in the *Smith* action properly assert a cause of action for vexatious litigation under the common law.[27]

[27] Our decision today should not be construed as a statement that the plaintiff will be successful in proving this claim at a trial. This case comes before us on an appeal from the granting of a motion for summary judgment, in which we must construe the allegations of the complaint and the evidence in the light most favorable to the plaintiff. Even though we have concluded that the vexatious litigation counts can properly be based on the defendant's alleged bad faith pleading in the *Smith* action, at a trial of the matter the plaintiff still must prove the elements of those counts and any damages she

4

Finally, we address the defendant's contention that the plaintiff's "remedy for an untrue or unfounded allegation in a pleading is . . . § 52-99 and Practice Book § 10-5, not a vexatious litigation action." (Footnotes omitted.) As we have noted in this opinion, both § 52-99 and Practice Book § 10-5 permit a party to seek monetary sanctions when "[a]ny allegation or denial [is] made without reasonable cause and found [to be] untrue . . . ." Neither the statute nor the rule of practice, however, includes language indicating that it is the exclusive remedy for untrue pleadings, nor has the defendant directed this court to any authority supporting that proposition. In the absence of any such limiting language or authority, we cannot conclude that the plaintiff's only remedy for the defendant's untrue pleadings in the *Smith* action was to seek sanctions pursuant to § 52-99 or Practice Book § 10-5.[28] See *Caciopoli* v. *Lebowitz*, 309 Conn. 62, 72, 68 A.3d 1150 (2013) ("[T]he legislature is capable of providing explicit limitations

has suffered. Moreover, the concurring and dissenting opinion also spends significant time discussing the admissions made by the defendant in response to the request for admissions filed by the plaintiff. See footnote 6 of this opinion. Those admissions may impact the amount of damages, if any, suffered by the plaintiff but have no bearing on the issue of whether the defendant had probable cause to plead denials in its answer and amended answers, which were filed *prior* to the admissions.

[28] We find persuasive statements of the Hawaii Supreme Court in *Arquette* v. *State*, 128 Haw. 423, 431–33, 290 P.3d 493 (2012), in which the court first recognized a cause of action for maintaining a malicious prosecution. The court stated that doing so was necessary to "properly guard against the harms associated with protracted litigation," and that litigation can have "a profound effect upon the quality of one's life that goes beyond the mere entitlement to counsel fees." (Internal quotation marks omitted.) Id., 431. The court explained further that "the existing rules and statutes do not fully remedy the harms inflicted by protracted litigation"; id., 432; in that, "[a]lthough the conduct associated with continuing a malicious prosecution is subject to sanctions [of attorney's fees], attorney's fees may not always provide a complete remedy to a litigant . . . ." (Footnote omitted.) Id., 432–33.

when that is its intent. . . . In the absence of explicit language indicating that the statute is the exclusive remedy, we will not presume that the legislature intended to occupy the field and preempt a common-law cause of action. See *Lynn* v. *Haybuster Mfg., Inc.*, [226 Conn. 282, 290, 627 A.2d 1288 (1993)] ([t]he legislature's intent is derived not in what it meant to say, but in what it did say . . .") (Citations omitted; internal quotation marks omitted.)).

Moreover, the fact that other remedies exist with respect to allegations or denials in pleadings made without reasonable cause and found to be untrue undermines any exclusivity argument relating to § 52-99 and Practice Book § 10-5.[29] For example, a "trial court, in

[29] We also point out that rule 11 of the Federal Rules of Civil Procedure similarly "provides a vehicle for sanctioning an attorney, a client, or both . . . [and] is aimed at curbing abuses of the judicial system . . . ." (Citations omitted; footnote omitted; internal quotation marks omitted.) *United States* v. *International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO*, 948 F.2d 1338, 1343 (2d Cir. 1991). Federal courts have determined that "the Federal Rules of Civil Procedure, including [r]ule 11, do not preempt malicious prosecution claims predicated on federal civil actions. See, e.g., *U.S. Express Lines* [*Ltd.* v. *Higgins*, 281 F.3d 383, 393 (3d Cir. 2002)]; *Cohen* v. *Lupo*, 927 F.2d 363, 365 (8th Cir. 1991); *Tarkowski* v. *County of Lake*, 775 F.2d 173, 175 (7th Cir. 1985); *McShares, Inc.* v. *Barry*, 266 Kan. 479, [491–92, 970 P.2d 1005] (1998) ('Rule 11 cannot abridge the substantive state law of malicious prosecution, nor was it adopted to serve as a surrogate for an action based upon a claim of malicious prosecution resulting from frivolous, harassing, or vexatious litigation.'); *Del Rio* v. *Jetton*, 55 Cal. App. 4th 30, [37] 63 Cal. Rptr. 2d [712] (1997) ('Nothing in [r]ule 11 indicates an intent to occupy the entire field of groundless suits brought for malicious purpose, nor is there any conflict between [r]ule 11 and a damages action for such malicious prosecution.'). As the [r]ule 11 advisory committee observed, 'Rule 11 is not the exclusive source for control of improper presentations of claims, defenses, or contentions. . . . *Rule 11 does not preclude a party from initiating an independent action for malicious prosecution or abuse of process.*' [Fed. R. Civ. P.] 11 advisory committee's note . . . . Thus, the United States Supreme Court is 'confident that district courts will resist the temptation to use [rule 11] sanctions as substitutes for tort damages.' [*Business*] *Guides, Inc.* v. *Chromatic* [*Communications Enterprises*], *Inc.*, 498 U.S. 533, 553, 111 S. Ct. 922, 112 L. Ed. 2d 1140 (1991)." (Emphasis in original.) *Graber* v. *Fuqua*, 279 S.W.3d 608, 613–14 (Tex.), cert. denied, 558

the exercise of its inherent authority, may impose sanctions of attorney's fees for a course of bad faith pleading." *Fattibene* v. *Kealey*, 18 Conn. App. 344, 344, 558 A.2d 677 (1989). This court has "long recognized that, apart from a specific rule of practice authorizing a sanction, the trial court has the inherent power to provide for the imposition of reasonable sanctions, to compel the observance of its rules. . . . Our trial courts have the inherent authority to impose sanctions against an attorney and his client for a course of claimed dilatory, bad faith and harassing litigation conduct, even in the absence of a specific rule or order of the court that is claimed to have been violated." (Internal quotation marks omitted.) *Stein* v. *Horton*, 99 Conn. App. 477, 489, 914 A.2d 606 (2007). Additionally, under rule 3.1 of the Rules of Professional Conduct, "[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." See *O'Brien* v. *Superior Court*, 105 Conn. App. 774, 786–87, 939 A.2d 1223 ("[W]e recently have recognized that, although a claim need not be based on fully substantiated facts when filed, once it becomes apparent that the claim lacks merit, an attorney violates rule 3.1 by persisting with the claim, rather than withdrawing it. *Brunswick* v. *Statewide Grievance Committee*, [103 Conn. App. 601, 619, 931 A.2d 319] ('rule 3.1 prohibits an attorney from asserting . . . a claim on which the attorney reasonably is unable to maintain a good faith argument on the merits')."), cert. denied, 287 Conn. 901, 947 A.2d 342 (2008).

We also find informative our Supreme Court's statements and analysis in the plaintiff's appeal in the *Smith*

U.S. 880, 130 S. Ct. 288, 175 L. Ed. 2d 136 (2009). This analysis regarding rule 11 provides further support for our determination that the sanctions available under § 52-99 and Practice Book § 10-5 do not preclude a tort action for vexatious litigation based on the same conduct.

action, particularly its statement that a vexatious suit was one of many remedies available to the plaintiff for her claim "challeng[ing] the defendant's conduct in defending against her underinsured motorist claim." *Dorfman* v. *Smith*, supra, 342 Conn. 597. In *Dorfman*, the court described the plaintiff's claim in the *Smith* action that the defendant had breached the implied covenant of good faith and fair dealing as follows: "The plaintiff alleged that the defendant *falsely responded to the complaint*, including by asserting a special defense the defendant knew had no basis in fact, as well as falsely responding to interrogatories and discovery requests. As a result, the defendant 'used intentional misstatements, intentional misrepresentations, *intentionally deceptive answers*, and violated established rules of conduct in litigation,' and 'knowingly and intentionally engaged in dishonest and sinister litigation practices by taking legal positions that were without factual support in order to further frustrate [the plaintiff's] ability to receive benefits due [to her] under her contract.' According to the plaintiff, through this conduct, the defendant (1) engaged in unfair, deceptive, and self-serving conduct, (2) deceitfully and maliciously attributed responsibility for the car crash to the plaintiff, (3) compelled the plaintiff to resort to litigation to obtain her benefits, and (4) *filed false and misleading answers in pleadings* and discovery responses it knew had no basis in fact to prolong litigation and to attempt to reduce the plaintiff's insurance benefits." (Emphasis added.) Id., 595. These allegations are very similar to those made by the plaintiff in the present action with respect to her claims for vexatious litigation.

Although the court in *Dorfman* v. *Smith*, supra, 342 Conn. 596, ultimately applied the litigation privilege to bar the plaintiff's claim for breach of the implied covenant of good faith and fair dealing, it recognized the "unfairness" in that result and, thus, stressed "the

importance of the availability of other remedies." Id., 599. In addition to pointing out the monetary sanctions available pursuant to § 52-99, the court noted that "the trial court has the inherent authority to sanction parties for litigation misconduct"; id., 611; and that "a party may file a motion to open a judgment on the ground that the judgment was obtained by fraud or intentional, material misrepresentation." Id., 612. The court further stated: "[A]s we noted in *DeLaurentis*, '[p]arties and their counsel who abuse the process by bringing unfounded actions for personal motives are subject to civil liability for vexatious suit or abuse of process.' *DeLaurentis* v. *New Haven*, supra, [220 Conn. 264]. Importantly, in the present case, upon a prior action terminating in her favor, the plaintiff could have brought a lawsuit for vexatious litigation. In fact, that is what she did. These other remedies belie the plaintiff's argument that, if immunity is granted, this court will open the floodgates to insurance companies using the litigation privilege as a loophole to engage in misconduct and deprive insureds of their contractual benefits." *Dorfman* v. *Smith*, supra, 612. We, therefore, reject the defendant's claim that the plaintiff's remedy for an untrue or unfounded allegation in a pleading is limited to § 52-99 and Practice Book § 10-5.

B

We now turn to the plaintiff's claims in counts two and three of the complaint alleging violations of the vexatious litigation statute, § 52-568, which is titled "Damages for groundless or vexatious suit or defense." Pursuant to § 52-568, "[a]ny person who commences and prosecutes any civil action or complaint against another, in his own name or the name of others, or *asserts a defense* to any civil action or complaint commenced and prosecuted by another (1) without probable cause, shall pay such other person double damages, or (2) without probable cause, and with a malicious

intent unjustly to vex and trouble such other person, shall pay him treble damages." (Emphasis added.) The allegations of counts two and three parallel those of count one and are based on the same alleged vexatious conduct of the defendant concerning its initial and three subsequent amended answers and its denials of allegations it allegedly knew to be true, with the exception of the allegations of malice, which are absent from count two.

In her supplemental brief to this court, the plaintiff argues that, pursuant to the plain language of § 52-568, her statutory vexatious litigation counts are properly premised on the defendant's initial and subsequent amended answers to the complaint in the *Smith* action. In making this argument, the plaintiff focuses on the phrase "asserts a defense" in § 52-568 and the fact that defenses must be set forth in a party's answer. She also relies on *Patchen* v. *Delohery Hat Co.*, 82 Conn. 592, 594, 74 A. 881 (1909), in which our Supreme Court of Errors stated that the defendant, in framing its answer, had a "duty to plead the truth," which is embodied in our statutes and rules of practice. In its supplemental brief, the defendant has not directly addressed the plaintiff's argument about the plain language of the statute and, in a single sentence addressing the statute, asserts that § 52-568 "does not proscribe specific allegations in a pleading if there is otherwise probable cause for the action or the defense."

Our resolution of this issue requires us to construe § 52-568, which "presents a question of law over which our review is plenary." (Internal quotation marks omitted.) *Karanda* v. *Bradford*, 210 Conn. App. 703, 711, 270 A.3d 743 (2022). Our analysis of § 52-568 is guided by the plain meaning rule in General Statutes § 1-2z, which provides that "[t]he meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If,

after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered."

Section 52-568 does not define the word "defense" in the context of the statute. "When a statute does not define a term, General Statutes § 1-1 (a) directs that we construe the term according to its commonly approved usage, mindful of any peculiar or technical meaning it may have assumed in the law. We may find evidence of such usage, and technical meaning, in dictionary definitions, as well as by reading the statutory language within the context of the broader legislative scheme." (Internal quotation marks omitted.) *777 Residential, LLC* v. *Metropolitan District Commission*, 336 Conn. 819, 831, 251 A.3d 56 (2020). Our Supreme Court recently addressed the definition of the word "defense" as it is used in Practice Book § 23-18, which applies to "any action to foreclose a mortgage where no defense as to the amount of the mortgage debt is interposed," and does not define the term "defense." Our Supreme Court stated: "[W]e look to the commonly approved usage of the word. See, e.g., *Ugrin* v. *Cheshire*, 307 Conn. 364, 380, 54 A.3d 532 (2012). Black's Law Dictionary defines 'defense' as '[a] defendant's stated reason why the plaintiff or prosecutor has no valid case . . . a defendant's answer, denial, or plea . . . .' Black's Law Dictionary (11th Ed. 2019) p. 528. . . . A 'stated reason' 'in law or fact' that challenges a plaintiff's right to recover includes a legal or factual argument raised in opposition to that party." (Citation omitted.) *JPMorgan Chase Bank, National Assn.* v. *Malick*, 347 Conn. 155, 168–69, 296 A.3d 157 (2023); see also Merriam-Webster's Collegiate Dictionary, supra, p. 326 (similarly defining "defense" as "a defendant's denial, answer, or plea"). Under this commonly used and broad definition,

"defense" includes anything that defeats the claim asserted, whether it be by way of a special or affirmative defense asserted in an action,[30] as well as by an answer denying the allegations of a complaint, which is a form of a defense to the action and is done to oppose or to challenge the validity of the allegations of a complaint. See Practice Book § 10-46 ("[t]he defendant in the answer shall specially deny such allegations of the complaint as the defendant intends to controvert"). We do not find ambiguity in the language of the statute.

The concurring and dissenting opinion acknowledges that our Supreme Court has defined the word "defense" to include a defendant's answer, denial or plea, but nonetheless concludes that the term should not be construed as such in § 52-568 because "[t]he legislature . . . did not include the term 'denial' in enacting or amending § 52-568," and if it had "intended to include general denials within the ambit of § 52-568, it could have defined the term 'defense,' or it could have enacted the statute to apply to any person who " 'asserts a *denial or* defense to any civil action . . . .' " (Emphasis in original.) We reject this contention for two reasons. First, when a statute or rule of practice does not define a term, as our Supreme Court instructs, "it is

[30] "Practice Book § 10-50 defines the purpose of a special defense. That section, titled, 'Denials; Special Defenses,' provides in relevant part: 'No facts may be proved under either a general or special denial except such as show that the plaintiff's statements of fact are untrue. Facts which are consistent with such statements but show, notwithstanding, that the plaintiff has no cause of action, must be specially alleged . . . .' Practice Book § 10-50." *Kaye* v. *Housman*, supra, 184 Conn. App. 817. "An answer and a special defense have legally distinct functions . . . ." Id., 816–17. "The purpose of a special defense is to plead facts that are consistent with the allegations of the complaint but demonstrate, nonetheless, that the plaintiff has no cause of action." (Internal quotation marks omitted.) Id., 818. "It is axiomatic that a special defense is not provable under a simple denial, because, by definition, a special defense is a claim that defeats the plaintiff's cause of action without disproving it." *Bruno* v. *Whipple*, 162 Conn. App. 186, 203, 130 A.3d 899 (2015), cert. denied, 321 Conn. 901, 138 A.3d 280 (2016).

appropriate to consult contemporaneous dictionary definitions. See, e.g., *Ledyard* v. *WMS Gaming, Inc.*, 338 Conn. 687, 697, 258 A.3d 1268 (2021) ('in the absence of statutory definitions, we look to the contemporaneous dictionary definitions of words to ascertain their commonly approved usage'); see also General Statutes § 1-1 (a) ('[i]n the construction of the statutes, words and phrases shall be construed according to the commonly approved usage of the language')." *Cerame* v. *Lamont*, 346 Conn. 422, 428, 291 A.3d 601 (2023); see also *Dunn* v. *Northeast Helicopters Flight Service, LLC*, 346 Conn. 360, 377, 290 A.3d 780 (2023) ("[i]n the absence of statutory definitions, we again look to the common usage of each term"). The commonly approved usage of the term "defense" is the one set forth in Black's Law Dictionary (12th Ed. 2024) p. 528, and Merriam-Webster's Collegiate Dictionary, supra, p. 326, not what the concurring and dissenting opinion considers to be "the most familiar legal sense" of the word "as used by legal practitioners in this state . . . ." In the absence of any indication that the term "defense" as used in § 52-568 was intended to have a technical or special meaning; see *Perruccio* v. *Allen*, 156 Conn. 282, 286, 240 A.2d 912 (1968); we see no reason to depart from our regular practice of looking to the common usage of a term as defined in dictionaries. Second, because the commonly used definition of "defense" necessarily includes a denial, it would have been superfluous for our legislature to add that word to the statutory language. Courts "must construe a statute as written. . . . Courts may not by construction supply omissions . . . or add exceptions merely because it appears that good reasons exist for adding them. . . . It is axiomatic that the court itself cannot rewrite a statute to accomplish a particular result. That is a function of the legislature." (Internal quotation marks omitted.) *Blondeau* v. *Baltierra*, 337 Conn. 127, 143, 252 A.3d 317 (2020).

In our view, the concurring and dissenting opinion also incorrectly takes the position that the statutory language—asserts a defense—"refers to defenses that are affirmatively pleaded, rather than general denials set forth in a defendant's answer." At the outset, we point out the familiar principle that, if the legislature wanted to limit the type of defense to which the statute applies—for example, to the assertion of a special or affirmative defense—it easily could have so provided. See *Dunn* v. *Northeast Helicopters Flight Service, LLC*, supra, 346 Conn. 375; see also *Curley* v. *Phoenix Ins. Co.*, 220 Conn. App. 732, 769, 299 A.3d 1133 ("[t]he absence of . . . language [in a statute] is significant, 'as it is a well settled principle of statutory construction that the legislature knows how to convey its intent expressly . . . or to use broader or limiting terms when it chooses to do so' "), cert. denied, 348 Conn. 914, 303 A.3d 260 (2023). Instead of using the term "special defense," the legislature used the broader term "defense."

This is especially true, in light of the distinct functions of an answer and special defense, both of which are ways to "assert a defense" to an action. See footnote 30 of this opinion. For example, not all defenses are special or affirmative defenses. See *Shaheer* v. *Commissioner of Correction*, 207 Conn. App. 449, 461 n.6, 262 A.3d 152 ("duress is a defense to a crime . . . [but] not an affirmative defense" (citation omitted; internal quotation marks omitted)), cert. denied, 340 Conn. 903, 263 A.3d 388 (2021); *Pawlinski* v. *Allstate Ins. Co.*, 165 Conn. 1, 6, 327 A.2d 583 (1973) ("Practice Book § 120 [now § 10-50] lists some of the defenses which must be specially pleaded and proved"). "As a general rule, facts must be pleaded as a special defense when they are consistent with the allegations of the complaint but demonstrate, nonetheless, that the plaintiff has no cause of action. . . . The fundamental purpose of a

special defense, like other pleadings, 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 underway." (Internal quotation marks omitted.) *Coughlin* v. *Anderson*, 270 Conn. 487, 501, 853 A.2d 460 (2004). Also, "[t]here is a distinction between matters which may be proved under a general denial and matters constituting special defenses [which must be specially pleaded]." (Internal quotation marks omitted.) *Bennett* v. *Chenault*, 147 Conn. App. 198, 202, 81 A.3d 1184 (2013). That distinction "was enunciated in *Pawlinski* v. *Allstate Ins. Co.*, [supra, 1], where [our Supreme Court] observed . . . that [t]he issues to be tried may be framed in several ways. A denial of a material fact places in dispute the existence of that fact. Even under a denial, a party generally may introduce affirmative evidence tending to establish a set of facts inconsistent with the existence of the disputed fact. . . . If, however, a party seeks the admission of evidence which is consistent with a prima facie case, but nevertheless would [independently] destroy the cause of action, the new matter must be affirmatively pleaded as a special defense." (Internal quotation marks omitted.) *Barrows* v. *J.C. Penney Co.*, 58 Conn. App. 225, 233, 753 A.2d 404, cert. denied, 254 Conn. 925, 761 A.2d 751 (2000); see also Practice Book § 10-50 ("No facts may be proved under either a general or special denial except such as show that the plaintiff's statements of fact are untrue. Facts which are consistent with such statements but show, notwithstanding, that the plaintiff has no cause of action, must be specially alleged.").

In *Bennett* v. *Chenault*, supra, 147 Conn. App. 203, for example, the defendant, by her answer, "denied the plaintiff's claim of negligence and raised a special defense of comparative negligence." This court stated that "[t]he *denial of negligence* and the allegation of a special defense thus constitute[d] *separate and distinct*

defenses, either of which [could] support the jury's general verdict." (Emphasis added.) Id. Similarly, in *Mulcahy* v. *Hartell*, 140 Conn. App. 444, 446, 59 A.3d 313 (2013), the dispositive issue before this court was "whether evidence of a plaintiff's posttreatment conduct may be offered by a defendant under a general denial for the purpose of showing that the plaintiff's conduct was the sole proximate cause of her injuries." This court concluded that "the claim that an actor other than the defendant caused the plaintiff's injuries is inconsistent with a prima facie negligence case, and, thus, can be pursued under a general denial. The essence of the *defense at issue* in the present case was that the plaintiff was entirely responsible for her injuries; therefore, the court correctly admitted it without the assertion of a special defense"; (emphasis added) id., 450; and "pursuant to a general denial." Id., 452. What is evident from these cases is that a party, by generally denying factual allegations of a complaint, is, in effect, asserting a defense to those allegations.

The defendant has not directed us to any authority suggesting that a denial in an answer is not a defense or establishing that the term "defense" as used in § 52-568 must be limited to special defenses. We conclude that to do so would be contrary to the purpose of § 52-568, which "make[s] it clear that it is the strong public policy of this state to discourage dishonesty during the litigation process . . . ." *Dorfman* v. *Smith*, supra, 342 Conn. 644 (*Ecker*, *J.*, concurring in part and dissenting in part). As we stated previously in this opinion, we must read the term "defense" in § 52-568 within the context of the broader legislative scheme. "Connecticut's vexatious litigation statute strives to deter parties from bringing claims [or asserting defenses] without probable cause and with malicious intent." *Metcalf* v. *Fitzgerald*, 333 Conn. 1, 29, 214 A.3d 361 (2019), cert. denied, U.S. , 140 S. Ct. 854, 205 L. Ed. 2d 460

(2020). It serves to recognize "the right of an individual to be free from unjustifiable litigation . . . ." (Internal quotation marks omitted.) *Bernhard-Thomas Building Systems, LLC* v. *Dunican*, supra, 286 Conn. 553–54. That right applies whether a party "commences and prosecutes" an action without probable cause, as well as whether a party unjustly "asserts a defense" to an action without probable cause, whether by way of filing an answer to a complaint denying allegations of a complaint that are known to be true or asserting a groundless special defense.

Significantly, our Supreme Court has stated repeatedly that "[a] statutory action for vexatious litigation under . . . § 52-568 . . . differs from a common-law action *only* in that a finding of malice is not an essential element, but will serve as a basis for higher damages." (Citation omitted; emphasis added.) *Falls Church Group, Ltd.* v. *Tyler, Cooper & Alcorn, LLP*, supra, 281 Conn. 94; see also *Bernhard-Thomas Building Systems, LLC* v. *Dunican*, supra, 286 Conn. 554; *DeLaurentis* v. *New Haven*, supra, 220 Conn. 256; *Christian* v. *Iyer*, 221 Conn. App. 869, 877, 303 A.3d 604 (2023). "[Vexatious suit] is the appellation given in this [s]tate to the cause of action created by statute . . . § 52-568 . . . for the malicious prosecution of a civil suit . . . which [our Supreme Court has] said was governed by the same general principles as the common-law action of malicious prosecution." (Internal quotation marks omitted.) *Falls Church Group, Ltd.* v. *Tyler, Cooper & Alcorn, LLP*, supra, 103; see also *Embalmers' Supply Co.* v. *Giannitti*, 103 Conn. App. 20, 46, 929 A.2d 729 ("§ 52-568 represents a statutory codification of the common-law cause of action for vexatious litigation"), cert. denied, 284 Conn. 931, 934 A.2d 246 (2007).

Courts consistently have applied the continuation theory under § 674 of the Restatement (Second) of Torts

to both statutory and common-law claims of vexatious litigation; see *Diamond 67, LLC* v. *Oatis*, supra, 167 Conn. App. 683 (with respect to action alleging common-law and statutory claims for vexatious litigation, "genuine issue of material fact [existed] as to each defendant's participation in the initiation, procurement, and/or continuation of their respective interventions in the plaintiff's administrative and mandamus actions"); *Schaeppi* v. *Unifund CCR Partners*, supra, 161 Conn. App. 41–42 (statutory vexatious litigation count based on defendant's continuing to prosecute foreclosure action and appeal from denial of motion to open foreclosure judgment); see also *Rousseau* v. *Weinstein*, supra, 204 Conn. App. 851 (action raising common-law and statutory vexatious litigation claims alleging that "defendants lacked probable cause to commence and to continue [a] civil action"); and claims for vexatious litigation have been brought on the basis of actions apart from commencing and prosecuting a civil action or asserting a counterclaim or special defense, although we note that the precise issue of whether the statute supports such actions was not before the courts in those cases. See *Diamond 67, LLC* v. *Oatis*, supra, 668 (interventions in administrative action); *Schaeppi* v. *Unifund CCR Partners*, supra, 41–42 (appeal from denial of motion to open foreclosure judgment); *Spilke* v. *Wicklow*, 138 Conn. App. 252, 261, 53 A.3d 245 (2012) (vexatious litigation claim stemmed from filing of motion for contempt), cert. denied, 307 Conn. 945, 60 A.3d 737 (2013);[31] *Perez* v. *D & L Tractor Trailer School*,

[31] We note that in *Spilke* v. *Wicklow*, supra, 138 Conn. App. 255–56, the plaintiff alleged claims for vexatious litigation, both under the common law and § 52-568, based on the defendant's conduct in filing a motion for contempt during divorce proceedings. Although the plaintiff argued on appeal that all of the proceedings surrounding the divorce were vexatious, this court disagreed and concluded that the vexatious litigation claims "stemm[ed] from the filing of the motion [for] contempt, and not from the divorce proceedings." Id., 261. The plaintiff was awarded $10,001 in damages with respect to her common-law claim, and the trial court determined that she was entitled to treble the damages under § 52-568, for a total award of

117 Conn. App. 680, 685, 981 A.2d 497 (2009) (appeal from unemployment compensation benefits award), cert. denied, 294 Conn. 923, 985 A.2d 1062 (2010); *Embalmers' Supply Co.* v. *Giannitti*, supra, 103 Conn. App. 49 (shareholder litigation and subsequent appeal therefrom); *Duse* v. *Carter*, supra, 9 Conn. App. 219 (filing motion for contempt in prior marital dissolution action without probable cause); *Nutmeg Financial Holdings, LLC* v. *Bachleda*, supra, Superior Court, Docket No. CV-21-6142429-S (moving to open judgment and appealing therefrom); *Silano* v. *Verespy*, supra, 68 Conn. L. Rptr. 438 (filing motion for summary judgment).

In light of the foregoing, we conclude, under the particular facts of this case, that the allegations of counts two and three of the complaint concerning the defendant's alleged bad faith pleading in its answers in the *Smith* action properly assert causes of action for vexatious litigation pursuant to § 52-568.

Accordingly, we reject the defendant's claim that an action for vexatious litigation, whether under the common law or § 52-568, cannot be based on allegedly false answers to a complaint in a prior action.

II

We now address the plaintiff's claim that the court erred in determining that no genuine issues of material fact exist as to whether the defendant had probable cause to answer the complaint in the *Smith* action in the manner it did and to assert the special defense of contributory negligence. Specifically, the plaintiff argues that the defendant did not meet its burden, as the party moving for summary judgment, of establishing

$30,003. Id., 256. Because the defendant did not argue on appeal that the court abused its discretion in awarding treble damages, however, this court did not address that issue.

the absence of a genuine issue of material fact concerning probable cause because it did not provide evidence in support of its motion demonstrating that it had any factual basis for asserting the denials in its answer as well as its special defense of contributory negligence. Thus, the plaintiff argues, the burden never shifted to her to submit documents establishing the existence of such an issue of fact. The plaintiff's second claim is that the court misapplied the standard for summary judgment when it failed to construe the evidence in the light most favorable to the plaintiff. Because these claims are related, we address them together.

The following general principles guide our analysis of these claims. "[T]he legal idea of probable cause is a bona fide belief in the existence of the facts essential under the law for the action and such as would warrant a person of ordinary caution, prudence and judgment, under the circumstances, in entertaining it. . . . Probable cause is the knowledge of facts, actual or apparent, strong enough to justify a reasonable man [or woman] in the belief that he [or she] has lawful grounds for prosecuting the defendant in manner complained of. . . . Thus, in the context of a vexatious suit action, the defendant lacks probable cause if he [or she] lacks a reasonable, good faith belief in the facts alleged and the validity of the claim asserted. . . . [T]he existence of probable cause is an absolute protection against an action for [vexatious litigation], and what facts, and whether particular facts, constitute probable cause is always a question of law. . . . Because the question of whether there is probable cause in a vexatious litigation case is a question of law, our scope of review is plenary." (Citation omitted; internal quotation marks omitted.) *Rousseau* v. *Weinstein*, supra, 204 Conn. App. 853–54. "[T]he probable cause standard applied to a vexatious litigation action against a litigant is a purely objective

one." *Falls Church Group, Ltd.* v. *Tyler, Cooper & Alcorn, LLP*, supra, 281 Conn. 95.

In the present case, to prevail on its motion for summary judgment, the defendant bore the initial burden to negate, with evidence, the factual claims as framed by the vexatious litigation counts of the complaint. See *10 Marietta Street, LLC* v. *Melnick Properties, LLC*, 216 Conn. App. 262, 272, 285 A.3d 82 (2022) ("[o]n a motion by the defendant for summary judgment the burden is on [the] defendant *to negate each claim as framed by the complaint*" (emphasis in original; internal quotation marks omitted)); see also Practice Book § 17-45 (providing that motion for summary judgment must be supported by appropriate documents). The factual claims of those counts can be distilled to the following: the defendant lacked probable cause when it (1) asserted the special defense of contributory negligence and (2) denied the allegations of the complaint that stated that (a) Smith failed to stop and slow his vehicle when he approached the intersection and collided with the plaintiff's vehicle, (b) the collision and resulting injuries and damages sustained by the plaintiff were proximately caused by Smith's negligence, (c) the plaintiff suffered injuries, incurred medical bills, and lost wages as a result of Smith's negligence, (d) Smith was underinsured, (e) the plaintiff complied with her duties under the terms of her insurance policy with the defendant, and (f) the defendant was liable for her damages that exceeded the amount covered by Smith's insurance policy. In other words, the defendant had the burden to demonstrate the absence of any genuine issue of material fact that it had probable cause to assert that special defense and to deny these various allegations.

The probable cause inquiry in the present case, therefore, entails a consideration of whether, on the basis of the facts known by the defendant at the times it asserted the special defense and denied or asserted that

it lacked sufficient information to admit or deny those allegations, a reasonable person familiar with Connecticut law would have believed that probable cause existed for the defendant to do so. See *Falls Church Group, Ltd.* v. *Tyler, Cooper & Alcorn, LLP*, supra, 281 Conn. 104–105. In the present case, the court based its probable cause determination on the following reasoning: "The allegations required to be [pleaded] in a negligence action are generally not within a defendant's knowledge. In the present case, [the plaintiff's] complaint alleged that her injuries were proximately caused by the defendant's negligence. . . . [The plaintiff's] claim for vexatious litigation is founded on [the defendant's] being in possession of her medical bills and report, a witness' statement and the police report. These are facts, unlike the signing of a promissory note or mortgage deed, that are not within a defendant's personal knowledge or necessarily subject to ascertainment. Moreover, [the plaintiff's] assertion that possession of these documents establishes a basis to assert a basis for vexatious suit upon the failure to admit the veracity of the information contained in them would compel a finding that a defendant must make a credibility determination without the benefit of subjecting witnesses to the crucible of trial. . . . Similarly, [the plaintiff] alleged that Smith's negligence was a proximate cause of her injuries. Such a combined legal and factual conclusion is manifoldly not within the knowledge of the defendant. In the present case, as argued by [the defendant], 'it was necessary to fully substantiate facts and information through the course of discovery and, as that was done, the complaint was amended to address what had been substantiated.'[32] Given the intrinsic

[32] On appeal, the defendant reiterates this argument, namely, that it is easier for counsel to plead contributory negligence in a case than it is not to plead it and then, after facts are developed, to move to amend the answer. When asked during oral argument before this court to specify the evidence in the record that supports its claim that it had probable cause to file the special defense of contributory negligence, the defendant's counsel stated

uncertainty of the nature of a claim of injuries proximately caused by another's negligence,[33] [the defendant] had probable cause to answer the complaint in the manner in which it did." (Citation omitted; emphasis omitted; footnotes added.).

We first conclude that the court, in making its probable cause determination, did not apply the proper legal standard. See *Ferri* v. *Powell-Ferri*, 200 Conn. App. 63, 73, 239 A.3d 1216 (whether court applied correct legal standard involves question of law subject to plenary review), cert. denied, 335 Conn. 970, 240 A.3d 285 (2020). Nowhere in the court's decision did the court point out the specific information known to the defendant at the time it filed its answer, amended answers and special defense of contributory negligence, or that

that the defendant's position was that "there could be evidence developed" subsequent to the filing of its special defense. We disagree, as "Connecticut is a fact pleading jurisdiction," under which "allegations must be made 'with reasonable cause' and with a good faith belief in their truth. See Practice Book §§ 4-2 (b) and 10-5." *CIT Bank, N.A.* v. *Francis*, 214 Conn. App. 332, 354–55, 280 A.3d 485 (2022) (*Bright, C. J.*, concurring). Moreover, "discovery is used to develop claims that have been properly pleaded, not to create them." Id., 357; see also *Somers* v. *Chan*, supra, 110 Conn. App. 535 ("[o]ur rules of practice require all allegations [in pleadings] to be founded on a reasonable basis"). Thus, the assertion of an allegation or special defense with *no* reasonable basis for doing so, and the use of discovery to see if the claim can be substantiated and amend the complaint if it cannot, is contrary to our pleading requirements. See Practice Book § 10-5 ("[a]ny allegation or denial made without reasonable cause and found untrue shall subject the party pleading the same to the payment of such reasonable expenses . . . as may have been necessarily incurred by the other party by reason of such untrue pleading").

[33] We note that the *Smith* action did not involve an allegation of negligence against the defendant. Rather, the plaintiff alleged negligence against Smith, who was underinsured and ultimately settled with the plaintiff for the limit of his policy, and the plaintiff alleged a claim of breach of contract against the defendant, which was brought into the action for purposes of providing coverage pursuant to the underinsured motorist provision of the plaintiff's insurance policy with the defendant. Significantly, the plaintiff has not based this vexatious ligation action on the defendant's failure to admit its own negligence in the *Smith* action, and, thus, the defendant's claims to that effect are without merit.

no genuine issue of material fact existed as to the defendant's knowledge, nor did the court determine whether a reasonable person, knowing that information, would have had a reasonable, good faith belief in the facts alleged in the answers and the validity of the special defense of contributory negligence asserted. We agree with the plaintiff that the court should have looked "critically at each representation at issue alongside the information within [the defendant's] knowledge at the time it made the representation," and determined whether any genuine issues of material fact existed as to the defendant's knowledge.

The court focused its analysis on whether genuine issues of material fact existed as to the cause of the plaintiff's injuries. We acknowledge that, generally, the truth of the allegations pleaded in a negligence action likely will not be within a defendant's knowledge and that it is typically necessary to substantiate information and facts regarding a party's claimed injuries. Indeed, it will be a rare case in which a party's denial of allegations concerning causation of injuries will give rise to a vexatious litigation claim. For that reason, it is understandable why the court focused its analysis on whether genuine issues of material fact existed as to the cause of the plaintiff's injuries, which is almost always disputed in a negligence action, even when there is no dispute as to the cause of the accident.

The present case, however, is not a typical negligence action, and, thus, the court's conclusion that the allegations of the complaint in the *Smith* action concerned matters "generally not within a defendant's knowledge" does not take account of all of the factual circumstances of this case. By limiting its analysis to the issue of the causation of the plaintiff's injuries, the court did not take into account the defendant's denials of allegations that Smith failed to stop and slow his vehicle when he approached the intersection and collided with the

plaintiff's vehicle, the collision was caused by Smith's negligence, Smith was underinsured, the plaintiff complied with her duties under the terms of her insurance policy with the defendant, and the defendant was liable under the plaintiff's insurance policy for her damages that exceeded the amount covered by Smith's insurance policy, as well as the defendant's assertion of the special defense of contributory negligence.

As we stated previously in this opinion, our rules of practice require that allegations, including denials, be made on a reasonable basis; see Practice Book § 10-5; and a defendant, in an answer, "shall specially deny such allegations of the complaint as the defendant intends to controvert, admitting the truth of the other allegations, unless the defendant intends *in good faith* to controvert all the allegations, in which case he or she may deny them generally." (Emphasis added.) Practice Book § 10-46. In other words, "[i]f the allegation is true in part, that part should be admitted and the balance denied. Evasive denials are not to be countenanced." 2 J. Kaye & W. Effron, supra, Form 105.3, authors' comment, p. 155. As we stated previously in this opinion, in the present case the defendant did just that in its December 15, 2016 answer when it admitted the portion of paragraph 7 of the amended complaint in the *Smith* action alleging that the accident was caused by "Smith's failure to keep a proper and reasonable lookout for other motor vehicles upon the roadway," but asserted that it was without sufficient information to either admit or deny the remaining allegations of that paragraph. In its initial and amended answers, however, the defendant asserted blanket denials of allegations in the *Smith* action, only a portion of which related to causation of the plaintiff's injuries, and the court did not take into consideration whether the defendant had probable cause to deny the portion of the allegations not relating to causation of the plaintiff's injuries, or the special

defense of contributory negligence. As a result, the court did not consider if genuine issues of material fact existed as to whether the defendant had probable cause for answering the complaint in the manner in which it did with respect to these other allegations and asserting the special defense, as the defendant's own internal investigation indicated that Smith was 100 percent responsible for causing the accident.

Moreover, in making its probable cause finding, the court does not appear to have considered each of the specific factual allegations in the complaint. This is apparent from the court's decision, which lacks references to many of the allegations concerning the information of which the defendant was aware when it filed its answer, amended answers, and special defense. Nor did the court consider whether the defendant submitted any evidence in support of its motion for summary judgment to rebut the plaintiff's allegations. The plaintiff also asserts that, if the court had applied the proper standard and viewed the evidence in the light most favorable to the plaintiff, "it would have seen that there were, at the very least, material issues of fact with respect to whether [the defendant] had probable cause for each of its representations in the pleadings and its special defense . . . ." We agree.

The court did refer in its decision to the allegation that the defendant's "own investigation concluded that . . . Smith was '100 [percent] liab[le]' for the accident" but, nevertheless, found probable cause for the defendant to assert the special defense of contributory negligence without addressing that allegation. Additionally, although the court did mention that "[the plaintiff's] claim for vexatious litigation [was] founded on [the defendant's] being in possession of her medical bills and report, a witness' statement and the police report," it excluded from that list of supporting documents a recorded statement the defendant had taken from the

plaintiff and, nonetheless, concluded that the documents were facts "not within a defendant's personal knowledge . . . ." In *Dorfman* v. *Smith*, supra, 342 Conn. 586, our Supreme Court noted that, through the course of the defendant's investigation of the plaintiff's claim, "the defendant acquired the police report regarding the collision, the plaintiff's recorded statement, and the recorded statement of . . . Guman, a witness to the collision who was not listed in the police report. The report and the statements all noted Smith's failure to stop at the stop sign. Based on this information, two claims specialists employed by the defendant both concluded that Smith was 100 percent liable for the collision and noted their findings in the claim file." The trial court in the present case concluded that the defendant lacked knowledge of the contents of those documents. There is nothing in the record, however, to support the court's determination, especially given that the defendant, as part of its business practice, undertook a lengthy and in-depth investigation into the circumstances of the accident, which took place over the course of one year prior to when the defendant was brought into the *Smith* action.[34] Moreover, the court's determination concerning the information within the defendant's knowledge or of which it was aware amounts to a factual finding regarding a disputed issue in the case; see generally *Roger B.* v. *Commissioner of Correction*, 190 Conn. App. 817, 839, 212 A.3d 693

[34] As we stated previously in this opinion, in the prior appeal in the *Smith* action, our Supreme Court, in construing the allegations of the complaint in the light most favorable to the plaintiff, noted that, "[i]n answering the complaint [on May 17, 2016], the defendant pleaded that either it denied or did not have sufficient information to admit the allegations that Smith had failed to stop at a stop sign, causing the collision and the plaintiff's resulting injuries. The defendant also asserted a special defense of contributory negligence, *even though it knew this to be false*." (Emphasis added.) *Dorfman* v. *Smith*, supra, 342 Conn. 587. This further supports our determination that the court in the present case did not construe the allegations of the complaint in the light most favorable to the plaintiff.

(habeas court made factual finding about what petitioner knew), cert. denied, 333 Conn. 929, 218 A.3d 70 (2019), and cert. denied, 333 Conn. 929, 218 A.3d 71 (2019); *Winchester* v. *McCue*, 91 Conn. App. 721, 729, 882 A.2d 143 (there was sufficient factual basis for court's finding regarding independent knowledge possessed by parties), cert. denied, 276 Conn. 922, 888 A.2d 91 (2005); which is not appropriate on summary judgment.

Additionally, in the present case, the defendant did not submit documentary evidence or affidavits[35] demonstrating the absence of a genuine issue of material fact that it lacked knowledge of the contents of the documents and information gathered as part of its investigation, or demonstrating that it had an objectively reasonable, good faith belief in the facts alleged in its answer

[35] Nothing in DeStefano's affidavit negates the plaintiff's allegation that the defendant knew from its investigation that Smith was 100 percent liable for the accident when it filed its special defense asserting that the plaintiff was contributorily negligent. There are only two averments in the affidavit that might be construed as relating to the issue of probable cause: (1) "Attorney Joseph Grippe filed an answer and special defenses to the amended complaint on May 17, 2016," and (2) "[the defendant] relied on the skill and judgment of Attorney Grippe to draft an appropriate response to the amended complaint . . . ." The defendant, however, did not assert a special defense of advice of counsel, which is a complete defense to a vexatious litigation claim; see *Kazemi* v. *Allen*, supra, 214 Conn. App. 117; although it did argue in its memorandum of law in support of its motion for summary judgment that it relied on the advice of counsel. Nevertheless, the court did not address that argument in light of its determination that the defendant had probable cause to answer the complaint in the manner in which it did. On appeal, the defendant asserts in its brief that its responsive pleadings in the *Smith* action were prepared and filed by counsel, and that it "relied on the independent judgment of counsel to draft an appropriate response to the amended complaint in the [*Smith* action]." Aside from these few assertions, the defendant cited to no authority and provided no analysis or argument in support of a reliance on the advice of counsel claim, or concerning the court's failure to address that claim in its decision granting the motion for summary judgment. Accordingly, in this appeal, we deem any such claim relating to advice of counsel abandoned. See, e.g., *Fraser Lane Associates, LLC* v. *Chip Fund 7, LLC*, 221 Conn. App. 451, 472, 301 A.3d 1075 (2023).

and amended answers, or in the validity of the special defense of contributory negligence asserted.[36] See *Rockwell* v. *Rockwell*, 178 Conn. App. 373, 397–98, 175 A.3d 1249 (2017), cert. denied, 328 Conn. 902, 177 A.3d 563 (2018); see also *Martin Franchises, Inc.* v. *Cooper U.S., Inc.*, 164 Conn. App. 486, 501, 137 A.3d 882 (2016) ("[w]here the affidavits of the moving party do not affirmatively show that there is no genuine issue of material fact as to all relevant issues in the case, summary judgment should be denied"). Although the question of what facts constitute probable cause is one of

[36] The concurring and dissenting opinion relies on the amount of the jury award in the *Smith* action as evidence of probable cause. We do not believe that the amount of the jury award in the *Smith* action is relevant to the issue in this case, which concerns whether the defendant met its burden, in moving for summary judgment, of establishing the absence of any genuine issue of material fact that it had probable cause to answer the complaint in the *Smith* action in the manner in which it did and to assert the special defense of contributory negligence. As we have stated in this opinion, the probable cause determination "entails a consideration of whether, on the basis of the facts known by the defendant *at the times* it asserted the special defense and denied or asserted that it lacked sufficient information to admit or deny those allegations, a reasonable person familiar with Connecticut law would have believed that probable cause existed for the defendant to do so." (Emphasis added.) In light of our conclusion that we cannot make a determination of whether probable cause exists in the exercise of our plenary review under the circumstances of this case, in which the underlying facts that form the basis for probable cause are disputed and factual findings must be made by a trier of fact, we do not agree that the amount of damages awarded in the *Smith* action should be viewed as evidence that the defendant had probable cause to deny the material allegations of the complaint. That is especially true given that probable cause may ultimately be found as to the defendant's denials of allegations concerning causation of injuries, but also may be found lacking with respect to the defendant's denials of allegations concerning the cause of the accident. Nevertheless, we do note that the concurring and dissenting opinion's analysis on this point fails to recognize that the jury awarded the plaintiff damages in the amount of $169,928, which amounts to $30,072 less than the $200,000 she sought, not $80,072. Following the jury's verdict, the parties entered into a stipulation that, after a reduction of the tortfeasor's payment of $50,000 to the plaintiff, judgment could enter in the amount of $119,928. The fact that the defendant's obligation to pay the plaintiff was reduced by the $50,000 that the plaintiff already had received in settlement from Smith had no bearing on the jury's determina-

law, over which our review is plenary; see *Falls Church Group, Ltd.* v. *Tyler, Cooper & Alcorn, LLP*, supra, 281 Conn. 94; when the underlying facts that form the basis for probable cause are disputed and factual findings relating thereto must be made by the trier of fact, we cannot make a determination of whether probable cause exists in the exercise of our plenary review, and summary judgment is not appropriate. See *Rozbicki* v. *Sconyers*, supra, 198 Conn. App. 791 (trial court improperly granted defendant's motion for summary judgment because genuine issue of material fact existed as to whether defendant had probable cause to assert special defense); *Cody Real Estate, LLC* v. *G & H Catering, Inc.*, 219 Conn. App. 773, 792, 296 A.3d 214 (it is not within province of Appellate Court to make factual findings), cert. denied, 348 Conn. 910, 303 A.3d 11 (2023).

The present case does not involve a situation in which the facts giving rise to the existence of probable cause are undisputed; rather, a factual finding must be made, at a minimum, as to the defendant's knowledge at the time it filed its answer, amended answers, and special defense of contributory negligence in the *Smith* action. As our Supreme Court explained in *DeLaurentis* v. *New Haven*, supra, 220 Conn. 252–53: "The third requirement for a vexatious suit action is that the defendant's claims lacked 'probable cause.' Whether the facts are sufficient to establish the lack of probable cause is a question ultimately to be determined by the court, but when the facts themselves are disputed, the court may submit the issue of probable cause in the first instance to a jury as a mixed question of fact and law." See *Falls Church Group, Ltd.* v. *Tyler, Cooper & Alcorn, LLP*, supra, 281 Conn. 90–92 (trial court bifurcated issue of probable cause, conducted evidentiary hearing and then concluded that probable cause existed); *Rockwell* v.

tion that the plaintiff had established damages in the amount of $169,928, which the plaintiff received from the defendant and Smith combined.

Rockwell, 196 Conn. App. 763, 771, 230 A.3d 889 (2020) (genuine issue of material fact had to be resolved to determine whether defendant had probable cause to pursue action); see also *Liu* v. *Tangney*, Docket No. 3:19-CV-894 (OAW), 2022 WL 4367594, *7 (D. Conn. September 21, 2022) (parties had material disagreement about whether party's knowledge of facts would satisfy probable cause standard and court could not determine whether party acted without probable cause without first making credibility determination, which was not appropriate on summary judgment).

Accordingly, on the basis of our review of the record, viewed in the light most favorable to the plaintiff, we conclude that the defendant did not meet its burden, as the party moving for summary judgment, of showing the absence of an issue of material fact as to whether it had probable cause for pleading in the manner in which it did in the *Smith* action. Therefore, the court improperly granted the defendant's motion for summary judgment as to the vexatious litigation counts of the complaint on the basis of its probable cause determination.[37] See *Rozbicki* v. *Sconyers*, supra, 198 Conn. App. 781 (defendants were not entitled to summary judgment as to issue of probable cause because genuine issue of material fact existed as to party's knowledge).

The next issue we must address is the proper remedy. As we stated previously in this opinion, the defendant raised five grounds in support of its motion for summary judgment. Because the court based its decision granting the motion solely on the basis of its finding of probable

[37] In light of our determination that the court improperly granted the defendant's motion for summary judgment as to the counts of the complaint alleging vexatious litigation, we need not address the plaintiff's claim that the court improperly denied her the ability to obtain meaningful discovery related to her claims of vexatious litigation prior to granting the defendant's motion for summary judgment.

cause, as to which we have determined the court applied an improper standard and will require factual findings that are not appropriate on summary judgment, the court never addressed the other four arguments raised by the defendant in support of its motion for summary judgment. On appeal, the defendant has not argued that, if this court reverses the summary judgment in its favor, the matter should be remanded for further proceedings on its remaining claims that were never addressed by the trial court. Nevertheless, we believe that the proper course of action here is to remand the case to the trial court for further proceedings to address the remaining grounds raised in the defendant's motion for summary judgment. See generally *Kellogg* v. *Middlesex Mutual Assurance Co.*, 211 Conn. App. 335, 356–57, 272 A.3d 677 (2022) (when trial court did not address arguments raised in support of motion for summary judgment due to court's improper reliance on decisions relating to arbitration award and motion to dismiss, appropriate course for Appellate Court was to remand case for further proceedings on motion); *Teodoro* v. *Bristol*, 184 Conn. App. 363, 383–84, 195 A.3d 1 (2018) (reversing summary judgment rendered in favor of defendant and remanding matter for further proceedings on motion); *Greene* v. *Keating*, 156 Conn. App. 854, 860–62, 115 A.3d 512 (2015) (because trial court decided motions for summary judgment on ground not raised by parties and, essentially, did not rule on parties' motions, it was appropriate to remand matter for trial court's consideration of matter in first instance); see also *Singhaviroj* v. *Board of Education*, 124 Conn. App. 228, 236, 4 A.3d 851 (2010) ("[b]ecause a res judicata or collateral estoppel claim is the 'civil law analogue' to a double jeopardy challenge, a court faced with such a claim must resolve that question before trial may commence," and, therefore, court improperly denied motions for summary judgment without determining whether genuine issue of material fact

existed with respect to res judicata and collateral estoppel defenses).

III

The plaintiff's next claim is that the court did not engage in the proper analysis when it granted the defendant's motion for summary judgment as to the counts of her complaint alleging violations of CUTPA and CUIPA. Specifically, the plaintiff argues that the court, in its decision, did not address the CUTPA/CUIPA claims in any meaningful way in that it did not articulate the necessary elements of a cause of action pursuant to CUTPA or CUIPA, and did not discuss her allegations relating to those claims. Instead, the plaintiff argues, the court stated that its determination regarding probable cause rendered it unnecessary to address the other claims, even though probable cause is not a necessary predicate to a claim pursuant to CUTPA or CUIPA. The defendant, relying on *Dorfman* v. *Smith*, supra, 342 Conn. 616, argues that the court properly granted its motion for summary judgment because the plaintiff's CUTPA claims, which are based on alleged violations of CUIPA, are barred by the doctrine of absolute immunity under the litigation privilege. We agree with the defendant.

We first briefly set forth the basis for our Supreme Court's decision in *Dorfman* concluding that the plaintiff's CUTPA claim in that case was "barred by the doctrine of absolute immunity under the litigation privilege." Id. Specifically, the court stated: "A business practice of responding falsely to discovery requests, to the extent it involves '[m]isrepresenting pertinent facts or insurance policy provisions relating to coverages at issue,' is prohibited under CUIPA. General Statutes § 38a-816 (6) (A). The parties have not cited any case law—from this court, the federal courts, or sister state

courts—that has addressed whether the litigation privilege applies to claims for violating statutes prohibiting unfair insurance practices. In our own research, we have found only one case addressing this issue. The United States District Court for the Eastern District of Pennsylvania, in *Harrison* v. *Nationwide Mutual Fire Ins. Co.*, 580 F. Supp. 133, 136 (E.D. Pa. 1983), and its progeny, held that, when an unfair insurance practices claim is premised on pleadings or documents filed in and relevant to an underlying judicial proceeding, the conduct is absolutely privileged, even if the statements were made falsely or maliciously.

"The plaintiff argues, however, that absolute immunity would undermine the legislative intent of CUIPA, which is to hold insurers accountable for misrepresenting facts relating to coverage issues. In essence, the plaintiff argues that CUIPA abrogates absolute immunity as to the conduct alleged under § 38a-816 (6). Contrary to the plaintiff's argument, CUIPA does not explicitly abrogate absolute immunity. Although § 38a-816 (6) in fact prohibits the business practice of misrepresenting facts relating to coverage issues, CUIPA does not impose liability for this conduct by authorizing a private right of action but, instead, limits the remedy under that act to administrative action by the Commissioner of Insurance. Rather than establishing that immunity should be abrogated, § 38a-816 shows that the legislature prescribed remedies other than civil liability for deterring and curing the alleged conduct, and such remedies are available to the plaintiff in the present case. Additionally, the legislature is aware of both this court's precedent regarding the applicability of the litigation privilege to litigation conduct, as well as the various other tools available to the court to regulate and police litigation misconduct. See, e.g., *Chadha* v. *Charlotte Hungerford Hospital*, [272 Conn. 776, 793 n.21, 865 A.2d 1163 (2005)] ('the legislature is presumed to be aware of

prior judicial decisions involving common-law rules'). If the legislature thought that the particular litigation conduct at issue—filing false discovery responses—had become such a systemic problem that neither the judiciary nor the Commissioner of Insurance has been able to police it, the legislature would have been explicit in abrogating the immunity afforded by the litigation privilege.

"Nevertheless, our case law makes clear that an insurer may be held liable under CUTPA for conduct proscribed by § 38a-816 (6). See *Mead* v. *Burns*, 199 Conn. 651, 663, 509 A.2d 11 (1986) ('it is possible to state a cause of action under CUTPA for a violation of CUIPA'). That does not necessarily mean that the legislature intended to abrogate a party's absolute immunity from CUTPA claims based on a business practice of filing false discovery responses. Although there is minimal case law regarding CUIPA and the litigation privilege, there is a wealth of case law regarding CUTPA and the litigation privilege. Courts consistently have applied the litigation privilege to CUTPA claims premised on false communications made during and relevant to an underlying judicial proceeding. See, e.g., *Simms* v. *Seaman*, [308 Conn. 523, 561–62, 69 A.3d 880 (2013)] (discussing federal case law that consistently has held that CUTPA claims premised on false communications made during and relevant to underlying judicial proceeding are barred by litigation privilege); *Bruno* v. *Travelers Cos.*, [172 Conn. App. 717, 722, 727–29, 161 A.3d 630 (2017)] (CUTPA claim against insurance companies was barred by litigation privilege); *Tyler* v. *Tatoian*, [164 Conn. App. 82, 86–87, 93–94, 137 A.3d 801] (CUTPA claim against attorney for communications made in course of prior judicial proceeding was barred by litigation privilege) [cert. denied, 321 Conn. 908, 135 A.3d 710 (2016)]. These holdings are in line with case law from other jurisdictions, the majority of which have applied the litigation privilege to both

common-law and statutory causes of action, including claims for unfair trade practices brought pursuant to the jurisdiction's analogue to CUTPA. . . .

"Under this precedent, the litigation privilege bars CUTPA claims, like the claim at issue, premised solely on general allegations of intentionally false discovery responses because these claims merely challenge the making of false statements. Additionally, there are other remedies available to deter the alleged conduct. See *Tyler* v. *Tatoian*, supra, 164 Conn. App. 93–94. This does not mean, however, that a defendant enjoys absolute immunity from all CUTPA claims under the litigation privilege, even those premised on a violation of CUIPA. Rather, we merely hold that this specific claim—a business practice of filing false discovery responses—is afforded absolute immunity. We recognize that the legislature intended to prohibit certain unfair and deceptive business practices by enacting CUTPA and CUIPA, but the plaintiff has not cited, and we have not discovered, any provision of these statutes that explicitly abrogates the common-law litigation privilege, which, historically, has been applied to false and malicious statements made during and relevant to judicial proceedings. Our holding leaves open the possibility that other CUTPA claims may not be barred by absolute immunity under the litigation privilege. Thus, we conclude that the litigation privilege bars the plaintiff's CUTPA-CUIPA claim." (Citations omitted; footnote omitted.) *Dorfman* v. *Smith*, supra, 342 Conn. 617–20.

In the present case, the plaintiff alleges violations of CUTPA based on a violation of CUIPA in counts four and five of the complaint. Specifically, both counts incorporate the allegations of paragraphs 1 through 64 of count two, which alleges a claim for statutory vexatious litigation. Thus, counts four and five are based on the same conduct underlying the vexatious litigation claims, namely, the defendant's conduct in the *Smith*

action of denying allegations of the complaint that it knew to be true and asserting a special defense of contributory negligence that it knew to be false. Count four further alleges that the defendant's conduct, as set forth, violates CUIPA in that "the defendant made, published, and disseminated statements before the public with respect to the business of insurance that it knew to be untrue, deceptive, or misleading, in violation of . . . § 38a-816 (2)," and that such violations caused the plaintiff an ascertainable loss and damages.[38] Count five alleges a business practice by the defendant of insurance misconduct by filing false pleadings and lists thirteen other cases in which the defendant was alleged to have failed to admit allegations it knew to be true in its answer to a complaint and pleaded an affirmative defense it knew to be false. Count five further alleges that the defendant's general business practice violates § 38a-816 (6) of CUIPA in that the defendant misrepresents facts, and that the plaintiff suffered an ascertainable loss and damages.

We fail to see how these allegations of a business practice of filing false pleadings differ in any meaningful way from the alleged business practice of responding falsely to discovery requests underlying the CUTPA claim at issue in *Dorfman* v. *Smith*, supra, 342 Conn. 617–20. In determining that the CUTPA claim was barred by the litigation privilege, our Supreme Court relied on precedent from other courts, which "consistently have applied the litigation privilege to CUTPA claims premised on false communications made during and relevant to an underlying judicial proceeding." Id., 618. Although our Supreme Court left "open the possibility that other CUTPA claims may not be barred by

[38] Notably, the damages claimed by the plaintiff in the present case as a result of the defendant's alleged CUTPA/CUIPA violations are identical to the damages the plaintiff claimed to have sustained for the defendant's CUTPA/CUIPA violation in the *Smith* action, and included damages for "(a) [w]rongfully, intentionally, and maliciously withholding money due to [the plaintiff]; (b) [c]ausing [the plaintiff] to suffer extreme upset, fear, anger,

absolute immunity under the litigation privilege"; id., 620; the present case does not present such a situation. The allegations underlying the plaintiff's CUTPA/CUIPA claims in the present case are based on alleged false representations and pleadings of the defendant in an underlying judicial proceeding. Moreover, the plaintiff has not directed this court to any statutory provision abrogating the common-law litigation privilege, "which, historically, has been applied to false and malicious statements made during and relevant to judicial proceedings." Id.

Although we agree with the plaintiff that the court did not apply the correct standard in rendering summary judgment as to the CUTPA/CUIPA counts of her complaint, as the court's probable cause determination was not dispositive of these counts, nonetheless, we affirm the summary judgment rendered in favor of the defendant on these counts on the alternative ground that the claims in counts four and five are barred by the litigation privilege. "[I]t is axiomatic that [an appellate court] may affirm a proper result of the trial court for a different reason. . . . *Silano* v. *Cooney*, 189 Conn. App. 235, 241 n.6, 207 A.3d 84 (2019); see also *Helvering* v. *Gowran*, 302 U.S. 238, 245, 58 S. Ct. 154, 82 L. Ed. 224 (1937) (the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground)." (Internal quotation marks omitted.) *Tracey* v. *Miami Beach Assn.*, 216 Conn. App. 379, 396 n.19, 288 A.3d 629 (2022), cert. denied, 346 Conn. 919, 291 A.3d 1040 (2023).

The judgment is reversed only with respect to the granting of the defendant's motion for summary judgment as to the vexatious litigation counts of the complaint and the case is remanded for further proceedings

frustration, and distress as a direct result of the defendant's intentional and malicious acts; (c) [c]ausing [the plaintiff] to incur unnecessary legal fees and expenses; and (d) [d]epriving [the plaintiff] of her insurance benefits."

consistent with this opinion; the judgment is affirmed in all other respects.

In this opinion ALVORD, J., concurred.

ELGO, J., concurring in part and dissenting in part. This case presents a question of first impression regarding an action for vexatious litigation predicated on a defendant's answer to a civil complaint. I agree with the majority's rejection of the claims of the plaintiff, Tamara Dorfman, regarding her ability to obtain meaningful discovery prior to the rendering of summary judgment and the analysis employed by the trial court on her claims under the Connecticut Unfair Trade Practices Act, General Statutes § 42-110a et seq., and the Connecticut Unfair Insurance Practices Act, General Statutes § 38a-815 et seq. I disagree in part with the majority's conclusion that the court improperly rendered summary judgment in favor of the defendant, Liberty Mutual Fire Insurance Company, on the vexatious litigation counts of her complaint. I therefore respectfully dissent in that limited regard.

Because the facts giving rise to this appeal are set forth in the majority opinion, I focus my attention on the plaintiff's vexatious litigation claims. As our Supreme Court has explained, "[t]he cause of action for vexatious litigation permits a party who has been wrongfully sued to recover damages." *Bernhard-Thomas Building Systems, LLC* v. *Dunican*, 286 Conn. 548, 553, 944 A.2d 329 (2008). "A vexatious suit is a type of malicious prosecution action, differing principally in that it is based upon a prior civil action, whereas a malicious prosecution suit ordinarily implies a prior criminal complaint. To establish either cause of action, it is necessary to prove want of probable cause, malice and a termination of suit in the plaintiff's favor." *Vandersluis* v. *Weil*, 176 Conn. 353, 356, 407 A.2d 982 (1978); see also *Allstate*

Ins. Co. v. *Opie*, United States District Court, Docket No. 3:13-CV-01101 (RNC) (D. Conn. December 9, 2014) ("vexatious litigation and malicious prosecution are so similar as to be essentially the same tort").

The archetype of either a common-law or statutory action for vexatious litigation is the existence of a prior lawsuit commenced by the defendant against the plaintiff. See, e.g., *Bernhard-Thomas Building Systems, LLC* v. *Dunican*, supra, 286 Conn. 553 ("[t]he cause of action for vexatious litigation permits a party who has been wrongfully sued to recover damages"); *Rioux* v. *Barry*, 283 Conn. 338, 347, 927 A.2d 304 (2007) ("[v]exatious litigation [generally] requires a plaintiff to establish that . . . the previous lawsuit or action was initiated or procured by the defendant against the plaintiff"); *Christian* v. *Iyer*, 221 Conn. App. 869, 871–72, 303 A.3d 604 (2023) (plaintiffs brought vexatious litigation action against defendant neighbors for instituting prior trespass action against them); *Greene* v. *Keating*, 197 Conn. App. 447, 449–50, 231 A.3d 1178 (2020) (plaintiff brought vexatious litigation action against defendant law firm for instituting prior action against her).

This case does not involve a prior action initiated by the defendant against the plaintiff, but rather one instituted *by the plaintiff against the defendant*. See *Dorfman* v. *Smith*, 342 Conn. 582, 586–87, 271 A.3d 53 (2022). It thus falls outside the archetype of a vexatious litigation action, as the plaintiff here does not claim that she was "wrongly sued"; see *Bernhard-Thomas Building Systems, LLC* v. *Dunican*, supra, 286 Conn. 553; by the defendant. Instead, the plaintiff's vexatious litigation action is predicated on her contention that the defendant improperly (1) asserted the special defense of contributory negligence and (2) denied cer-

tain paragraphs of her complaint in that prior action.[1] I address each in turn.

I

Connecticut law has recognized that an action for vexatious litigation may lie with respect to special defenses asserted by a defendant in a prior action between the parties.[2] See *Rozbicki* v. *Sconyers*, 198 Conn. App. 767, 783, 234 A.3d 1061 (2020) (summary judgment improperly granted because genuine issue of material fact existed as to whether defendants had probable cause to assert special defenses); *Forsstrom* v. *Smanik*, Superior Court, judicial district of Windham at Putnam, Docket No. CV-12-6005759-S (June 10, 2013) (56 Conn. L. Rptr. 248, 250) (denying motion to strike because vexatious litigation count of complaint sufficiently alleged that defendant played material role in assertion of "vexatious defenses" without probable cause). In the prior action at issue here, the defendant, in its May 17, 2016 answer and special defenses, alleged contributory negligence as a special defense in response to the plaintiff's amended complaint, which she filed on December 22, 2015. For that reason, I agree with the majority that it was not improper for the plaintiff to commence a vexatious litigation action predicated on the defendant's assertion of that special defense.

In moving for summary judgment, the defendant bore the burden of demonstrating the absence of a genuine

[1] With respect to the paragraphs of the plaintiff's complaint that are at issue in this appeal, the defendant pleaded either that the paragraph is "denied" or that the defendant "is without sufficient information to either admit or deny the allegations, *and*, *therefore*, *denies the allegations* and leaves the plaintiff to her proof." (Emphasis added.) As our Supreme Court has explained, "[t]he pleading of no knowledge or information to [the] allegations is in effect a denial." *Postemski* v. *Watrous*, 151 Conn. 183, 185, 195 A.2d 425 (1963).

[2] Under our common law and rules of practice, special defenses must be affirmatively pleaded by a party. See *Coughlin* v. *Anderson*, 270 Conn. 487, 501, 853 A.2d 460 (2004); see also Practice Book § 10-50.

issue of material fact on the question of whether it possessed probable cause to assert that special defense. See *Windsor* v. *Loureiro Engineering Associates*, 181 Conn. App. 356, 369–71, 186 A.3d 729 (2018) (defendant who moves for summary judgment on special defense bears initial burden of proof); *Trotter* v. *Anderson*, 417 F.2d 1191, 1192 (7th Cir. 1969) (defendant seeking summary judgment on special defense of contributory negligence has "heavy burden" in establishing absence of genuine factual dispute). As this court has noted, "[t]he legal idea of probable cause is a bona fide belief in the existence of the facts essential under the law for the action and such as would warrant a person of ordinary caution, prudence and judgment, under the circumstances, in entertaining it. . . . Probable cause is the knowledge of facts, actual or apparent, strong enough to justify a reasonable man [or woman] in the belief that he [or she] has lawful grounds for prosecuting the defendant in the manner complained of. . . . Thus, in the context of a vexatious suit action, the defendant lacks probable cause if he [or she] lacks a reasonable, good faith belief in the facts alleged and the validity of the claim asserted. . . . [T]he existence of probable cause is an absolute protection against an action for [vexatious litigation], and what facts, and whether particular facts, constitute probable cause is always a question of law. . . . [T]he standard is an objective one that is necessarily dependent on what the [party] knew when [it asserted the special defense]." (Citation omitted; internal quotation marks omitted.) *Rozbicki* v. *Sconyers*, supra, 198 Conn. App. 774–75.

Because the defendant failed to adduce evidence in support of its motion for summary judgment that would support a good faith belief that the plaintiff was negligent in any manner, I would conclude that the court improperly rendered summary judgment in favor of the

defendant with respect to the special defense of contributory negligence.[3] I therefore concur with the majority opinion in this respect.

II

The plaintiff's vexatious litigation counts also are predicated on the defendant's denial of certain paragraphs of her complaint in the prior action between the parties.[4] For two distinct reasons, I would conclude that the court properly rendered summary judgment with respect to those general denials.

A

First, I do not believe that the plaintiff has met her burden of establishing that the scope of an action for vexatious litigation encompasses general denials pleaded by a defendant in response to a civil complaint in a prior action. In that regard, it bears emphasis that, in every appeal before this court, "the burden rests with the appellant to demonstrate reversible error." *Jalbert*

[3] I also find it noteworthy that only seven months after it asserted that special defense—and more than twenty-one months *before* trial commenced—the defendant withdrew that defense. Accordingly, the relevant time period for purposes of evaluating the plaintiff's vexatious litigation claim is that seven month window in which the defendant maintained the special defense of contributory negligence.

In its appellate brief, the defendant avers that, "[a]t no time prior to the withdrawal of the special defense of contributory negligence on December 15, 2016, did the plaintiff take any depositions or disclose any experts as to liability for the subject accident." Although that allegation has no bearing on the issue of probable cause before this court, it may be relevant to the merits of the plaintiff's vexatious litigation claim on remand. Also relevant is the fact that, on August 10, 2016, the plaintiff filed a request for the defendant to revise its contributory negligence special defense, arguing that certain allegations did "not set forth any facts" and that the plaintiff was "entitled to know the facts upon which [the defendant's] assertion is based."

[4] It is well established that an appellate court may "take judicial notice of the court files in another suit between the parties, especially when the relevance of that litigation was expressly made an issue at this trial." *McCarthy* v. *Warden*, 213 Conn. 289, 293, 567 A.2d 1187 (1989), cert. denied, 496 U.S. 939, 110 S. Ct. 3220, 110 L. Ed. 2d 667 (1990).

v. *Mulligan*, 153 Conn. App. 124, 145, 101 A.3d 279, cert. denied, 315 Conn. 901, 104 A.3d 107 (2014); see also *Brookfield* v. *Candlewood Shores Estates, Inc.*, 201 Conn. 1, 7, 513 A.2d 1218 (1986) ("[t]he burden is on the appellant to prove harmful error"); *Harlow* v. *Stickels*, 151 Conn. App. 204, 210, 94 A.3d 706 (2014) ("[a]n appellant bears the burden to show that there was error from which she appeals"). I am aware of no Connecticut authority, nor has the plaintiff identified any, that authorizes a plaintiff to maintain a vexatious litigation action on the basis of general denials pleaded by a defendant in response to a negligence claim in a prior action.[5] To resolve that question of first impression in this state, I

[5] Although the plaintiff's complaint in the prior action alleged a breach of contract on the part of the defendant, that count was premised on the purported negligence of the tortfeasor, Joscelyn M. Smith, in whose shoes the defendant stood as a party to that action. See *Collins* v. *Colonial Penn Ins. Co.*, 257 Conn. 718, 732–34, 778 A.2d 899 (2001) (plaintiff's uninsured motorist insurance carrier acts as surrogate for uninsured tortfeasor and stands in shoes of tortfeasor); *Anderson* v. *Peerless Ins. Co.*, Superior Court, judicial district of Middlesex, Docket No. 66861 (February 3, 1993) (8 Conn. L. Rptr. 728, 730) ("the same defenses that the uninsured [tortfeasor] had are also legitimate defenses for the carrier to invoke"). To prevail in her underinsured motorist action against the defendant, the plaintiff was required to establish negligence on the part of Smith. See *Collins* v. *Colonial Penn Ins. Co.*, supra, 741 ("[w]ithout proof of the negligence of a tortfeasor . . . there can never be a recovery of uninsured motorist benefits"); cf. *Enviro Express, Inc.* v. *AIU Ins. Co.*, 279 Conn. 194, 204, 901 A.2d 666 (2006) ("[U]nderinsured motorist payments are not purely contractual in nature because such payments operate in part as a liability insurance surrogate for the underinsured motorist third party tortfeasor. . . . [U]nderinsured motorist benefits are sui generis. They are contractual, but they depend on principles of tort liability and damages." (Internal quotation marks omitted.)); *Haynes* v. *Yale-New Haven Hospital*, 243 Conn. 17, 26 n.9, 699 A.2d 964 (1997) (rejecting claim "that underinsured motorist payments are purely contractual in nature" and emphasizing that "underinsured motorist payments are . . . exclusively premised upon a third party's *tort liability*" (emphasis altered)); *Miller* v. *State Farm Mutual Automobile Ins. Co.*, 993 A.2d 1049, 1055 (Del. 2010) ("the determination of the insured's damages in an underinsured motorist claim is governed not by contract principles, but by tort law"). For that reason, the trial court correctly observed that "[t]he essential characteristic of [the plaintiff's] underlying underinsured motorist claim is that of an action in negligence."

respectfully submit that the appropriate analytical approach begins within the confines of Connecticut law.[6]

"In Connecticut, the cause of action for vexatious litigation exists both at common law and pursuant to statute." *Bernhard-Thomas Building Systems, LLC* v. *Dunican*, supra, 286 Conn. 554. "A statutory action for vexatious litigation under General Statutes § 52-568 . . . differs from a common-law action only in that a finding of malice is not an essential element, but will

[6] The majority's analysis centers on a "determination of whether Connecticut follows" § 674 of the Restatement (Second) of Torts. For two reasons, I respectfully disagree with that approach. First, on an elemental level, it is axiomatic that such secondary sources are not binding on the courts of this state and properly are used to inform our discussion of a matter of state law, rather than drive it—particularly when statutory interpretation is at issue. See, e.g., *Stamford Property Holdings, LLC* v. *Jashari*, 218 Conn. App. 179, 198 n.12, 291 A.3d 117 (Restatement "is nonbinding secondary authority"), cert. denied, 347 Conn. 901, 296 A.3d 840 (2023); *Matter of Featherfall Restoration, LLC*, 261 Md. App. 105, 137–38, 311 A.3d 437 (Restatement "is merely a secondary source providing a survey of trends in common law on a national scale"), cert. granted, 487 Md. 264, 317 A.3d 913 (2024); *Gerling Konzern Allgemeine Versicherungs AG* v. *Lawson*, 472 Mich. 44, 57, 693 N.W.2d 149 (2005) ("the duty of this [c]ourt is to construe the language of Michigan's statutes before turning to secondary sources such as the Restatements").

Second, the question of whether Connecticut has adopted § 674 of the Restatement (Second) of Torts was never raised by any party, before either the trial court or this court. See *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 142, 84 A.3d 840 (2014) ("[o]ur case law and rules of practice generally limit [an appellate] court's review to issues that are distinctly raised at trial" (internal quotation marks omitted)). Although this court ordered the parties to file simultaneous supplemental briefs following oral argument in this appeal, we likewise did not raise that issue. While the plaintiff does cite to § 674 in one paragraph of her supplemental brief, she does not contend that Connecticut has adopted that Restatement provision. Perhaps most importantly, the defendant in this case had no notice of that issue and was never provided an opportunity to be heard thereon, in contravention of the mandate of our Supreme Court in *Blumberg Associates Worldwide, Inc.* See id., 128. Respectfully, I disagree with the majority that an isolated reference to § 674 in one paragraph of the plaintiff's supplemental brief before this court—to which the defendant had no opportunity to reply—properly "put the defendant on notice" that the issue of whether Connecticut follows § 674 was being raised in this appeal.

serve as a basis for higher damages." (Citation omitted.) *Falls Church Group, Ltd.* v. *Tyler, Cooper & Alcorn, LLP*, 281 Conn. 84, 94, 912 A.2d 1019 (2007); see also *Norse Systems, Inc.* v. *Tingley Systems, Inc.*, 49 Conn. App. 582, 596, 715 A.2d 807 (1998) ("[t]he elements of a common-law or statutory cause of action for vexatious litigation are identical"). Because the plaintiff in this case alleged both common-law and statutory vexatious litigation, which actions are largely identical, I begin with the question of whether § 52-568 permits a party to maintain such an action on the basis of general denials pleaded by a defendant in its answer to a complaint.

1

Statutory Vexatious Litigation

Whether the legislature intended § 52-568 to encompass a defendant's general denials to paragraphs of a plaintiff's complaint in a prior action presents a question of statutory interpretation, over which our review is plenary. See, e.g., *777 Residential, LLC* v. *Metropolitan District Commission*, 336 Conn. 819, 827, 251 A.3d 56 (2020). "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case . . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to

implement, and to its relationship to existing legislation and [common-law] principles governing the same general subject matter . . . .'' (Internal quotation marks omitted.) *Vitti* v. *Milford*, 336 Conn. 654, 660, 249 A.3d 726 (2020).

Section 52-568 provides: ''Any person who commences and prosecutes any civil action or complaint against another, in his own name or the name of others, or asserts a defense to any civil action or complaint commenced and prosecuted by another (1) without probable cause, shall pay such other person double damages, or (2) without probable cause, and with a malicious intent unjustly to vex and trouble such other person, shall pay him treble damages.'' By its plain language, that statute applies to two classes of persons—those who commence and prosecute a civil action, and those who assert a defense thereto. The dispute in this case concerns the latter class.

Section 52-568 does not define the term ''defense'' and provides little clarity as to precisely what constitutes the assertion of a defense in a civil action. Broadly speaking, the term ''defense'' plausibly may be read to include both general denials and special defenses affirmatively pleaded by a defendant. See, e.g., *JPMorgan Chase Bank, National Assn.* v. *Malick*, 347 Conn. 155, 169, 296 A.3d 157 (2023) (noting that Black's Law Dictionary ''defines 'defense' as '[a] defendant's stated reason why the plaintiff or prosecutor has no valid case . . . a defendant's answer, denial, or plea' '').

At the same time, General Statutes § 1-1 (a) requires us to construe statutory language in light of any peculiar or technical meaning it possesses in the law.[7] In this

[7] General Statutes § 1-1 (a) provides: ''In the construction of the statutes, words and phrases shall be construed according to the commonly approved usage of the language; and technical words and phrases, and such as have acquired a peculiar and appropriate meaning in the law, shall be construed and understood accordingly.''

regard, I note that the amendment that added the phrase "asserts a defense" to § 52-568 was enacted as part of the Tort Reform Act of 1986. See Public Acts 1986, No. 86-338, § 9 (P.A. 86-338). In ascertaining the apparent intent of the legislature in adding that language as part of its comprehensive tort reform, we must presume that the legislature was familiar with civil practice in this state and the fact that general denials are commonplace, consistent with our common law and rules of practice.[8] See, e.g., *Daley* v. *Kashmanian*, 344 Conn. 464, 485, 280 A.3d 68 (2022) ("we presume that the legislature is aware of the common law on a particular subject"); *State* v. *Miranda*, 260 Conn. 93, 131–32, 794 A.2d 506 (noting "the presumption that the legislature is aware of the existence of the rules of practice . . . and intended to create a consistent body of law" (internal quotation marks omitted)), cert. denied, 537 U.S. 902, 123 S. Ct. 224, 154 L. Ed. 2d 175 (2002). The legislature nevertheless did not include the term "denial" in enacting or amending § 52-568. "[I]t is a well settled principle of statutory construction that the legislature knows how to convey its intent expressly . . . ." (Citations omitted.) *Scholastic Book Clubs, Inc.* v. *Commissioner of Revenue Services*, 304 Conn. 204, 219, 38 A.3d 1183, cert. denied, 568 U.S. 940, 133 S. Ct. 425, 184 L. Ed. 2d 255 (2012). Had the legislature intended to include general denials within the ambit of § 52-568, it could have defined the term "defense." Alternatively, the legislature simply could have added two words to the statute, so as to read "[a]ny person who . . . asserts a

[8] As our Supreme Court explained, "[i]t has long been understood that Practice Book provisions are not intended to enlarge or abrogate substantive rights. . . . [T]his court has interpreted provisions of the Practice Book through the lens of the common law." (Citations omitted.) *Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, 292 Conn. 1, 44, 970 A.2d 656, cert. denied sub nom. *Bridgeport Roman Catholic Diocesan Corp.* v. *New York Times Co.*, 558 U.S. 991, 130 S. Ct. 500, 175 L. Ed. 2d 348 (2009).

denial or defense to any civil action or complaint commenced and prosecuted by another . . . .'' The legislature here did neither. See *Branford* v. *Santa Barbara*, 294 Conn. 803, 813, 988 A.2d 221 (2010) (''[w]e are bound to interpret legislative intent by referring to what the legislative text contains, not by what it might have contained'' (internal quotation marks omitted)).

I am also mindful that ''[l]egal terms . . . are to be presumed to be used in their legal sense. . . . *In ascertaining legislative intent* [*r*]*ather than using terms in their everyday sense*, [*t*]*he law uses familiar legal expressions in their familiar legal sense*.'' (Emphasis in original; internal quotation marks omitted.) *Rutter* v. *Janis*, 334 Conn. 722, 730–31, 224 A.3d 525 (2020). On multiple occasions, our Supreme Court has distinguished denials from defenses and counterclaims asserted by a party in response to a complaint. See, e.g., *Electrical Contractors, Inc.* v. *Ins. Co. of the State of Pennsylvania*, 314 Conn. 749, 760, 104 A.3d 713 (2014) (explaining that General Statutes § 49-42 (a) ''permits the court to award attorney's fees if it appears that any *claim*, *denial*, *or defense* is without substantial basis in fact or law'' (emphasis added)); *Nizzardo* v. *State Traffic Commission*, 259 Conn. 131, 162, 788 A.2d 1158 (2002) (''[t]he word 'pleading' is defined as '[a] formal document in which a party to a legal proceeding . . . sets forth or responds to allegations, claims, *denials*, *or defenses*' '' (emphasis altered)).

I respectfully submit that the most familiar legal sense of the phrase ''asserts a defense,'' as used by legal practitioners in this state in the context of responding to a complaint, refers to defenses that are affirmatively pleaded, rather than general denials set forth in a defendant's answer. In my years in practice and on the bench, not once have I heard an attorney state that they were ''asserting a denial'' to the allegations of a complaint—they simply ''denied'' those allegations. By contrast,

attorneys routinely "assert" special defenses and counterclaims—that vernacular is commonplace. See, e.g., *Dorfman* v. *Smith*, supra, 342 Conn. 587 (noting that defendant, in answering complaint, "denied" certain allegations and "also asserted a special defense"); *Assn. Resources, Inc.* v. *Wall*, 298 Conn. 145, 157, 2 A.3d 873 (2010) ("[t]he defendant responded by filing an answer and asserting numerous special defenses"); *Naples* v. *Keystone Building & Development Corp.*, 295 Conn. 214, 220, 990 A.2d 326 (2010) ("[t]he defendants filed an answer denying the plaintiffs' allegations, as well as special defenses asserting that the plaintiffs' claims were barred"); *Liberty Mutual Ins. Co.* v. *Lone Star Industries, Inc.*, 290 Conn. 767, 778, 967 A.2d 1 (2009) (defendant "filed an answer asserting numerous special defenses" and counterclaims); *Travelers Ins. Co.* v. *Namerow*, 261 Conn. 784, 788, 807 A.2d 467 (2002) ("In response [to the complaint], the plaintiff filed an answer denying each of the defendants' claims. The plaintiff also filed thirteen special defenses asserting, inter alia, that the policy did not cover the defendants' loss because the defendants either expected or intended the loss."); *Wallerstein* v. *Stew Leonard's Dairy*, 258 Conn. 299, 301, 780 A.2d 916 (2001) ("[t]he defendant denied liability, asserting no special defenses"); *Connecticut National Bank* v. *Giacomi*, 233 Conn. 304, 314, 659 A.2d 1166 (1995) (defendants "answered [the] complaint by denying liability and asserting identical special defenses and counterclaims").

In addition, I am sensitive to our obligation to "construe a statute *as a whole* . . . ." (Emphasis in original; internal quotation marks omitted.) *Thomas* v. *Dept. of Developmental Services*, 297 Conn. 391, 403–404, 999 A.2d 682 (2010); see also *Nizzardo* v. *State Traffic Commission*, supra, 259 Conn. 155 (courts engaging in statutory interpretation must be "faithful to the language of the act as a whole"). Significantly, § 52-568 is a punitive

statute that exposes the specified classes of persons to both double and treble damages. See *Ames* v. *Commissioner of Motor Vehicles*, 267 Conn. 524, 536, 839 A.2d 1250 (2004) ("[a]n award of multiple damages . . . is an extraordinary remedy"); *Westport Taxi Service, Inc.* v. *Westport Transit District*, 235 Conn. 1, 41 n.44, 664 A.2d 719 (1995) ("[t]reble damages are punitive damages"); see also *Kearney & Trecker Corp.* v. *Cincinnati Milacron, Inc.*, 562 F.2d 365, 373 (6th Cir. 1977) (describing treble damages as "extreme" sanction). In light of the gravity of those sanctions, I believe it is plausible that the legislature, in adding the phrase "asserts a defense to any civil action or complaint" to § 52-568, was referring to defenses that must be affirmatively pleaded and counterclaims, rather than general denials pleaded by a defendant in its answer.

Under our rules of statutory construction, ambiguity arises whenever statutory language is subject to more than one plausible interpretation. See, e.g., *Redding* v. *Georgetown Land Development Co., LLC*, 337 Conn. 75, 84 n.9, 251 A.3d 980 (2020) ("[o]ur case law is clear that ambiguity exists only if the statutory language at issue is susceptible to more than one plausible interpretation" (internal quotation marks omitted)); *State* v. *Pond*, 315 Conn. 451, 468, 108 A.3d 1083 (2015) ("[b]ecause the statutory language is subject to multiple, plausible interpretations, and it does not expressly address or resolve the certified question, [the language] is facially ambiguous"); *Commissioner of Correction* v. *Freedom of Information Commission*, 307 Conn. 53, 68, 52 A.3d 636 (2012) ("[b]ecause we believe that both of these interpretations are plausible, we conclude that the language [in question] is ambiguous"). In this case, I would conclude that the phrase "asserts a defense" is subject to more than one plausible interpretation. For that reason, § 52-568 is ambiguous, warranting resort to extratextual materials. See, e.g., *State* v. *Fernando A.*, 294 Conn. 1, 17, 981 A.2d 427 (2009).

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Legislative History

To resolve statutory ambiguity, it is appropriate to consider the circumstances surrounding the enactment of a statute or statutory amendment. See, e.g., *State* v. *Pond*, supra, 315 Conn. 471. Public Act 86-338, § 9, which amended § 52-568 to add the "asserts a defense" language in question, was enacted as part of a comprehensive tort reform in 1986. As our Supreme Court has observed, "[t]he Tort Reform Act was drafted in response to rapidly rising insurance rates, which, some believed, would be curtailed if tort liability could be limited and systematized. . . . As finally enacted, the act represents a complex web of interdependent concessions and bargains struck by hostile interest groups and individuals of opposing philosophical positions." (Footnote omitted.) *Sanzone* v. *Board of Police Commissioners*, 219 Conn. 179, 185, 592 A.2d 912 (1991); see also *White* v. *Byelas Irrevocable Trust*, 64 Conn. App. 506, 510–11, 780 A.2d 989 (2001) ("[i]n 1986, by enacting [P.A. 86-338] . . . the General Assembly replaced the common-law rule of joint and several liability with a system of apportioned liability that holds each defendant liable for only his or her proportionate share of damages" (internal quotation marks omitted)).

The legislative history of P.A. 86-338 reflects that the amendment of § 52-568 was an ancillary part of that reform that garnered relatively little discussion among legislators. Proponents of the changes to § 52-568 emphasized that "the number of suits, both serious and frivolous, [has] increased over the last several years." Conn. Joint Standing Committee Hearings, Judiciary, Pt. 1, 1986 Sess., p. 312, statement of Harry P. Harris on behalf of Southwestern Area Commerce & Industry Association; see also id., p. 315, statement of Kathleen A. Leary, Vice President of the Business/Industry Council

(noting that "[a]lso on the rise is the number of frivolous lawsuits being filed").

The primary change to § 52-568 as a result of P.A. 86-338 was the imposition of an additional penalty. The statute previously provided for an award of treble damages for any person who commenced a civil action (1) without probable cause and (2) with a malicious intent. See General Statutes (Rev. to 1985) § 52-568. Public Act 86-338 retained that penalty but added a provision imposing double damages on any person who commences a civil action without probable cause, *irrespective* of the question of malice. As Representative William L. Wollenberg, Chairman of the Judiciary Committee, explained when introducing the bill, "[Public Act 86-338] sets out . . . two standards, as opposed to what we have in [§ 52-568] today. If the action is brought without probable cause [there are] double damages, if the action is brought without probable cause and with malicious intent . . . there are treble damages. [That latter standard] is the law today. [Public Act 86-338] adds the double damages." 29 H.R. Proc., Pt. 16, 1986 Sess., p. 5739; see also 29 H.R. Proc., Pt. 22, 1986 Sess., pp. 8105–106, remarks of Representative Michael D. Rybak (noting that lack of probable cause is all that is required for award of double damages and remarking, "God help the poor lawyer who doesn't read that section" of P.A. 86-338); Conn. Joint Standing Committee Hearings, Judiciary, Pt. 7, 1986 Sess., p. 2220 (statement from Connecticut Association of Realtors, Inc., expressing support for "the stronger penalties provided for filing frivolous or vexatious suits"); id., p. 2340 (letter from Connecticut Society of Architects expressing support for "increasing sanctions against any person who commences and prosecutes any civil action or complaint against another without 'probable cause' "); id., p. 2377, statement of Raphael L. Podolsky, Acting Director of the Center for Advocacy and Research, Inc.

(opposing amendment because P.A. 86-338 "imposes double damages for a suit brought without probable cause, even though the suit is brought in good faith" and noting that "one person's lack of probable cause is another person's creative legal theory" (emphasis omitted)).

Although the legislative history contains a handful of references to parties that vexatiously defend a civil action, none pertains to the answering of a complaint. For example, at the hearing before the Judiciary Committee, Robert Hunter, President of the National Insurance Consumer Organization, testified that there should be penalties for both frivolous lawsuits and frivolous defenses, noting that "[l]awyers are known to paper and run the clock." Id., p. 2003. At that point, Representative Christopher Shays asked him to explain what he meant by a frivolous defense, to which Hunter replied: "Frivolous defense is, for example, I was told by an attorney that he took fifty depositions in a case. . . . He said many of those depositions were almost the identical evidence. He was running his clock. We know that attorneys do that, don't we? Including defense attorneys? But to deal with only one side of the equation, to unbalance a system that has grown over 200 years, I think is unfair." Id.; see also Conn. Joint Standing Committee Hearings, Judiciary, Pt. 6, 1986 Sess., p. 1893, testimony of Attorney Ralph Elliot, President of the Connecticut Bar Association (opining that there should be penalty for defendants who say, "I'm going to drag you through three or four years of litigation and then on the courthouse steps, I'll settle with you"); id., p. 1875, testimony of Henry J. Naruk, Vice President and Associate General Counsel of Travelers Insurance Company (stating that "[w]e have brought a number of sanctions against people who have brought frivolous lawsuits, who have extended [lawsuits] and failed to comply with discovery orders").

The legislative history thus suggests that the General Assembly, in enacting P.A. 86-338, was animated by some of the same considerations that underlie § 674 of the Restatement (Second) of Torts, which imposes liability on parties that wrongfully prolong a civil proceeding without probable cause.[9] See 3 Restatement (Second), Torts § 674, p. 452 (1977). Yet there is no indication in the Restatement (Second) that § 674 contemplates the scenario presented here, in which a vexatious litigation action was brought against a defendant for pleading general denials in its answer. As the Supreme Court of Kansas has observed, "[n]one of the examples in the comments to § 674 involve liability attaching to one who defends in an action *without* asserting a counterclaim or cross-claim." (Emphasis added.) *Wilkinson* v. *Shoney's, Inc.*, 269 Kan. 194, 206, 4 P.3d 1149 (2000). In the more than 1100 pages of legislative history of P.A. 86-338, there similarly is no mention whatsoever of a defendant's answer to a complaint or a defendant's denial of an allegation set forth therein. The legislative history thus is silent on the specific issue presented in this appeal, which is whether the legislature intended § 52-568 to encompass general denials pleaded by a defendant in response to a civil complaint.[10]

[9] Section 674 of the Restatement (Second) of Torts provides: "One who takes an active part in the initiation, *continuation* or procurement of civil proceedings against another is subject to liability to the other for wrongful civil proceedings if (a) he acts without probable cause, and primarily for a purpose other than that of securing the proper adjudication of the claim in which the proceedings are based, and (b) except when they are ex parte, the proceedings have terminated in favor of the person against whom they are brought." (Emphasis added.) 3 Restatement (Second), Torts § 674, p. 452 (1977). To be clear, I agree with the proposition that an action for vexatious litigation should lie against a party that purposely engages in conduct intended to needlessly foster protracted litigation without probable cause. I disagree that a defendant's filing of a general denial to a paragraph of a plaintiff's complaint should qualify as conduct exposing the defendant to an action for vexatious litigation.

[10] The legislative history also suggests that the wording of P.A. 86-338 was modeled on a similar Wisconsin statute. In a February 26, 1986 letter to the

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Canons of Construction

I therefore turn my attention to certain well established canons of construction to divine the proper meaning of § 52-568. See *Spadoro* v. *United States Customs & Border Protection*, 978 F.3d 34, 47 (2d Cir. 2020) ("we rely upon canons of construction only if the language of the statute is ambiguous"); *Stratford* v. *Jacobelli*, 317 Conn. 863, 875, 120 A.3d 500 (2015) (canons of construction are utilized to discern legislative intent when statutory language "is not clear and unambiguous").

Section 52-568 patently is a punitive statute that exposes parties, and potentially legal counsel, to double and treble damages. See, e.g., *Texas Industries*, *Inc.* v. *Radcliff Materials*, *Inc.*, 451 U.S. 630, 639, 101 S. Ct. 2061, 68 L. Ed. 2d 500 (1981) ("[t]he very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct"); *Westport Taxi Service*, *Inc.* v. *Westport Transit District*, supra, 235 Conn. 41 n.44 ("[t]reble damages are punitive damages"); *Osborne* v. *Warren*, 44 Conn. 357, 359 (1877) (statutory award of

Judiciary Committee, Judy A. C. Edwards, Executive Vice President of the Connecticut Society of Architects, opined that "courts are being used in a way which generates unnecessary litigation and burdens innocent parties with proving that they should not have been sued in the first place." Conn. Joint Standing Committee Hearings, Judiciary, Pt. 1, 1986 Sess., p. 295. She continued: "The Wisconsin statute, which is enclosed, follows an example of legislation encouraging courts to award costs and attorney['s] fees to the successful party when an action or a defense is found to have been brought frivolously." Id. A copy of that statute—Wis. Stat. § 814.025 (1977)—was admitted into the record of the Judiciary Committee's hearing. Like § 52-568, Wis. Stat. § 814.025 distinguishes two classes of litigants subject thereto and provides in relevant part: "If an action or special proceeding commenced or continued by a plaintiff or a counterclaim, defense, or cross complaint commenced, used or continued by a defendant is found, at any time during the proceedings or upon judgment, to be frivolous by the court, the court shall award to the successful party costs . . . and reasonable attorney fees . . . ." Id., p. 298. That Wisconsin statute was repealed in 2005.

double damages reflects legislative intent "to punish"); see also *Allstate New Jersey Ins. Co.* v. *Lajara*, 222 N.J. 129, 144–45, 117 A.3d 1221 (2015) ("[t]reble damages are intended to punish, and only partly to compensate, and therefore have the classic features of punitive damages"). The legislative history of § 52-568 likewise indicates that it is intended to penalize the persons specified therein. See, e.g., Conn. Joint Standing Committee Hearings, Judiciary, Pt. 1, 1986 Sess., p. 217, statement of Dr. Leonard Kemler (urging legislature to amend § 52-568 to "create sanctions for filing frivolous suits"); Conn. Joint Standing Committee Hearings, Judiciary, Pt. 6, 1986 Sess., p. 1908, statement of Attorney Theodore Racklin (noting that § 52-568, as amended by P.A. 86-338, "provides penalties for bringing an action without probable cause"); Conn. Joint Standing Committee Hearings, Judiciary, Pt. 7, 1986 Sess., p. 2220 (statement from Connecticut Association of Realtors, Inc., expressing support for "the stronger penalties provided for filing frivolous or vexatious suits" in § 52-568); id., p. 2340 (letter from Judy A. C. Edwards, Executive Vice President of the Connecticut Society of Architects, urging legislature to increase "sanctions against any person who commences and prosecutes any civil action or complaint against another without 'probable cause' ").

Because § 52-568 is punitive in nature, "we are required to construe it with reasonable strictness in determining whether the act complained of comes within the description in the statute of the acts for which the person in fault is made liable." (Internal quotation marks omitted.) *Branford* v. *Santa Barbara*, supra, 294 Conn. 814; see also *State* v. *Ledbetter*, 240 Conn. 317, 330, 692 A.2d 713 (1997) ("[b]ecause it is a punitive statute, the generally recognized rules of statutory construction normally . . . require the strictest of interpretations"); *Commissioner of Administrative Services* v. *Gerace*, 40 Conn. App. 829, 834, 673 A.2d 1172

(1996) ("the punitive nature of the action against the defendant requires a strict interpretation of the statute" (footnote omitted)), appeal dismissed, 239 Conn. 791, 686 A.2d 993 (1997); see also 3 S. Singer, Sutherland, Statutes and Statutory Construction (8th Ed. 2020) § 59.3, p. 181 (same). The precedent of our Supreme Court further instructs that, when a punitive statute is ambiguous, "we must interpret it in favor of the party who would be subject to the punitive consequences of the statute rather than in favor of the party who would benefit from those consequences." *Branford* v. *Santa Barbara*, supra, 814–15. Those maxims militate against a conclusion that the legislature intended § 52-568 to encompass a defendant's general denials to the allegations of a complaint.

Furthermore, it is well established that "[i]nterpreting a statute . . . to change radically existing law is appropriate only if the language of the legislature plainly and unambiguously reflects such an intent." (Internal quotation marks omitted.) *Adesokan* v. *Bloomfield*, 347 Conn. 416, 444, 297 A.3d 983 (2023). The plaintiff has provided this court with no Connecticut authority, nor has my research uncovered any, in which a party to a civil action in this state has been found to violate § 52-568 due to the filing of general denials in an answer. I respectfully submit that to expand that statutory cause of action to encompass such general denials constitutes a radical change in our law.

I also am guided by the precept that this court is obligated to "construe a statute as written. . . . Courts may not by construction supply omissions . . . . The intent of the legislature . . . is to be found not in what the legislature meant to say, but in the meaning of what it did say. . . . It is axiomatic that the court itself cannot rewrite a statute. . . . That is a function of the legislature." (Internal quotation marks omitted.) *Doe* v. *Norwich Roman Catholic Diocesan Corp.*, 279 Conn.

207, 216, 901 A.2d 673 (2006); see also *Lucarelli* v. *State*, 16 Conn. App. 65, 70, 546 A.2d 940 (1988) ("[c]ourts must interpret statutes as they are written . . . and cannot, by judicial construction, read into them provisions which are not clearly stated" (citation omitted)). To the extent that the plaintiff asks this court to expand the statutory cause of action for vexatious litigation to encompass a defendant's general denials to a complaint—which, at its essence, involves a judgment call on a matter of public policy—that request properly is the prerogative of our General Assembly. See *Commissioner of Environmental Protection* v. *State Five Industrial Park, Inc.*, 304 Conn. 128, 160 n.5, 37 A.3d 724 (2012) (it is "the prerogative of the legislature, rather than the courts, to amend the statutory scheme"); *State* v. *Reynolds*, 264 Conn. 1, 79, 836 A.2d 224 (2003) (Connecticut courts cannot exceed "[their] constitutional limitations by infringing on the prerogative of the legislature to set public policy through its statutory enactments"), cert. denied, 541 U.S. 908, 124 S. Ct. 1614, 158 L. Ed. 2d 254 (2004); *State* v. *Whiteman*, 204 Conn. 98, 103, 526 A.2d 869 (1987) ("[i]n areas where the legislature has spoken . . . the primary responsibility for formulating public policy must remain with the legislature").

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In light of the foregoing, I would conclude that the plaintiff has not satisfied her burden of demonstrating, as a matter of law, that § 52-568 encompasses a defendant's general denials to a plaintiff's complaint in a prior action. For that reason, I believe that summary judgment was properly rendered in favor of the defendant with respect thereto.

2

Common-Law Vexatious Litigation

The question of whether a common-law vexatious litigation action may be predicated on a defendant's

general denials to a complaint in a prior action is one of first impression in this state.[11] Appellate review of that question of law is plenary. See *State* v. *Campbell*, 328 Conn. 444, 477 n.11, 180 A.3d 882 (2018).

a

In urging this court to expand the common-law action for vexatious litigation, the plaintiff relies in part on § 674 of the Restatement (Second) of Torts, which imposes tort liability on a party who "takes an active part in the initiation, continuation or procurement of civil proceedings" without probable cause. See 3 Restatement (Second), supra, § 674, p. 452; see also

[11] In her supplemental brief to this court, the plaintiff posits that, in *Dorfman* v. *Smith*, supra, 342 Conn. 582, our Supreme Court "indicated that a vexatious litigation claim can be premised on [the defendant's] answers" in the prior action between the parties. I disagree. The statements referenced by the plaintiff arose in the context of the court's discussion of whether the trial court properly had applied the litigation privilege to a claim for breach of the implied covenant of good faith and fair dealing. See id., 596–612. During that discussion, the court stated that, "*even if* the allegations in the complaint are sufficient to support a claim for vexatious litigation or abuse of process but such claims are not raised, these allegations do not remove immunity from a claim that falls within the scope of the litigation privilege." (Emphasis added.) Id., 597. The court later noted: "[P]arties and their counsel who abuse the process by bringing unfounded actions for personal motives are subject to civil liability for vexatious suit or abuse of process. . . . Importantly, in the present case, upon a prior action terminating in her favor, the plaintiff could have brought a lawsuit for vexatious litigation." (Citation omitted; internal quotation marks omitted.) Id., 612. At the same time, the court emphasized that "[t]he fact that the plaintiff alleged facts that *may have been sufficient* to support a claim for vexatious litigation does not prevent the litigation privilege from applying to the claim alleged." (Emphasis added.) Id., 607.

"It is axiomatic that an appellate decision stands only for those issues presented to, and considered by, the court in that particular appeal." *Dept. of Public Safety* v. *Freedom of Information Commission*, 103 Conn. App. 571, 582 n.10, 930 A.2d 739, cert. denied, 284 Conn. 930, 934 A.2d 245 (2007). The issue of whether, as a matter of law, a statutory or common-law action for vexatious litigation may be predicated on a defendant's general denials to a complaint in a prior action was neither presented to nor decided by our Supreme Court in *Dorfman* v. *Smith*, supra, 342 Conn. 582. The plaintiff's reliance on that case, therefore, is misplaced.

footnote 9 of this opinion. There is no doubt that a party can improperly continue a civil proceeding, such as by taking numerous redundant depositions or filing frivolous motions, thereby needlessly prolonging litigation for years.[12] In my view, such conduct is what is contemplated by § 674 when it refers to the improper "continuation" of a civil proceeding. At the same time, neither § 674 nor any of the commentary to that section pertains to a defendant's conduct in filing an answer to a civil complaint. For that reason, I respectfully disagree with the majority that § 674 applies to a defendant's general denials to a complaint in a prior action. Instead, I would join the overwhelming majority of jurisdictions that have rejected similar claims.

Numerous courts have been confronted with claims alleging "malicious defense" on the part of a defendant. As the United States District Court for the District of Delaware observed: "A claim for malicious defense is the mirror image of a claim for malicious prosecution. As its name implies, the claim arises when a defendant adopts unfair or unreasonable litigation tactics in an effort to prejudice or harass an opponent." *Rowlands* v. *Phico Ins. Co.*, United States District Court, Docket Nos. Civ.A.00-477-(GMS) and Civ.A.00-485-(GMS) (D. Del. July 27, 2000). For example, in *Wilkinson* v. *Shoney's, Inc.*, supra, 269 Kan. 194, the plaintiff sought to prevail on a malicious defense claim, relying specifically "on the 'continuation or procurement of civil proceedings against another' wording of Restatement (Second) of Torts § 674 . . . ." Id., 204. In rejecting that claim, the court noted that "[n]one of the examples in

[12] As the Supreme Court of California noted one-half century ago, "[t]he judicial process is adversely affected by a maliciously prosecuted cause not only by the clogging of already crowded dockets, but by the unscrupulous use of the courts by individuals . . . as instruments with which to maliciously injure their fellow men." (Internal quotation marks omitted.) *Bertero* v. *National General Corp.*, 13 Cal. 3d 43, 51, 529 P.2d 608, 118 Cal. Rptr. 184 (1974) (en banc).

the comments to § 674 involve liability attaching to one who defends in an action without asserting a counterclaim or cross-claim. Some authorities have recognized an action for malicious prosecution based on the filing of a cross-complaint or counterclaim by [the] defendant on the theory that such cross-pleadings institute a separate and independent cause of action and potentially subject the cross-defendant to the same potential liability and injury as any other claim brought in the first instance. . . . Most courts, however, have found that a purely defensive action provides an insufficient basis for liability." (Citation omitted.) Id., 206–207. The court further emphasized that other remedies were available to the plaintiff, including requests for admission, court-ordered sanctions, and monetary penalties for defendants "who submit a false statement or representation knowing it to be false." Id., 205. Given the existence of those remedies, the court concluded that "there is no public policy justification to create a cause of action for malicious defense . . . ." Id. Moreover, the court emphasized that, "[i]f such [an action] is deemed desirable or needed, action by the legislature is required." Id., 208.

California courts repeatedly have resisted attempts to impose liability on defendants who maliciously defend a civil action. See *Bertero* v. *National General Corp.*, 13 Cal. 3d 43, 52, 529 P.2d 608, 118 Cal. Rptr. 184 (1974) (en banc) (declining to recognize tort of malicious defense and reaffirming "the right of a defendant, involuntarily haled into court, to conduct a vigorous defense"); *California Physicians' Service* v. *Superior Court*, 9 Cal. App. 4th 1321, 1325, 12 Cal. Rptr. 2d 95 (1992) ("[b]roadly but nevertheless accurately speaking, there is no tort of 'malicious defense' "); *DuBarry International, Inc.* v. *Southwest Forest Industries, Inc.*, 231 Cal. App. 3d 552, 575, 282 Cal. Rptr. 181 (1991) (opining, in section of opinion titled "A Denial of an

Agreement in a Pleading Can Not Serve as a Basis for Tort Liability," that "to permit a plaintiff to impose tort liability upon a defendant for positions asserted in pleadings not only imposes an unfair burden on the conduct of a defense but conflicts with the well accepted rule which permits the assertion of two or more inconsistent pleas").

As the Supreme Court of California noted more than one century ago regarding liability of a defendant who "makes a groundless defense" in a prior action, proponents of a malicious defense action fail "to distinguish between the position of the parties, plaintiff and defendant, in an action at law. The plaintiff sets the law in motion; if he does so groundlessly and maliciously, he is the cause of the defendant's damage. But the defendant stands only on his legal rights—the plaintiff having taken his case to court, the defendant has the privilege of calling upon him to prove it to the satisfaction of the judge or jury, and he is guilty of no wrong in exercising this privilege." (Internal quotation marks omitted.) *Eastin* v. *Bank of Stockton*, 66 Cal. 123, 127, 4 P. 1106 (1884).

The high courts of other states agree with that proposition. As the Supreme Court of Illinois explained: "The defendant had the right to resist [the plaintiffs'] claim and if [the] plaintiffs wished to establish their right it was necessary for them to resort to litigation. If, in the process of the procedure necessary to the establishment of [the] plaintiffs' claim, they were compelled to employ the services of lawyers and incur other expenses it was but an incident attached to the asserting and enforcement of their right . . . . If the wrongful conduct of a defendant causing the plaintiff to sue him would give rise to an independent tort and a separate cause of action, there would be no end to the litigation, for immediately upon the entry of judgment the plaintiff would start another action against the defendant for

his attorney fees and expenses incurred in obtaining the preceding judgment. . . . If the plaintiff is successful in the suit, the probability is that the conduct of the defendant causing the suit was wrongful. . . . Under our jurisprudence the defendant may present any defense to such an action that he may have or that he may deem expedient, and in so doing he will not be subjecting himself to a second suit by the plaintiff based on the wrongful conduct of the defendant in causing the plaintiff to sue him or in defending the action. The rule is the same even though the wrongful conduct of the defendant is willful, intentional, malicious or fraudulent." (Citations omitted.) *Ritter* v. *Ritter*, 381 Ill. 549, 554–55, 46 N.E.2d 41 (1943); accord *Pope* v. *Pollock*, 46 Ohio St. 367, 370, 21 N.E. 356 (1889) ("[w]hen the plaintiff sets the law in motion, he is the cause, if it be done groundlessly and maliciously, of [the] defendant's damage, and the defendant but stands upon his legal rights when he calls upon the plaintiff to prove his case to the satisfaction of judge and jury"); cf. *Photovest Corp.* v. *Fotomat Corp.*, 606 F.2d 704, 729 (7th Cir. 1979) ("Nothing in the case law suggests that liability may stem from the [d]efense of a lawsuit or from the decision to defend rather than settle. Such a rule would infringe basic rights in our system of jurisprudence."), cert. denied, 445 U.S. 917, 100 S. Ct. 1278, 63 L. Ed. 2d 601 (1980).

Those cases are rooted in the recognition that an action premised on a defendant's conduct in a prior action is fundamentally distinct from one premised on the conduct of a plaintiff who initiates a judicial proceeding in the first instance. Actions for vexatious litigation and malicious prosecution are predicated on "the right of an individual to be free from unjustifiable litigation [and the] wrongful initiation of civil suits." (Internal quotation marks omitted.) *Bernhard-Thomas Building Systems, LLC* v. *Dunican*, supra, 286 Conn. 553–54; see

also W. Keeton et al., Prosser and Keeton on the Law of Torts (5th Ed. 1984) § 119, p. 870 (tort of malicious prosecution protects "[t]he interest in freedom from unjustifiable litigation"). As one judge keenly observed: "The malicious plaintiff in a civil action institutes proceedings without probable cause and with malice. . . . Because the defendant is haled into court, all of the defendant's resulting financial, emotional, and reputational injuries are attributable to the plaintiff's malicious conduct. The malicious defendant, in contrast, raises or continues an ungrounded and malicious defense merely *to resist the claim of a plaintiff already before the court*. Unlike the defendant targeted by a malicious prosecution, *the plaintiff who encounters a malicious defense voluntarily entered the judicial system* and must be held to accept, to some degree, the costs and risks of litigation. When this plaintiff ultimately prevails in the action, at best only a portion of the plaintiff's litigation costs and damages can be attributed to the malicious defense. These differences in the position of a plaintiff and a defendant with regard to the institution of civil proceedings, the willingness of the involvement in the litigation, and the amount of damages attributable to the malicious conduct of the opposing party, are appropriately recognized by the existing discrepancy in remedies." (Citation omitted; emphasis added.) *Aranson* v. *Schroeder*, 140 N.H. 359, 372–73, 671 A.2d 1023 (1995) (Thayer, J., dissenting). That precept has been applied to defendants who plead general denials known to be untrue.[13]

[13] See, e.g., *Ritter* v. *Ritter*, supra, 381 Ill. 555 ("[a] defendant may present any defense to such an action that he may have or that he may deem expedient, and in so doing he will not be subjecting himself to a second suit by the plaintiff . . . even though the wrongful conduct of the defendant is willful, intentional, malicious or fraudulent"); *Baxter* v. *Brown*, 83 Kan. 302, 304, 111 P. 430 (1910) ("The question is this: A defendant is haled into court and required to defend against claims set forth against him in a civil action. Without asking any affirmative relief whatever, he simply files a general denial and verifies it. Although there may be many things alleged in the petition as true that he knows are true, and although he may know

The Supreme Court of Hawaii similarly has rejected malicious defense claims raised in the insurance defense context. In *Young* v. *Allstate Ins. Co.*, 119 Haw. 403, 410, 198 P.3d 666 (2008), the plaintiff brought an action against the defendants, an insurance company and its attorney, for malicious defense. The gravamen of her claim was that the defendants "took an active part in the initiation, continuation, or procurement of the defense in [her] case against [the insurer's] insured. She alleged that the defendants (1) maliciously defended the case and used the courts imprudently by acting without reasonable or probable cause and by acting with knowledge or notice that their positions lacked merit and (2) acted primarily for a purpose other than that of securing a proper adjudication of the claims and defenses, such as to harass, annoy, or injure or to cause an unnecessary delay or a needless increase in litigation costs."[14] Id., 411.

At the outset of its analysis, the Supreme Court of Hawaii noted that, "[a]lthough the torts of abuse of process and malicious prosecution are well established, the malicious defense tort is unfamiliar, if known at all." (Internal quotation marks omitted.) Id., 416. The court further stated: "This jurisdiction has not previously recognized a malicious defense claim, and we decline to do so now. We do not believe that recognizing the tort of malicious defense is necessary where (1)

that it will involve the plaintiff in considerable expense to prove and establish the truth thereof, is he responsible for making such defense? . . . In this state, and quite generally in other states, it has been held that damages for malicious prosecution of a civil action as well as for a malicious criminal charge may be recovered; expenses incurred and damage to business, and even exemplary damages have been allowed in such cases. We have failed, however, to find any authority for assessing damages for a malicious defense of an action.").

[14] In alleging that the defendants "took an active part in the initiation, continuation, or procurement" of the defense at issue, the plaintiff's complaint mirrored the relevant language of § 674 of the Restatement (Second) of Torts.

the threat of subsequent litigation will have a chilling effect on a party's legitimate defenses, and (2) existing rules and tort law compensate plaintiffs for the harm that they suffer when defendants' litigation tactics are brought in bad faith." Id. The court emphasized that, "by initiating the lawsuit, the plaintiff must be held to accept, to some degree, the costs and risks of litigation." (Internal quotation marks omitted.) Id., 420. The court also noted the existence of remedies already available to a plaintiff, including the imposition of sanctions on a malicious defendant and disciplinary proceedings pursuant to the Rules of Professional Conduct. See id., 423–24; see also W. Barker et al., "Litigating About Litigation: Can Insurers Be Liable for Too Vigorously Defending Their Insureds?," 42 Tort Trial & Ins. Prac. L.J. 827, 855 (2007) ("The refusal to recognize a tort of malicious defense does not deny that appeals or other defensive activities are wrongful when conducted maliciously and in bad faith, solely for the purpose of delay. . . . However, the proper remedy for this is the application of sanctions by the court in which frivolous, dilatory litigation occurs." (Footnotes omitted; internal quotation marks omitted.)). The court thus concluded that "it is appropriate to join the majority of courts that have addressed this issue and decided not to recognize the tort of malicious defense"; *Young* v. *Allstate Ins. Co.*, supra, 119 Haw. 419; and opined that, if such a change in the law was warranted, it was "more appropriate for the legislature" to do so.[15] Id., 427 n.23.

[15] Like the present case, *Young* involved a defendant insurer that was not the most sympathetic party. Compare *Young* v. *Allstate Ins. Co.*, supra, 119 Haw. 407 ("By dissuading claimants from seeking legal counsel, [the defendant] was able to prey upon injured and unrepresented claimants' trust and lack of knowledge and to deny or settle claims for a fraction of their value. . . . If a settlement offer were not accepted or the claimant hired an attorney, [the defendant] would fully litigate virtually every claim, irrespective of its insured's liability or the real physical harm and value of the injuries suffered by the claimant. [The defendant] thereby sought to subject claimants to unnecessary and oppressive litigation and expenses . . . ." (Footnote omitted.)), with *Dorfman* v. *Smith*, supra, 342 Conn. 588, 613

Courts that have declined to recognize the tort of malicious defense[16] also have emphasized the potential for endless litigation. As the Supreme Court of Ohio observed, "[i]f every suit may be retried on an allegation of malice, the evil would be intolerable, and the malice in each subsequent suit would be likely to be greater than in the first; and that, if a defendant ought to have damages upon a false claim, then the plaintiff ought to have damages on a false plea, which would make litigation interminable." *Pope* v. *Pollock*, supra, 46 Ohio St. 369; see also *California Physicians' Service* v. *Superior Court*, supra, 9 Cal. App. 4th 1325 n.2 (noting danger of endless litigation); *Ritter* v. *Ritter*, supra, 381 Ill. 555 ("[i]f the wrongful conduct of a defendant . . . would give rise to an independent tort and a separate cause of action, there would be no end to the litigation, for immediately upon the entry of judgment the plaintiff would start another action against the defendant for his attorney fees and expenses incurred in obtaining the preceding judgment"); *Rappaport* v. *Rappaport*, 44 Misc. 2d 523, 525, 254 N.Y.S.2d 174 (1964) ("[t]he danger of encouraging interminable litigation by [extending the

(noting that defendant's corporate designee testified under oath that defendant " 'did not single out [the plaintiff] for special or unique treatment when it conditioned [her] receipt of [underinsured motorist] benefits [on] the provision of an affidavit of no excess insurance but was instead pursuing conduct that [the defendant] routinely takes in its handling of claims from other policyholders as well' " and that defendant " 'did not single out [the plaintiff] for special or unique treatment when it responded falsely to [her] discovery requests' "). In upholding the judgment rendered in favor of the defendant on the plaintiff's claims of malicious defense, abuse of process, and breach of an assumed duty of good faith and fair dealing, the Supreme Court of Hawaii nonetheless recognized that the legal issues presented in that case were larger than any one party. Cf. *In re Purdue Pharma L.P.*, Docket No. 22-CV-4134 (CS), 2023 WL 5950707, *5 (S.D.N.Y. September 13, 2023) ("[the court's] role is to apply the law, and that sometimes means that a sympathetic party is not entitled to relief").

[16] The term "malicious defense" is something of a misnomer, since it applies to the conduct of both defendants *and* plaintiffs in responding to claims, counterclaims, cross claims, special defenses and the like.

tort of malicious prosecution to defenses asserted by a defendant in prior action] is also clear"), aff'd, 24 App. Div. 2d 844, 263 N.Y.S.2d 442, appeal denied, 16 N.Y.2d 487, 213 N.E.2d 697, 266 N.Y.S.2d 1025 (1965).

In addition, multiple courts have declined to impose liability on a defendant arising from its defense in a prior civil proceeding in the insurance context specifically. See, e.g., *Rowlands* v. *Phico Ins. Co.*, supra, United States District Court, Docket Nos. Civ.A.00-477-(GMS) and Civ.A.00-485-(GMS) ("the courts which have squarely addressed this issue in the insurance context have all rejected the malicious defense claim or its equivalent"); *Hostetter* v. *Hartford Ins. Co.*, Docket No. 85C-0628, 1992 WL 179423, *8 (Del. Super. July 13, 1992) (declining "to recognize the existence of [the] tort [of malicious defense] in the context of insurance claims"), overruled in part on other grounds by *Connelly* v. *State Farm Mutual Automobile Ins. Co.*, 135 A.3d 1271 (Del. 2016); *Young* v. *Allstate Ins. Co.*, supra, 119 Haw. 426 ("we decline to adopt the tort of malicious defense"); *Kranzush* v. *Badger State Mutual Casualty Co.*, 103 Wis. 2d 56, 73, 307 N.W.2d 256 (1981) (declining to "declare the existence of a [malicious defense] cause of action in favor of the claimant against the insurer"); W. Barker et al., supra, 42 Tort Trial & Ins. Prac. L.J. 854 ("[t]he cases almost uniformly reject [the] plaintiffs' attempts to impose liability based on allegedly frivolous defenses, supposedly asserted only to delay an inevitable recovery").

As best I can tell, only one jurisdiction has adopted the position urged by the plaintiff in the present case.[17]

[17] See, e.g., *Young* v. *Allstate Ins. Co.*, supra, 119 Haw. 418 ("only one jurisdiction has recognized the tort of malicious defense"); *Iantosca* v. *Merrill Lynch Pierce Fenner & Smith, Inc.*, Docket No. 08-0775-BLS2, 2009 WL 981389, *4 (Mass. Super. November 25, 2008) ("Massachusetts courts have never recognized a tort of malicious defense. Nor has any other jurisdiction done so, with the sole exception of New Hampshire.").

In *Aranson* v. *Schroeder*, supra, 140 N.H. 363, the plaintiffs asked the Supreme Court of New Hampshire to recognize a new cause of action for malicious defense, contending that it "is essentially the mirror image of § 674 of the Restatement [Second] of Torts . . . ." (Internal quotation marks omitted.) A divided panel of that court[18] acknowledged that "no jurisdiction has to date adopted malicious defense as a cause of action"; id., 365; but, citing to a law review article, reasoned that, "[i]n appropriate circumstances, there may be ample reason to extend the reach of the sanctions to counsel who engages in the fostering of an unfounded defense or pursues a defense for an improper purpose. . . . The difference between the adoption of the tort of malicious defense and the existing power of courts to levy sanctions is the nature and extent of the damages recoverable by the aggrieved party. Is a plaintiff less aggrieved when the groundless claim put forth in the courts is done defensively rather than affirmatively in asserting a worthless lawsuit for improper purposes? We think not." (Citation omitted.) Id., 364–65. The court thus recognized malicious defense as a cause of action under New Hampshire law. Id., 366.

At the same time, the court emphasized that, "[m]alicious defense, like its counterpart malicious prosecution, is a limited cause of action that will lie only in discrete circumstances, and malicious defense claims will accordingly be scrutinized closely and construed narrowly." Id., 366–67. It then made the following observation, which is highly relevant to the issue now before

[18] Justice Thayer dissented from the majority opinion, stating that "the majority's recognition of a tort of malicious defense is unwise as a matter of policy." *Aranson* v. *Schroeder*, supra, 140 N.H. 371. Justice Thayer reasoned that "plaintiffs who face a malicious and unfounded defense already have at their disposal adequate remedies for the injuries they may suffer"; id.; that "[t]he potential for increased litigation is obvious"; id., 373; and "[t]hat malicious defense is not a desirable addition to the tort law of New Hampshire is evidenced by the fact that no other jurisdiction in the country has explicitly recognized this cause of action." Id., 374.

us: "We would not, for example, look favorably upon a plaintiff's threatening a malicious defense action when faced *with a defendant's general denial of liability*, for a party should not be precluded from legitimately raising a defense for fear of such an action." (Emphasis added.) Id., 367. Accordingly, the one jurisdiction that has recognized a cause of action for malicious defense predicated on § 674 of the Restatement (Second) of Torts has expressly disavowed the imposition of liability for a defendant's general denials to a plaintiff's complaint in a prior action.

b

To resolve the dispute presently before us, it is unnecessary to decide whether to recognize the tort of malicious defense or to adopt § 674 of the Restatement (Second) of Torts. It is enough to conclude that a defendant's general denials to a complaint in a prior action cannot form the basis of a vexatious litigation action under either our common law or that section of the Restatement.[19] For three primary reasons, I would so conclude.

i

First, plaintiffs in Connecticut already have adequate remedies to deal with defendants who answer a complaint with denials that are false or made in bad faith.

[19] *DeLaurentis* v. *New Haven*, 220 Conn. 225, 248, 597 A.2d 807 (1991), and *Diamond 67, LLC* v. *Oatis*, 167 Conn. App. 659, 144 A.3d 1055, cert. denied, 323 Conn. 926, 150 A.3d 230 (2016), and 323 Conn. 927, 150 A.3d 228 (2016), and cert. denied, 323 Conn. 927, 150 A.3d 228 (2016), and cert. denied, 323 Conn. 927, 150 A.3d 229 (2016), and cert. denied, 323 Conn. 927, 150 A.3d 230 (2016), are irrelevant to that question. *DeLaurentis* stands for the unremarkable proposition that a plaintiff who was forced to defend himself in a prior administrative proceeding may thereafter maintain an action for vexatious litigation. See *DeLaurentis* v. *New Haven*, supra, 248–49. *Diamond 67, LLC*, concerned the conduct of third parties who intervened in various administrative and mandamus proceedings between the plaintiff company and a municipal land use agency; see *Diamond 67, LLC* v. *Oatis*, supra, 662; and held merely that a genuine issue of material fact existed as to their "role in the initiation, continuation, and/or procurement of the

Pursuant to our rules of practice, plaintiffs who encounter such denials can file requests asking defendants to revise their answers. See Practice Book § 10-35 (authorizing any party to file request to revise to obtain "the deletion of any unnecessary, repetitious, scandalous, impertinent, immaterial or otherwise improper allegations in an adverse party's pleading"); *Melfi* v. *Danbury*, 70 Conn. App. 679, 684–86, 800 A.2d 582 (request to revise properly used to delete improper statements from adverse pleading), cert. denied, 261 Conn. 922, 806 A.2d 1061 (2002).

Plaintiffs confronted with what they believe to be improper denials also may file requests for admissions soon after an answer is filed. As this court has observed, "Requests for admissions are governed by Practice Book §§ 13-22 through 13-25. . . . A party's response to a request for admissions is binding as a judicial admission unless the judicial authority permits withdrawal or amendment. . . . Similarly, a failure to respond timely to a request for admissions means that the matters sought to be answered were conclusively admitted." (Citations omitted; internal quotation marks omitted.) *East Haven Builders Supply, Inc.* v. *Fanton*, 80 Conn. App. 734, 744, 837 A.2d 866 (2004). If the plaintiff in the present case believed that the defendant's answers to her complaint in the prior action were false or that the defendant had refused to admit certain allegations "with a malicious intent to unjustly vex and trouble her and to force her to incur increased litigation costs"—as she now alleges in this vexatious litigation action—she could have sought judicial admissions with respect to any such allegations early in the pleading stage of that prior action, potentially obviating much of the litigation that followed. See, e.g., *Allied Grocers*

actions in which they sought to intervene." Id., 683. Neither *DeLaurentis* nor *Diamond 67, LLC*, concerned a defendant's liability for denials pleaded in response to a plaintiff's complaint in a prior action.

Cooperative, *Inc.* v. *Caplan*, 30 Conn. App. 274, 279–80, 620 A.2d 165 (1993) ("[b]ecause [the defendant] did not respond to the request for admissions [regarding the defendant's liability], those facts were conclusively established for purposes of this action"); *Wilkinson* v. *Shoney's*, *Inc.*, supra, 269 Kan. 205 (emphasizing, in declining to recognize malicious defense cause of action predicated on § 674 of Restatement (Second) of Torts, that "parties against whom claims are made are . . . obligated to make admissions if requested"). Indeed, the plaintiff did precisely that when she filed a request for admissions in 2018; in response, the defendant admitted, inter alia, that the motor vehicle collision at issue was directly and proximately caused by the negligence of the operator of the motor vehicle that collided with the plaintiff's vehicle and that the plaintiff suffered bodily injury as result thereof.

Furthermore, under our rules of practice, a party may move for summary judgment "as a matter of right *at any time* if no scheduling order exists and the case has not been assigned for trial." (Emphasis added.) Practice Book § 17-44; see also *Joe's Pizza*, *Inc.* v. *Aetna Life & Casualty Co.*, 236 Conn. 863, 867 n.8, 675 A.2d 441 (1996) ("a party may move for summary judgment at any time"). If the plaintiff in the prior action believed that the defendant's answers to certain allegations in her complaint regarding its liability were false or untenable, for example, she could have promptly moved for summary judgment on the issue of liability. See, e.g., *Gionfriddo* v. *Avis Rent A Car System*, *Inc.*, 192 Conn. 280, 282, 472 A.2d 306 (1984) ("[t]he plaintiff successfully moved for summary judgment as to liability against all three defendants on the first count of the complaint"); *Teachers Ins.* v. *Broad & Hanrahan*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-93-0132304-S (June 28, 1995) (granting motion for summary judgment as to liability filed less than two

months after plaintiff filed amended complaint). The plaintiff here declined to do so.

Plaintiffs in Connecticut who encounter denials in an answer that are false or made in bad faith also are not without statutory recourse. Our legislature enacted General Statutes § 52-99 to address that issue specifically.[20] As our Supreme Court explained, § 52-99 "allows parties to seek monetary sanctions from the trial court for allegations and denials within parties' pleadings made without reasonable cause and found to be untrue."[21] *Dorfman* v. *Smith*, supra, 342 Conn. 611–12. In addition, it is well established that "the trial court has the inherent authority to sanction parties for litigation misconduct." Id., 612; see also *CFM of Connecticut, Inc.* v. *Chowdhury*, 239 Conn. 375, 393, 685 A.2d 1108 (1996) (trial court "has the inherent authority to impose sanctions against an attorney and his client for a course of claimed dilatory, bad faith and harassing litigation conduct" (internal quotation marks omitted)), overruled in part on other grounds by *State* v. *Salmon*, 250 Conn. 147, 735 A.2d 333 (1999). The trial court likewise possesses inherent authority "to assess attorney's fees when the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons. . . . This bad faith exception applies, not only to the filing of an action, but also in the conduct of the litigation. . . . It applies both to the party and his counsel." (Internal quotation marks omitted.) *Lederle* v. *Spivey*, 332 Conn. 837, 844, 213 A.3d 481 (2019). Nothing prevented the plaintiff in

[20] General Statutes § 52-99 provides in relevant part: "Any allegation or denial made without reasonable cause and found untrue shall subject the party pleading the same to the payment of such reasonable expenses, to be taxed by the court, as may have been necessarily incurred by the other party by reason of such untrue pleading . . . ." Our rules of practice contain a reciprocal provision. See Practice Book § 10-5.

[21] As our Supreme Court observed in *Dorfman* v. *Smith*, supra, 342 Conn. 609, "§ 52-99 demonstrates that other remedies exist for addressing . . . the alleged conduct" of the defendant in the prior action.

the prior action from seeking costs, attorney's fees, or the imposition of sanctions in the face of allegedly false or bad faith denials by the defendant.

ii

Second, I am mindful that a defendant's answer to a plaintiff's complaint is a preliminary pleading that must be filed within thirty days of the return date.[22] See Practice Book § 10-8. Significantly, the purpose of pleadings in this state is *not* to determine the truth of the allegations contained therein. Rather, "[p]leadings are intended to limit the issues to be decided at the trial of a case and [are] calculated to prevent surprise." (Internal quotation marks omitted.) *Birchard* v. *New Britain*, 103 Conn. App. 79, 83, 927 A.2d 985, cert. denied, 284 Conn. 920, 933 A.2d 721 (2007); see also *Biller* v. *Harris*, 147 Conn. 351, 357, 161 A.2d 187 (1960) ("[t]he purpose of pleadings is to apprise the court and opposing counsel of the issues to be tried"); *Thames River Recycling, Inc.* v. *Gallo*, 50 Conn. App. 767, 782, 720 A.2d 242 (1998) ("essential purpose" of pleadings is to limit issues to be tried); 71 C.J.S. 34, Pleading § 2 (2022) ("[t]he purpose of pleadings is to frame, present, define, and narrow the issues and to form the foundation of, and to limit, the proof to be submitted on the trial").

"In a civil action the general burden of proof rests on the plaintiff . . . ." *Hally* v. *Hospital of St. Raphael*, 162 Conn. 352, 358, 294 A.2d 305 (1972); see also *Ivimey*

[22] When a defendant files an answer in accordance with our rules of practice, it often does so days or weeks after receiving a complaint, and before it has had the opportunity to conduct discovery or depose relevant parties such as the plaintiff. For that reason, it is not unusual for a defendant to file an amended answer pursuant to Practice Book § 10-60 or § 10-61. See, e.g., *Ed Lally & Associates, Inc.* v. *DSBNC, LLC*, 145 Conn. App. 718, 740–41, 78 A.3d 148 (defendants filed third amended answer more than one year after complaint was filed and seven weeks before "trial was due to begin"), cert. denied, 310 Conn. 958, 82 A.3d 626 (2013).

v. *Watertown*, 30 Conn. App. 742, 753, 622 A.2d 603 ("[i]t is elementary that in a civil action, the plaintiff bears the burden of proof on all essential elements of a claim"), cert. denied, 226 Conn. 902, 625 A.2d 1375 (1993). When a defendant answers a complaint, it alerts the plaintiff and the court to the issues in dispute, thereby leaving the plaintiff to its burden of proof. See *Hally* v. *Hospital of St. Raphael*, supra, 358 ("when an answer denies several paragraphs of the complaint the burden of proving each separate, material issue of fact that was raised is thrown on the plaintiff"); *Eastern Consolidators, Inc.* v. *W. L. McAviney Properties, Inc.*, 159 Conn. 510, 510–11, 271 A.2d 59 (1970) (defendant's general denial in answer "put these allegations in issue, with the burden on the plaintiff to prove them"); see also *Argentinis* v. *Gould*, 23 Conn. App. 9, 16, 579 A.2d 1078 (1990) ("[a] general denial does not place any burden on the denier"), rev'd in part on other grounds, 219 Conn. 151, 592 A.2d 378 (1991). In Connecticut, general denials are commonplace. See, e.g., *Parente* v. *Pirozzoli*, 87 Conn. App. 235, 239, 866 A.2d 629 (2005) ("[t]he defendant's answer set forth only general denials of the plaintiff's allegations"); *Musorofiti* v. *Vlcek*, 65 Conn. App. 365, 368, 783 A.2d 36 ("[t]he defendants' answer contains a general denial"), cert. denied, 258 Conn. 938, 786 A.2d 426 (2001); *Monterose* v. *Cross*, 60 Conn. App. 655, 661, 760 A.2d 1013 (2000) ("[i]n this case, there was a general denial and a special defense of contributory negligence"); *Nesbitt* v. *Mulligan*, 11 Conn. App. 348, 352, 527 A.2d 1195 ("[t]he defendants' answer consisted merely of a general denial of the plaintiff's allegations of negligence"), cert. denied, 205 Conn. 805, 531 A.2d 936 (1987). Given the purpose and common practice of pleadings in this state, I believe that expanding our common-law vexatious litigation action to encompass a defendant's general denials to a complaint is ill-advised and will wreak havoc on our civil courts.

iii

Third, additional dangers abound. The expansion of the common-law action for vexatious litigation undoubtedly will result in more, and potentially interminable, litigation. See *California Physicians' Service* v. *Superior Court*, supra, 9 Cal. App. 4th 1325 n.2; *Ritter* v. *Ritter*, supra, 381 Ill. 555; *Rappaport* v. *Rappaport*, supra, 44 Misc. 2d 525. The risk of wasting "precious judicial resources"; *Green* v. *Commissioner of Correction*, 184 Conn. App. 76, 82, 194 A.3d 857, cert. denied, 330 Conn. 933, 195 A.3d 383 (2018); will only increase.

In addition, I am particularly concerned about engendering conflict between attorneys and their clients. The preamble to our Rules of Professional Conduct states that, "[a]s advocate, a lawyer zealously asserts the client's position under the rules of the adversary system." Rules of Professional Conduct, preamble, p. 1. At the same time, "[a] lawyer shall not bring or defend a proceeding or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous"; Rules of Professional Conduct 3.1; and shall not "assist a client . . . in conduct that the lawyer knows is . . . fraudulent . . . ." Rules of Professional Conduct 1.2 (d). Lawyers in this state likewise are prohibited from knowingly making "a false statement of fact or law to a tribunal or fail[ing] to correct a false statement of material fact or law previously made"; Rules of Professional Conduct 3.3 (a) (1); and are obligated to "make reasonable efforts to expedite litigation consistent with the interests of the client." Rules of Professional Conduct 3.2. Those precepts are not empty bromides but, rather, expose attorneys to professional discipline. See Rules of Professional Conduct, preamble, p. 3 ("[f]ailure to comply with an obligation or prohibition imposed by a [r]ule is a basis for invoking the [attorney] disciplinary process").

If pleading a denial in response to a civil complaint constitutes a proper basis for a vexatious litigation action, I fear increased conflict between clients and their attorneys in light of those professional obligations. As the Supreme Court of Hawaii recognized, "[t]he creation of the tort of malicious defense and recognizing potential liability for defendants . . . may have a chilling effect on some legitimate defense and perhaps drive a wedge between defendants seeking zealous advocacy and defense attorneys who fear personal liability in a second action. . . . The risk of compromising a defendant's right to vigorous and zealous advocacy by virtue of the threat of a subsequent lawsuit [is] too great to justify the recognition of the tort of malicious defense." (Citation omitted; internal quotation marks omitted.) *Young* v. *Allstate Ins. Co.*, supra, 119 Haw. 419–20; see also *Aranson* v. *Schroeder*, supra, 140 N.H. 373 (Thayer, J., dissenting) ("[The] potential for conflict between the interests of defendants and their attorneys can only be expected to undermine the goals of [the Rules of Professional Conduct]. Attorneys may give priority to their own interests when formulating defense strategies, and they may be tempted to disclose the client's role in pursuing specific defense tactics in order to shield themselves from personal attack."). Furthermore, the prospect of a subsequent vexatious litigation action could be wielded strategically against defendants by shrewd attorneys whose clients, as plaintiffs, shoulder the burden of proof in all civil actions in this state.[23] See *Hally* v. *Hospital of St. Raphael*, supra, 162 Conn. 358.

I recognize that there is no Connecticut authority precluding this court from expanding our common-law

[23] See 4 Restatement (Second), Torts § 767, comment (c), pp. 30–31 (1979): "Litigation and the threat of litigation are powerful weapons. When wrongfully instituted, litigation entails harmful consequences to the public interest in judicial administration as well as to the actor's adversaries."

vexatious litigation action to encompass a defendant's denials to a complaint. Given the grave implications for practitioners and parties alike, I nevertheless am troubled by the prospect of this court doing so, particularly when this novel issue has not been thoroughly vetted by members of our profession in the form of amicus briefs or proceedings before the Rules Committee of the Superior Court or the General Assembly.

c

The majority today articulates a holding regarding pleading practice that will reverberate through every civil courthouse in this state.[24] Our Supreme Court has long "eschewed the notion that pleadings should be read in a hypertechnical manner." (Internal quotation marks omitted.) *Carpenter* v. *Daar*, 346 Conn. 80, 128, 287 A.3d 1027 (2023). There is an ocean of difference between an inartfully or even negligently pleaded answer on the one hand and the kind of malicious conduct that vexatious suits are intended to punish on the other. In light of today's decision, the mere denial of an allegation in a civil pleading—whether in response to a claim, counterclaim, cross claim, or special defense—may subject attorneys and their clients to the daunting prospect of defending a vexatious litigation action, and exposure to double and treble damages. For all of the foregoing reasons, I believe that such expansion of our common-law cause of action for vexatious litigation is unwarranted.

B

Even if I were to conclude otherwise, the plaintiff still cannot prevail. Apart from my concern about the proper scope of a vexatious litigation action, I believe

[24] I am aware of not a single case from any jurisdiction, and neither the plaintiff nor the majority has identified any, in which a court has held that an action for vexatious litigation properly may be predicated on a party's denial of a paragraph of a complaint.

that the defendant had a good faith basis to plead general denials to the allegations of the complaint in the prior action.

"[I]n the context of a vexatious suit action, the defendant lacks probable cause if he lacks a reasonable, good faith belief in the facts alleged and the validity of the claim asserted." *DeLaurentis* v. *New Haven*, 220 Conn. 225, 256, 597 A.2d 807 (1991). "[P]robable cause may be present even where a suit lacks merit. . . . The lower threshold of probable cause allows attorneys and litigants to present issues that are arguably correct, even if it is extremely unlikely that they will win . . . ." (Citation omitted; internal quotation marks omitted.) *Falls Church Group, Ltd.* v. *Tyler, Cooper & Alcorn, LLP*, supra, 281 Conn. 103–104. "In either [a common-law or statutory vexatious litigation] action . . . [t]he existence of probable cause is an absolute protection . . . ." (Citation omitted; internal quotation marks omitted.) Id., 94.

As recited in her August 21, 2019 complaint in the present case, the plaintiff predicates her vexatious litigation claims on certain allegations from her complaint in the prior action.[25] Causation was an integral part of

[25] In paragraph 8 of the first count of her August 21, 2019 complaint in the present action, the plaintiff alleges in relevant part: "In [the prior action, the plaintiff] set forth the following factual allegations:

"a. As Joscelyn M. Smith approached the aforementioned intersection, he failed to stop or slow his vehicle, and collided with [the plaintiff's] vehicle as she proceeded through the intersection, *causing the harms and losses set forth below*;

"b. Said collision and the resulting injuries, damages and losses sustained by [the plaintiff] were *directly and proximately caused* by [Smith's] negligence and/or carelessness . . . .

"c. *As a direct and proximate result* of said collision, caused by [Smith's] negligence and/or carelessness, [the plaintiff] suffered physical injuries, some, or all of which are likely to be permanent in nature . . . .

"d. *As a further direct and proximate result* of [Smith's] negligence and/or carelessness, [the plaintiff] was forced to expend sums [for medical care and treatment] . . . .

"e. *As a further direct and proximate result* of [Smith's] negligence and/or carelessness, [the plaintiff] was forced to miss time from work and lose wages . . . .

those allegations, which allege both that the plaintiff's injuries were directly and proximately caused by the negligence of the underinsured motor vehicle operator involved in the automobile accident, and that the defendant was liable to the plaintiff for the damages that were caused by the tortfeasor's negligence and were not covered by the tortfeasor's insurance coverage.[26] In its answer to the plaintiff's November 25, 2015 amended complaint, the defendant stated, with respect to the allegations now at issue,[27] that it was "without sufficient information to either admit or deny the allegations, *and*, *therefore*, *denies the allegations* and leaves the plaintiff to her proof." (Emphasis added.)

The defendant filed an amended answer on December 15, 2016, in which it admitted the truth of certain allegations that it had denied in its previous answer.[28] As to the

"f. *As a further direct and proximate result* of the negligence and/or carelessness of [Smith], [the plaintiff] has been permanently impaired in her ability to pursue and enjoy life's activities and pleasure, including suffering emotional distress . . . .

"g. At the time of the . . . accident . . . [Smith] . . . was underinsured . . . .

"h. [The plaintiff] has complied with her duties under the insurance contract between herself and the defendant . . .

"i. The defendant . . . is liable to [the plaintiff] pursuant to the terms of the above-mentioned insurance contract for *damages resulting from the* bodily injury sustained by [the plaintiff] which were not compensated for by the other involved operator's insurance coverage." (Emphasis added.)

[26] As the trial court noted in its memorandum of decision, "the factual predicate for all counts [set forth in the plaintiff's complaint] are the allegations of the inappropriate denial of liability and damages."

[27] In that answer, the defendant admitted the truth of other allegations set forth in count two of the plaintiff's amended complaint, which are not at issue in this vexatious litigation action.

[28] Specifically, the defendant admitted that, "[o]n or about September 27, 2014, at approximately 10 a.m., the plaintiff was operating a motor vehicle in an easterly direction on Elmfield Street, a public thoroughfare located in West Hartford, Connecticut, and was approaching the intersection of Somerset Street and Elmfield Street"; that "the accident was caused by Joscelyn Smith's failure to keep a proper and reasonable lookout for other motor vehicles upon the roadway"; and that the plaintiff "has complied with her duties to date [under the insurance policy between herself and the

other allegations material to this appeal, the defendant again stated that it was "without sufficient information to either admit or deny the allegations, and, therefore, denies the allegations and leaves the plaintiff to her proof." See footnote 1 of this opinion.

On April 12, 2017, the plaintiff filed her second amended complaint. Count two of that complaint alleged breach of contract on the part of the defendant. In paragraphs 6 through 11, the plaintiff alleged that she sustained injuries and damages that were caused by the negligence of Joscelyn M. Smith.[29] In both its June 14, 2017 answer and September 5, 2017 revised answer to the plaintiff's April 12, 2017 second amended complaint, the defendant generally denied those allegations.[30]

defendant] but the policy requires the plaintiff to comply with continuing duties and obligations."

[29] In paragraphs 6 through 11, the plaintiff alleged in relevant part:

"6. As [Smith] approached the intersection, he failed to stop or slow his vehicle, and collided with [the plaintiff's] vehicle as she proceeded through the intersection, *causing the harms and losses* set forth below.

"7. Said collision and the resulting injuries, damages and losses sustained by [the plaintiff] were *directly and proximately caused* by [Smith's] negligence and/or carelessness . . . .

"8. *As a direct and proximate result* of said collision, caused by [Smith's] negligence and/or carelessness, [the plaintiff] suffered physical injuries, some, or all of which are likely to be permanent in nature . . . .

"9. *As a further direct and proximate result* of [Smith's] negligence and/or carelessness, [the plaintiff] was forced to expend sums [for medical care and treatment] . . . .

"10. *As a further direct and proximate result* of [Smith's] negligence and/or carelessness, [the plaintiff] was forced to miss time from work and lose wages . . . .

"11. *As a further direct and proximate result* of the negligence and/or carelessness of [Smith], [the plaintiff] has been permanently impaired in her ability to pursue and enjoy life's activities and pleasure." (Emphasis added.)

[30] Although it acknowledges that the issue of causation was raised in various paragraphs of the plaintiff's complaint, the majority suggests that an action for vexatious litigation properly may be predicated on the defendant's allegedly evasive denials of *portions* of those paragraphs. I respectfully disagree. It is well established that Connecticut courts do not read pleadings in a hypertechnical manner. See *Carpenter* v. *Daar*, supra, 346 Conn. 128. Moreover, plaintiffs that are unsatisfied with a defendant's answer to a

On appeal, the plaintiff submits that it was improper for the defendant to do so in light of the fact that (1) the tortfeasor caused the motor vehicle accident in question and (2) the tortfeasor was underinsured. As she states in her appellate reply brief, "insurance companies *are not entitled to litigate* against their own insureds when there is no basis in fact for their litigation position. . . . [R]equiring the insureds to engage in lengthy litigation just to obtain the benefit of the insurance policies for which they have paid a premium . . . is textbook vexatious litigation and precisely what [the defendant] did here." (Emphasis added.)

I respectfully disagree. In my view, a defendant in a motor vehicle negligence action always may dispute whether the negligent conduct in question caused the injuries and damages complained of by a plaintiff, even when liability is not contested.[31] See, e.g., *General Accident Ins. Co.* v. *Mortara*, 314 Conn. 339, 353, 101 A.3d 942 (2014) (discussing uninsured motorist benefits case

particular paragraph of a complaint have multiple avenues of recourse under our rules of practice. They may file requests to revise pursuant to Practice Book § 10-35 or requests for admission pursuant to Practice Book § 13-22. Alternatively, plaintiffs who have alleged multiple factual allegations in a single paragraph—as the plaintiff did here—may amend the complaint, either as of right pursuant to Practice Book § 10-59 or by leave of the court pursuant to Practice Book § 10-60, to allege each factual allegation distinctly.

In this regard, I am mindful of the many attorneys in this state who toil in the trenches of civil practice on a daily basis, where general denials, requests to revise, requests for admissions, and amended complaints are commonplace. Although the failure to admit a portion of a paragraph of a complaint may give rise to monetary sanctions pursuant to § 52-99, sanctions ordered by the court pursuant to its inherent authority; see *CFM of Connecticut, Inc.* v. *Chowdhury*, supra, 239 Conn. 393; and even an award of attorney's fees; see *Lederle* v. *Spivey*, supra, 332 Conn. 844; I do not believe that it should give rise to a civil action for vexatious litigation.

[31] The issue of causation frequently implicates (1) the credibility of witnesses, such as plaintiffs, medical providers and experts, (2) the related issue of whether a plaintiff has any preexisting injuries, and (3) the extent of any pain and suffering sustained by a plaintiff, a notoriously difficult type of damage to measure.

in which "the disputed issue did not pertain to insurance coverage, but to damages that would have been recoverable from the tortfeasor"); *Bodner* v. *United Services Automobile Assn.*, 222 Conn. 480, 488, 610 A.2d 1212 (1992) (defendant uninsured motorist insurance carrier disputed only "the amount of damages" plaintiff sustained); *Trujillo* v. *Chekas*, 139 Conn. App. 675, 678, 59 A.3d 245 (2012) (plaintiff in action to recover uninsured motorist benefits "failed to carry his burden of establishing the threshold question of causation, which was contested at trial"); *Caprood* v. *Atlanta Casualty Co.*, 80 Conn. App. 338, 339, 835 A.2d 74 (2003) ("[t]he defendant [uninsured motorist insurance carrier] denied that the plaintiff had been injured *as a result of* the negligent conduct of the hit-and-run driver" (emphasis altered)); *Garcia* v. *ITT Hartford Ins. Co.*, 72 Conn. App. 588, 590, 805 A.2d 779 (2002) (answer filed by defendant uninsured motorist insurance carrier "denied most of the allegations in the complaint"); *Daigle* v. *Metropolitan Property & Casualty Ins. Co.*, 60 Conn. App. 465, 467–68, 760 A.2d 117 (2000) ("[t]he defendant [uninsured motorist insurance carrier] admitted that the tortfeasors were negligent, but contested the causal relationship between the accidents and the injuries claimed, as well as their extent"), aff'd, 257 Conn. 359, 777 A.2d 681 (2001). Simply put, liability for a motor vehicle accident is different from liability for injuries allegedly sustained therein.

Moreover, the record before us reflects that, subsequent to the filing of the defendant's answers, the plaintiff filed a request for admissions. See part II A (2) (b) (i) of this opinion. In response, the defendant admitted, inter alia, that the motor vehicle collision at issue was caused by the negligence of the operator of the motor vehicle that collided with the plaintiff's vehicle and that the plaintiff suffered bodily injury as result thereof. As a result of those admissions, the issues that remained

for trial were narrowed, and the primary dispute concerned the extent of the damages sustained by the plaintiff that were caused by the negligent conduct of the tortfeasor.

In that regard, the record indicates that the underinsured motorist insurance policy at issue in this case provided $250,000 in coverage. The record also indicates that, sometime prior to January 5, 2016, the plaintiff released her claim against the tortfeasor, Smith, in exchange for his $50,000 policy limit. After taking into account the $50,000 that she received from the tortfeasor, the plaintiff sought to recover the sum of $200,000 from the defendant in the prior action, filed an offer of compromise to that effect,[32] and rejected offers of compromise by the defendant for less than that amount.[33] When the defendant declined to settle for $200,000, a trial followed. The jury thereafter returned a verdict in favor of the plaintiff, and the court rendered judgment in her favor in the amount of $119,928. The fact that the plaintiff recovered $80,072 *less* than the $200,000 she had sought to recover from the defendant is, in my view, prima facie evidence that the defendant had probable cause to deny the material allegations of the plaintiff's complaint.

That undisputed fact also raises the question of whether, for purposes of a vexatious litigation analysis, the prior proceeding truly "terminated in the plaintiff's favor." *Rioux* v. *Barry*, supra, 283 Conn. 347; see also *MacDermid, Inc.* v. *Leonetti*, 158 Conn. App. 176, 184, 118 A.3d 158 (2015) ("[the] favorable termination

[32] On May 15, 2017, the plaintiff filed an offer of compromise, in which she offered to "resolve this case" for $200,000.

[33] On April 24, 2017, the defendant filed an offer of compromise, in which it offered to settle the plaintiff's claims for $25,000. It thereafter filed a second offer of compromise on April 2, 2018, in which it increased its settlement offer to $35,000.

requirement is an essential element of a vexatious litigation claim"). Because the defendant was successful in litigating the prior action—insofar as the plaintiff recovered $80,072 less than the amount that she sought to recover from the defendant—the prior action arguably terminated in the defendant's favor for purposes of determining whether its conduct in answering the complaint was vexatious.

As our Supreme Court has noted, "[f]avorable termination of [a plaintiff's] suit often establishes lack of merit . . . ." (Internal quotation marks omitted.) *Falls Church Group, Ltd.* v. *Tyler, Cooper & Alcorn, LLP*, supra, 281 Conn. 103. I suggest the corollary is also true when a defendant elects to contest the issue of whether the negligent conduct in question caused the injuries and damages complained of by a plaintiff. If a defendant decides to have the jury resolve that issue because it does not agree that the plaintiff is entitled to the full amount of damages sought, and the jury then vindicates that decision by awarding the plaintiff something much less than that amount, I submit that such a ruling is both favorable to the defendant and a per se indication that it possessed probable cause to litigate the issue.

In light of the foregoing, I would conclude that the trial court properly determined that the defendant had probable cause to answer the plaintiff's complaint as it did. Because the existence of probable cause in the vexatious litigation context is a question of law; see id., 94; I would further conclude that the court properly rendered summary judgment in favor of the defendant with respect to the pleading of general denials in its answer. I, therefore, respectfully dissent in part.

BENCHMARK MUNICIPAL TAX SERVICES, LTD. *v.* 899 ETG ASSOCIATES, LLC, ET AL.

(AC 46547)

Cradle, Suarez and Clark, Js.

Syllabus

The plaintiff sought to foreclose a mortgage on certain real property owned by the named defendant, E Co. E Co. executed a promissory note in the plaintiff's favor, which was secured by a mortgage on the property. E Co. subsequently entered into a modification agreement with the plaintiff that increased the amount of the principal in exchange for a six month extension of the maturity date. E Co. thereafter defaulted on the mortgage and the defendants requested a second extension, which the plaintiff refused. The plaintiff also alleged that the defendant guarantors had breached their guarantees. The defendants asserted the special defense of unclean hands, claiming that the parties had negotiated for an additional extension of time regarding the maturity date, which the plaintiff refused to honor. In opposition to the plaintiff's motion for summary judgment as to liability, the defendants submitted an affidavit from the defendant S, who signed the modification agreement on E Co.'s behalf. S averred that E Co. entered into the modification agreement in reliance on the plaintiff's false promise to grant an additional extension of the maturity date. The trial court granted the plaintiff's motion for summary judgment, and rendered a judgment of strict foreclosure, from which the defendants appealed to this court. *Held*:

1. The appeal was dismissed as to the guarantor defendants for lack of standing; it was undisputed that none of the guarantor defendants was a party to the note, mortgage or modification agreement, and neither the plaintiff nor the defendants alleged that the guarantor defendants had any interest in the property or a right of redemption.
2. The trial court properly granted the plaintiff's motion for summary judgment as to liability: because the text of the modification agreement expressly addressed the question of further extensions, specifically providing that the maturity date "shall not be further extended" past the initial six month extension, the trial court properly concluded that the modification agreement was integrated on this point; moreover, S's affidavit was insufficient to raise a genuine issue of material fact as to the defendants' unclean hands defense, as E Co. could not manufacture a material factual dispute as to the parties' intent by pointing to parol

evidence of negotiations that contradicted the express written terms of the modification agreement, even by way of a sworn affidavit.

Argued May 23—officially released August 20, 2024

Procedural History

Action, inter alia, to foreclose a mortgage on certain real property owned by the named defendant, and for other relief, brought to the Superior Court in the judicial district of New Haven, where the court, *Spader*, *J.*, granted the plaintiff's motion for summary judgment as to liability; thereafter, the court, *Spader*, *J.*, rendered judgment of strict foreclosure, from which the defendants appealed to this court. *Appeal dismissed in part*; *affirmed*; *further proceedings*.

Kyle R. Barrett, for the appellants (defendants).

Juda J. Epstein, with whom, on the brief, was *Matthew M. Hausman*, for the appellee (plaintiff).

Opinion

CLARK, J. In this foreclosure action, the defendants—the owner of certain mortgaged real property and four alleged guarantors—jointly appeal the judgment of strict foreclosure rendered in favor of the plaintiff, Benchmark Municipal Tax Services, Ltd.[1] On appeal, the defendants argue that the trial court, in granting the plaintiff's motion for summary judgment as to liability, improperly determined that there was no genuine issue of material fact as to the defendants'

[1] In its operative revised complaint, the plaintiff named 899 ETG Associates, LLC, David Silberstein, Tsiri Silberstein, Silver Mount, LLC, and Silver Mount Two, LLC, as defendants. 899 ETG Associates, LLC, is alleged to be the owner of the subject property and a party to a promissory note and mortgage with respect to that property. David Silberstein, Tsiri Silberstein, Silver Mount, LLC, and Silver Mount Two, LLC, are alleged to be guarantors of the subject note and mortgage. In this opinion, we refer to all defendants collectively as the defendants, and to David Silberstein, Tsiri Silberstein, Silver Mount, LLC, and Silver Mount Two, LLC, collectively as the guarantor defendants. We refer to the individual defendants by name when necessary.

special defense of unclean hands. For the reasons that follow, we dismiss the appeal as to the four guarantor defendants and affirm the judgment of the trial court.

The following procedural history is relevant to this appeal. On November 2, 2021, the plaintiff filed a five count revised complaint against the defendants seeking, inter alia, to foreclose on a mortgage securing certain real property located at 899 Ella T. Grasso Boulevard in New Haven (property). In count one, the plaintiff alleged that, on September 19, 2019, 899 ETG Associates, LLC (899 ETG), executed a promissory note in the plaintiff's favor in the principal amount of $600,000, secured by an open-end mortgage deed on the property. The plaintiff further alleged that, on September 17, 2020, 899 ETG executed a "Mortgage and Note Modification Agreement" (modification agreement) that increased the amount of the principal to $655,000, and that 899 ETG defaulted on March 18, 2021. The plaintiff sought to accelerate the balance due and to foreclose on the mortgage. In the remaining four counts, the plaintiff named the other four defendants as guarantors of 899 ETG's note and mortgage and alleged that they had breached their guarantees.

On March 3, 2022, the defendants filed an answer and special defenses. As relevant to this appeal, they asserted the special defense of unclean hands, claiming that "the parties negotiated for an extension of time with regard to the date when the debt which is the subject of [this] action would mature and the plaintiff thereafter refused to honor said extension agreement."[2]

On July 7, 2022, the plaintiff moved for summary judgment as to liability. In support of its motion, the

[2] The defendants also asserted as a special defense that the plaintiff had failed to properly and accurately account for payments they had tendered. The defendants' counsel, however, abandoned this defense before the trial court during oral argument on the plaintiff's summary judgment motion and the defendants have not pursued it on appeal. As such, we do not consider it.

plaintiff attached, inter alia, copies of the original promissory note, mortgage deed, and notice of default. The plaintiff also attached a copy of the modification agreement, as well as an affidavit from Mark Zucker, the plaintiff's president (Zucker affidavit).

The Zucker affidavit averred the following: 899 ETG executed a mortgage on the property in favor of the plaintiff on September 19, 2019, as security for a promissory note in the principal amount of $600,000. Under the terms of the original note, the defendants were to make principal payments for the complete amount of their indebtedness on or before the maturity date, September 18, 2020. The defendants, however, subsequently requested an extension of the maturity date, and, on September 17, 2020, the plaintiff granted a six month extension to March 18, 2021, in exchange for a $55,000 increase in the amount of the principal and $30,093 in fees. The plaintiff indicated that no further extensions would be granted. The defendants failed to remit payment and requested a second extension. Notwithstanding the plaintiff's earlier refusal to grant an additional extension, "new terms were proposed for a second extension to allow the [d]efendants time to refinance and cure the default," but the defendants refused those terms. As such, the defendants were now in default.

The modification agreement reflected that, as averred in the Zucker affidavit, the plaintiff and 899 ETG had agreed, on September 17, 2020, to modify the maturity date to March 18, 2021, and to increase the amount of the principal by $55,000. The modification agreement specified that the maturity date "shall not be further extended." The modification agreement was notarized and signed by the defendant David Silberstein, acting on 899 ETG's behalf as its duly authorized "Member-

Manager." The modification agreement did not include a merger clause.[3]

On October 11, 2022, the defendants filed their objection to the plaintiff's motion for summary judgment. They argued that there was a material issue of fact as to their special defense of unclean hands. The only evidence that they produced in support of their objection was an affidavit from David Silberstein (Silberstein affidavit). The plaintiff did not file a reply to the defendants' objection.

The Silberstein affidavit averred the following: In September, 2020, 899 ETG entered into negotiations with the plaintiff's representative for an extension of the maturity date of the mortgage and the note. On September 10, 2020, the plaintiff's representative "advised [the] [d]efendant . . . that the maturity date could be extended up to a year." In reliance on this representation, 899 ETG executed the modification agreement for a six month extension, paid the $30,093 in fees, and agreed to an increase in the amount of the principal by $55,000, with the understanding that an additional six month extension would be available. 899 ETG would not have agreed to pay these fees and to increase its indebtedness by that amount had it not believed it would receive an additional extension. Subsequently, in March, 2021, 899 ETG requested that the maturity date be extended by six more months, but the plaintiff refused to grant this request, contrary to the previous representations of the plaintiff's representative. As a result of the plaintiff's refusal to extend the maturity date, 899 ETG defaulted on the note and mortgage.

[3] A merger clause, also known as an integration clause, is "[a] contractual provision stating that the contract represents the parties' complete and final agreement and supersedes all informal understandings and oral agreements relating to the subject matter of the contract." Black's Law Dictionary (12th Ed. 2024) p. 962.

The trial court, *Spader*, *J.*, heard oral argument on the plaintiff's motion on December 12, 2022. The following day, the court issued a memorandum of decision granting summary judgment as to liability in favor of the plaintiff on count one of the revised complaint. The court concluded that "[t]he plaintiff has set forth its prima facie case for a commercial foreclosure, including providing the court with proof of compliance with the terms of the commercial note and mortgage, as modified, in terms of noticing, evidence of default, and the plaintiff's holdership status of the note and mortgage." The court further determined that there was no genuine issue of material fact as to the defendants' unclean hands defense. Notwithstanding 899 ETG's claim that the plaintiff had offered it an additional six month extension of the maturity date, the court noted, the fact that 899 ETG had shortly thereafter signed the modification agreement—which "specifically stat[ed] there would be no further extensions"—undercut its claim that the plaintiff had acted dishonestly. The court reasoned that "[c]ommercial parties negotiate terms of their agreements and reduce them to writing," and that "[t]he writing here establishes the terms of the agreement." Because 899 ETG was a "commercially sophisticated party," the court wrote, it should not have signed the modification agreement if it did not reflect the terms to which it had agreed. The court characterized the Silberstein affidavit as "self-serving," and noted that "[t]erms that are part of the negotiation that are not part of the final agreement [are] not enforceable as they are not included in the agreement." The court did not grant the plaintiff's motion for summary judgment as to the remaining four counts of the revised complaint, as it determined that the plaintiff had provided "no evidence of any guarant[ee] . . . ."

On April 25, 2023, the plaintiff moved for a judgment of strict foreclosure. On May 8, 2023, the trial court

granted that motion as to count one of the revised complaint only and rendered a judgment of strict foreclosure, setting the first law day for September 11, 2023. This appeal followed.

I

Before turning to the merits, we address a threshold jurisdictional question with respect to the standing of the four guarantor defendants in this appeal. Although no party raised the issue in their appellate briefing, this court asked the parties to provide supplemental memoranda on the issue of whether the guarantor defendants had standing to appeal from the judgment of strict foreclosure rendered in this case in light of this court's decision in *World Business Lenders, LLC* v. *526-528 North Main Street, LLC*, 197 Conn. App. 269, 270, 231 A.3d 386 (2020). See *Deutsche Bank National Trust Co.* v. *Thompson*, 163 Conn. App. 827, 831, 136 A.3d 1277 (2016) ("the question of subject matter jurisdiction, because it addresses the basic competency of the court, can be raised . . . by the court sua sponte, at any time" (internal quotation marks omitted)).

Having received the parties' briefing on this issue, we conclude that, although 899 ETG has standing to challenge the trial court's judgment, the guarantor defendants do not. The guarantor defendants concede in their supplemental memorandum that, pursuant to *World Business Lenders, LLC*, "they lack standing to appeal the judgment of foreclosure rendered on count one as to "[899 ETG]." Indeed, in *World Business Lenders, LLC*, this court observed that the guarantor in that case was not a party to the mortgage or the note and had neither a legal interest in the property securing the note, nor an equitable or statutory right of redemption in the property. *World Business Lenders, LLC* v. *526-528 North Main Street, LLC*, supra, 197 Conn. App.

278. As such, this court held that, "[b]ecause [the guarantor] was not and could not be a party to the foreclosure claim, she [had] no standing to challenge the foreclosure judgment on appeal." Id.

In the present case, it is undisputed that none of the guarantor defendants is a party to the note, mortgage, or modification agreement.[4] Neither the plaintiff nor the defendants have alleged that any of the guarantor defendants has any interest in the property or a right of redemption. In accordance with this court's holding in *World Business Lenders, LLC* v. *526-528 North Main Street, LLC*, supra, 197 Conn. App. 278–79, we conclude that the guarantor defendants lack standing to challenge the trial court's foreclosure judgment. Accordingly, we dismiss the appeal as to those defendants.

II

Having resolved that threshold jurisdictional question, we turn to the merits of 899 ETG's claims on appeal. 899 ETG claims that the trial court erred in granting the plaintiff's motion for summary judgment because the Silberstein affidavit was sufficient to raise a genuine issue of material fact as to the defendants' unclean hands defense. Specifically, 899 ETG argues that the Silberstein affidavit contradicts the Zucker affidavit and evinces misrepresentations by the plaintiff's representative during negotiations to extend the maturity date.[5] We are not persuaded.

[4] David Silberstein signed all three documents but did so on behalf of 899 ETG.

[5] In their brief, the defendants set forth three questions in their statement of issues: (1) whether the trial court erred in granting the plaintiff's motion for summary judgment; (2) whether the trial court erred in concluding that there were no disputed issues of material fact; and (3) whether the trial court erred in finding that there were no disputed issues of material fact with respect to the defendants' unclean hands defense. The remainder of the brief, however, exclusively addresses the third issue. To the extent that 899 ETG challenges other portions of the trial court's decision to grant the plaintiff's motion for summary judgment—for example, its determination that the plaintiff had made out a prima facie case—it has inadequately

We begin by setting forth our standard of review and the principles that guide our analysis. "It is well established that Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party moving for summary judgment has the burden of showing the absence of any genuine issue of material fact and that the party is, therefore, entitled to judgment as a matter of law. . . . On appeal, we must determine whether the legal conclusions reached by the trial court are legally and logically correct and whether they find support in the facts set out in the memorandum of decision of the trial court. . . . Our review of the trial court's decision to grant [a party's] motion for summary judgment is plenary." (Internal quotation marks omitted.) *Graham* v. *Commissioner of Transportation*, 330 Conn. 400, 414–15, 195 A.3d 664 (2018).

In the foreclosure context, "a court may properly grant summary judgment as to liability . . . if the complaint and supporting affidavits establish an undisputed prima facie case and the defendant fails to assert any legally sufficient special defense." *GMAC Mortgage, LLC* v. *Ford*, 144 Conn. App. 165, 176, 73 A.3d 742 (2013). "In order to establish a prima facie case . . . the plaintiff must prove by a preponderance of the evidence that it is the owner of the note and mortgage, that the defendant mortgagor has defaulted on the note

briefed those arguments and, thus, has abandoned them. See, e.g., *C. B.* v. *S. B.*, 211 Conn. App. 628, 630, 273 A.3d 271 (2022) ("[when] a claim is asserted in the statement of issues but thereafter receives only cursory attention in the brief without substantive discussion or citation of authorities, it is deemed to be abandoned" (internal quotation marks omitted)).

and that any conditions precedent to foreclosure, as established by the note and mortgage, have been satisfied." (Internal quotation marks omitted.) *Goshen Mortgage, LLC* v. *Androulidakis*, 205 Conn. App. 15, 37, 257 A.3d 360, cert. denied, 338 Conn. 913, 259 A.3d 653 (2021). Defeating a motion for summary judgment requires the nonmoving party to show "evidentiary facts or substantial evidence outside the pleadings from which material facts alleged in the pleadings can be warrantably inferred. . . . A material fact is one that will make a difference in the result of the case." (Citation omitted; internal quotation marks omitted.) *New Milford Savings Bank* v. *Roina*, 38 Conn. App. 240, 244, 659 A.2d 1226, cert. denied, 235 Conn. 915, 665 A.2d 609 (1995).

"Because an action to foreclose a mortgage is an equitable proceeding, the doctrine of unclean hands is a viable special defense." *Deutsche Bank National Trust Co.* v. *Bretoux*, 225 Conn. App. 455, 464, 317 A.3d 152 (2024). "It is a fundamental principle of equity jurisprudence that for a complainant to show that he is entitled to the benefit of equity he must establish that he comes into court with clean hands. . . . The clean hands doctrine is applied not for the protection of the parties but for the protection of the court. . . . It is applied not by way of punishment but on considerations that make for the advancement of right and justice. . . . The doctrine of unclean hands expresses the principle that where a plaintiff seeks equitable relief, he must show that his conduct has been fair, equitable and honest as to the particular controversy in issue. . . . Unless the plaintiff's conduct is of such a character as to be condemned and pronounced wrongful by honest and fair-minded people, the doctrine of unclean hands does not apply. . . . The party seeking to invoke the clean hands doctrine to bar equitable relief must show that his opponent engaged in wilful misconduct

with regard to the matter in litigation. . . . Wilful misconduct has been defined as intentional conduct designed to injure for which there is no just cause or excuse." (Internal quotation marks omitted.) *Homebridge Financial Services, Inc.* v. *Jakubiec*, 223 Conn. App. 517, 539, 309 A.3d 1223, cert. denied, 349 Conn. 909, 314 A.3d 602 (2024). The alleged misconduct must relate to the "making, validity, or enforcement" of the mortgage in order to serve as the predicate for an unclean hands defense. *M&T Bank* v. *Lewis*, 349 Conn. 9, 26, 312 A.3d 1040 (2024).

899 ETG contends that the plaintiff's conduct, as averred in the Silberstein affidavit, meets the standard for unclean hands established in *U.S. Bank National Assn.* v. *Blowers*, 332 Conn. 656, 212 A.3d 226 (2019). In *Blowers*, our Supreme Court held that the defendant in that foreclosure action could properly base an unclean hands defense on allegations of "harm resulting from a mortgagee's wrongful postorigination conduct in negotiating loan modifications, when such conduct is alleged to have materially added to the debt and substantially prevented the mortgagor from curing the default." Id., 662, 667. The court identified three scenarios in which such a defense could be raised: when the mortgagee is alleged to have "engaged in conduct that wrongly and substantially increased the mortgagor's overall indebtedness, caused the mortgagor to incur costs that impeded the mortgagor from curing [a] default, or reneged upon modifications . . . ." (Citation omitted.) Id., 675. Such misconduct, the court held, is " 'directly and inseparably connected' " to the enforcement of the note and mortgage. Id., quoting *Thompson* v. *Orcutt*, 257 Conn. 301, 313, 777 A.2d 670 (2001).

The Silberstein affidavit averred that 899 ETG entered into the modification agreement and thereby increased its indebtedness by $55,000, in reliance on the plaintiff's

false promise to grant an additional six month extension of the maturity date. These averments, 899 ETG argues, raise a genuine issue of material fact as to whether the plaintiff engaged in misconduct of the type *Blowers* has deemed sufficient to support an unclean hands defense, specifically, whether it reneged on a modification, or engaged in wrongful conduct that increased 899 ETG's debt.

The problem with this argument is that it hinges on a question of contractual intent. To find a genuine issue of material fact as to unclean hands under the rubric of *Blowers*, we would have to conclude that there was a genuine issue of fact as to whether the parties intended that a second six month extension would be offered. Otherwise, there could be no agreement to that effect on which the plaintiff reneged, and no causal nexus between the plaintiff's alleged misrepresentations and 899 ETG's decision to increase its indebtedness.

But the text of the modification agreement conclusively resolves this issue in the plaintiff's favor. It provides, without caveat, that the maturity date "shall not be further extended" past the initial six month extension. The trial court concluded, as a matter of law, that the modification agreement was integrated on this point. See *Giorgio* v. *Nukem, Inc.*, 31 Conn. App. 169, 175, 624 A.2d 896 (1993) (if trial court draws conclusions on summary judgment as to parties' intent to integrate, "based on the intent expressed in the contract itself and the affidavits submitted with the motion for summary judgment considered in light of their surrounding circumstances [then] the legal inferences to be drawn from the documents raise questions of law rather than of fact" (internal quotation marks omitted)).

Exercising our plenary review, we find little to quarrel with in this conclusion, as the modification agreement

expressly addresses the question of further extensions—the very subject matter of the plaintiff's alleged misrepresentations. See, e.g., *Associated Catalog Merchandisers, Inc.* v. *Chagnon*, 210 Conn. 734, 740, 557 A.2d 525 (1989) ("[a] written agreement is integrated and operates to exclude evidence of the alleged extrinsic negotiation if the subject matter of the latter is mentioned, covered, or dealt with in the writing" (internal quotation marks omitted)).[6] Because the modification agreement is integrated on this point, 899 ETG cannot manufacture a material factual dispute as to the parties' intent by pointing to parol evidence of negotiations that contradict the express written terms of the modification agreement. See *Fiorillo* v. *Hartford*, 212 Conn. App. 291, 303, 275 A.3d 628 (2022) ("[p]arol evidence offered solely to vary or contradict the written terms of an integrated contract is . . . legally irrelevant" (internal quotation marks omitted)). The only legally pertinent evidence of the parties' agreement is the text of the modification agreement itself, and it is clear, from our review of that agreement, that the parties intended that no further extensions would be granted. Bald assertions to the contrary, even in a sworn affidavit, do not call this conclusion into doubt. See, e.g., *Connecticut Housing Finance Authority* v. *John Fitch Court Associates Ltd. Partnership*, 49 Conn. App. 142, 146–49, 713 A.2d 900 (assertion in affidavit that parties to note and mortgage intended their contract to benefit particular third party was insufficient to raise genuine issue of material fact as to whether that party was actually beneficiary, where "express language" of note and mortgage made no reference to that party as either direct or intended beneficiary), cert. denied, 247 Conn. 908, 719 A.2d 901 (1998).

[6] Although the modification agreement lacks a merger clause, the mere absence of a merger clause does not render a contract incomplete or ambiguous. See *Massey* v. *Branford*, 118 Conn. App. 491, 499, 985 A.2d 335 (2009), cert. denied, 295 Conn. 913, 990 A.2d 345 (2010).

In the face of the parties' modification agreement, the Silberstein affidavit was insufficient to raise a genuine issue of material fact as to 899 ETG's unclean hands defense. The court thus did not err in granting summary judgment as to liability on count one of the revised complaint.

The appeal is dismissed with respect to the guarantor defendants; the judgment is affirmed and the case is remanded for the purpose of making a new finding as to the amount of the debt, for the setting of a new law day, and for other proceedings according to law.[7]

In this opinion the other judges concurred.

DARNELL MOORE *v.* COMMISSIONER OF CORRECTION (AC 45842)

Elgo, Moll and Clark, Js.

Syllabus

The petitioner, who had previously been convicted, following a jury trial, of murder, sought a writ of habeas corpus, claiming that the state had violated his right to due process during his underlying criminal trial by failing to disclose an alleged cooperation agreement with G, who had been with the petitioner on the day of the murder and who testified at the petitioner's criminal trial. At the petitioner's habeas trial, the respondent, the Commissioner of Correction, introduced testimony from G, G's former attorney, and three prosecutors who were involved in the petitioner's underlying criminal trial and sentencing, all of whom testified that there was no formal or informal agreement or understanding between G and the state prior to or during the petitioner's trial. The habeas court denied the petitioner's petition for a writ of habeas corpus but granted certification to appeal. While the petitioner's appeal was pending, he filed a motion for rectification and/or augmentation of the record, seeking to include additional transcripts from the prosecution of G and G's court file. The habeas court denied the motion, finding, inter alia, that the petitioner was improperly seeking to create a record, rather than rectify the existing record. The petitioner filed with this

[7] See *Wahba* v. *JPMorgan Chase Bank, N.A.*, 349 Conn. 483, 508 n.10, 316 A.3d 338 (2024).

court a motion for review of the habeas court's denial of his motion, and this court granted the motion for review but denied the relief requested therein. *Held*:

1. The petitioner could not prevail on his claim that the habeas court erred in rejecting his claim that the state violated his right to due process by failing to disclose an alleged cooperation agreement with G to the defense and by knowingly soliciting allegedly false and misleading testimony from G and allowing that testimony to stand uncorrected: contrary to the petitioner's assertions, the transcripts from G's sentencing hearing that the petitioner submitted as exhibits during his habeas trial did not contradict the testimony of the witnesses who testified at the habeas trial because, although the transcripts from that hearing revealed that the prosecutor informed the court that it was supporting a relatively lenient disposition in consideration for the testimony that G had given at the petitioner's criminal trial, he did not state or imply that the state had reached an agreement or understanding with G at the time of the petitioner's criminal trial; moreover, the habeas court was not required to infer such an agreement or understanding under the circumstances of this case and, on the basis of the record in this case, the habeas court's finding was not clearly erroneous.
2. This court declined to revisit its prior ruling on the petitioner's motion for review or to take judicial notice of certain materials that were never submitted to the habeas court: the petitioner's arguments on appeal were nearly identical to those he made before this court in his motion for review, and this court has made clear that it will order a hearing pursuant to *State* v. *Floyd* (253 Conn. 700) only in the unusual situation in which a defendant was precluded from perfecting the record due to new information obtained after judgment; moreover, if this court were to grant the petitioner's request and consider evidence that was not reviewed by the habeas court or by the state, even though the petitioner had the opportunity to present such evidence, the result would be trial by ambuscade.

Argued April 15—officially released August 20, 2024

Procedural History

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

Denis J. O'Malley III, assistant public defender, for the appellant (petitioner).

Danielle Koch, assistant state's attorney, for the appellee (respondent).

Opinion

CLARK, J. The petitioner, Darnell Moore, appeals following the granting of his petition for certification to appeal from the judgment of the habeas court denying his petition for a writ of habeas corpus. The petitioner claims that (1) the habeas court erred in rejecting his claim that the state violated his right to due process during his underlying criminal trial by (a) failing to disclose an alleged cooperation agreement with a witness who testified at his criminal trial and (b) knowingly soliciting that witness' allegedly false and misleading testimony and allowing that testimony to go uncorrected, and (2) this court should (a) revisit its prior ruling on his motion for review and grant the relief requested therein to supplement the record in this appeal with transcripts and a court file from a witness' criminal case that were not before the habeas court, or, in the alternative, (b) take judicial notice of those materials. We conclude that the habeas court properly denied the petitioner's petition for a writ of habeas corpus on the ground that the petitioner failed to prove that the state violated his due process rights, and we decline the petitioner's invitation to revisit this court's prior ruling on his motion for review or to take judicial notice of materials that were not before the habeas court. Accordingly, we affirm the judgment of the habeas court.

The following facts, as set forth by this court in the petitioner's direct appeal and as found by the habeas court, are relevant to our resolution of this appeal. "[D]uring the evening of August 26, 2010, in the vicinity of Lake Street in Norwich, the [petitioner] and the victim, Namdi Smart,[1] became embroiled in an argument

[1] "There was evidence that the victim also was known as 'Big Man.' " *State* v. *Moore*, 169 Conn. App. 470, 473 n.1, 151 A.3d 412 (2016), appeal

over liquor. The [petitioner], known as 'Boo' or 'Boo-Boo,' was accompanied during this initial altercation by his friend, Tjamel Hendrickson, known as 'Soda Pop.' During the course of the loud, verbal dispute, the victim ripped the [petitioner's] T-shirt. As the [petitioner] walked away from the scene, he was observed pointing to the victim, and was overheard uttering an expletive and stating that he would return to 'get' the victim.

"Shortly thereafter, Hendrickson called Samuel Gomez on the telephone. He requested that Gomez come to Norwich with a firearm. Gomez drove to Spaulding Street in Norwich, where he met with Hendrickson and the [petitioner]. Gomez handed a .45 caliber handgun to the [petitioner]. Gomez drove the [petitioner] and another man, Jordan Brown, to the vicinity of Lake Street so that the [petitioner] could search for the victim. After the [petitioner] identified the victim, the three men returned to Spaulding Street for a period of time. Thereafter, Gomez drove the [petitioner] and Brown to yet another location, where Gomez parked his automobile. The [petitioner] exited the automobile and, within a few minutes, he shot the victim on Lake Street, causing his death. The shooting was witnessed by three bystanders who lived near the scene of the shooting: Kimberly Harris, Roslyn Hill, and Laryssa Reeves. The [petitioner], who was dressed in a black hooded sweatshirt, a black hat, a black mask, and jeans, returned to the automobile still in possession of the gun that Gomez had delivered to him. The [petitioner] gave possession of the gun to Brown, who later exited the automobile with it. Gomez drove the [petitioner] to his mother's residence before returning to New London." (Footnote in original.) *State* v. *Moore*, 169 Conn. App. 470, 473–74, 151 A.3d 412 (2016), appeal dismissed, dismissed, 334 Conn. 275, 221 A.3d 40 (2019) (certification improvidently granted).

334 Conn. 275, 221 A.3d 40 (2019) (certification improvidently granted).

The petitioner subsequently was arrested and charged with murder in violation of General Statutes § 53a-54a. On December 11, 2012, at the petitioner's criminal trial, the state offered Gomez as a witness. "[Counsel for the petitioner, Attorney Norman] Pattis informed the court that 'Gomez was arrested pursuant to a warrant. That warrant was perfected on May 19, 2011, and he was charged with a series of crimes related to his conduct in this case, including carrying a pistol or revolver without a permit and hindering prosecution in the second degree. The warrant was signed by Judge Kwak and bond was set in the amount of $100,000. That case is open and pending in . . . the New London Superior Court. It's my understanding that [Gomez] intends to testify. I asked the state whether there was any understanding or cooperation agreement. . . . [T]he state says that his counsel, meaning Attorney [Peter] Catania, has not been given any assurances whatsoever even that favorable consideration could be expected from the state in the event that his client testified truthfully here.' . . .

"Pattis argued that 'competent and capable counsel would [not] permit . . . a client facing felony charges to testify basically inculpating himself in the very offense for which he stands trial without any understanding from anyone, whether it be the state or the judge, that his client would be given favorable consideration.' . . . Pattis requested permission to call Catania as a witness 'to inquire of him not of that information which is privileged—to wit, what he may or may not have said to his client—but on the scope of his conversation with members of the state's attorney's office and potentially with the presiding judge in the New London district.' . . . The state, represented by [Assistant

State's] Attorney David Smith, objected to this request, which the court denied. . . .

"Pattis extensively cross-examined Gomez. . . . The cross-examination often focused on eliciting from Gomez some acknowledgment that he was receiving a benefit from the state in exchange for his testimony. Gomez answered 'no' when asked if anyone had led him to believe that testifying might benefit him. . . . Pattis asked Gomez why he had not yet pleaded guilty to his pending charges and if he committed those offenses. . . . Gomez admitted that he had committed the charged offense but did not answer why he had not resolved the charges. . . . Catania requested a recess so that he could advise Gomez about invoking his rights. After the trial resumed, Gomez answered that he did not know why the charges had not been resolved and that he was still going to court for his cases. . . . At the conclusion of his cross-examination, Pattis asked Gomez if he 'fully intend[ed] to cut a deal with the state after [his] testimony in this case' and if what he was 'hoping for in this case is that the testimony [he] offer[ed] helps [him] out at sentencing. . . . Gomez answered [that] he was 'hoping for the best' and 'yeah.' " (Citations omitted.)

On December 19, 2012, the jury found the petitioner guilty of murder in violation of § 53a-54a, and, on March 5, 2013, the court, *Jongbloed*, *J.*, sentenced the petitioner to a total effective sentence of fifty-three years of incarceration. See *State* v. *Moore*, supra, 169 Conn. App. 474. The petitioner appealed from his conviction to this court, which affirmed the trial court's judgment of conviction. Id., 499.

"On March 14, 2013, Gomez pleaded guilty pursuant to *North Carolina* v. *Alford*, 400 U.S. 25, 91 S. Ct. 160,

27 L. Ed. 2d 162 (1970), to one count of hindering prosecution in the third degree in violation of General Statutes § 53a-167. Attorney Stephen Carney, the prosecutor, stated the supporting facts and informed the court that his 'recommendation in regards to this matter [was] five years, suspended, with three years [of] probation. Your Honor, we make the recommendation with the acknowledgement that [Gomez] did testify at the trial regarding [the petitioner], as I indicated. And I understand that [Smith] found his testimony to be both credible and highly probative, and I believe that the conviction was secured largely because this individual came forward with some peril to himself and gave forthright information to the jury. We are, in consideration, recommending a fully suspended sentence then.' . . . The court canvassed Gomez, accepted his plea, and continued the matter for sentencing and a presentence investigation report. Catania indicated for the record that 'for [Pattis'] benefit . . . there [were] no prior deals, prior to today, nothing arranged with the state. I know [Pattis] carried on quite a bit on the record during . . . [the petitioner's] trial that I must have been an idiot or struck a deal with the state; one or the other, and—despite the request of [Pattis] that I be forced to get on the stand and testify during that—that trial, I didn't have the chance to defend myself.' . . .

"On June 21, 2013, with Attorney Paul Narducci filling in for Carney, Gomez was sentenced in accordance with his plea agreement and the state nolled all other charges in three part B cases. . . . Narducci told the court that he had 'spoken with [Carney] on this. Your Honor is fully aware with the underlying factual basis for this. [Carney] informs me that as part of an agreement [Gomez] has pled to the hindering prosecution [charge].' " (Citations omitted.)

The petitioner commenced this habeas action in 2015. On April 29, 2021, he filed the operative third amended

petition for a writ of habeas corpus, which contained three counts, one of which is relevant to this appeal. In the third count, the petitioner alleged prosecutorial misconduct stemming from Gomez' testimony at the petitioner's criminal trial. Specifically, the petitioner alleged that "the state failed to disclose exculpatory information regarding an informal agreement or understanding or an expectation of leniency between the state and [Gomez] regarding favorable consideration in exchange for his cooperation in testifying at the petitioner's trial." The petitioner also alleged that "the state knowingly solicited Gomez' false testimony concerning not receiving any consideration for his testimony and allowed this testimony to stand uncorrected."[2]

A habeas trial was held on March 30, 2022, at which the petitioner testified and presented the testimony of Pattis, Gomez, Catania, Carney, Smith, and Narducci.[3] "At the habeas trial, Gomez, Catania, and several prosecutors—Carney, Smith, and Narducci—testified about the plea agreement between Gomez and the state. Gomez denied being approached by any of the three prosecutors regarding a plea agreement. On cross-examination, Gomez denied approaching the state and offering his testimony in exchange for consideration in his criminal cases. Gomez acknowledged that his attorney had never told him that he had been offered a deal in exchange for his testimony but that he did

[2] The first and second counts alleged ineffective assistance on the part of his criminal trial counsel, Pattis, in (1) failing to impeach the testimony of Hill, and (2) failing to investigate and/or present favorable witnesses. As to count one, the court found that the petitioner "failed to show that Pattis' decision was deficient performance and that he was prejudiced." As to count two, the court found that the petitioner had "not presented any evidence [to] [substantiate] the claim that Pattis failed to investigate and call witnesses." The petitioner has not appealed with respect to either of these two counts.

[3] The petitioner also moved into evidence numerous transcripts from his criminal case and three transcripts from Gomez' criminal case, which were admitted in full.

hope that his testimony would be looked upon favorably in his cases. According to Catania, Gomez was not offered a plea agreement or leniency by the state, and there were no plea discussions, prior to or during the petitioner's trial. The state promised nothing to Gomez, who cooperated with the hope that he would secure a benefit later. On cross-examination, Catania answered '[t]hat's correct' when asked if the petitioner's prosecutor would not even discuss a plea bargain agreement until after the petitioner's criminal case was complete.

"Carney confirmed that no plea offer was made to Gomez prior to the petitioner's trial, nor that he personally solicited favorable testimony from Gomez. According to Carney, he recommended the sentence Gomez was to receive because it took into consideration the fact that Gomez had testified against the petitioner. Although Carney could not recall precisely when he made the plea offer to Gomez, he was certain that it was not made before or during the petitioner's trial. Carney also noted that the prosecutors in the New London office did not communicate amongst each other about a plea agreement before or during the petitioner's trial. There was a definite effort by the prosecutors to not make an offer to Gomez regarding his testimony to avoid coloring or influencing his testimony in any way.

"On cross-examination, Carney confirmed that he has a duty to disclose exculpatory evidence and plea bargain agreements made with cooperating witnesses. Carney indicated that he follows the policies of the Division of Criminal Justice and his ethical obligations. Thus, Carney would not make a deal with a cooperating witness without disclosing [it] to opposing counsel, nor would he disclose potential sentences with such a witness out of concern that the testimony would be tailored. Carney stated that he would not disclose such information to the witness' attorney because there would be no way to prevent counsel from sharing that

information with their client and potentially result in tailored testimony.

"Smith, who prosecuted the petitioner, indicated that he was not aware of any offer, plea arrangement, or informal agreement made by the state with Gomez in exchange for his testimony. Smith further indicated that he did not make any offers, plea arrangements, or informal agreements with Gomez, nor could he recall any communications among the prosecutors in New London regarding a plea agreement for Gomez. Smith was aware that another prosecutor in his office was handling the Gomez case, did not delve into the topic of offers with him, and kept his case against the petitioner separate from Gomez' case. Smith recalled having a conversation with Carney long after the petitioner's criminal trial was over.

"On cross-examination, Smith also acknowledged that he is aware of his ethical obligation to disclose plea agreements made with cooperating witnesses and that he abides by that obligation. Smith confirmed that he would not have offered consideration to Gomez in exchange for his testimony because he was not prosecuting Gomez and, therefore, not responsible for determining the sentence communicated in an offer.

"Lastly, Narducci, who stood in for Carney at Gomez' sentencing, did not have any knowledge or recollection of how Gomez related to the petitioner's trial. Narducci was not aware of, nor did he recall, any communications among the New London prosecutors about Gomez' plea agreement. Additionally, Narducci had no recollection of having any discussions with Smith about Gomez."

On August 8, 2022, the habeas court, *M. Murphy*, *J.*, rendered judgment denying the petition. As to count three, the court found that "[t]he evidence in this case, contrary to the petitioner's contention, does not support the conclusion that there was any agreement, whether

formal or informal, between the state and Gomez in exchange for his testimony. The testimony from Gomez, his former attorney, and three prosecutors, which the court finds credible both individually and collectively, does not show the existence of any agreement or understanding between Gomez and the state. There is no evidence of an express intention by the state not to prosecute Gomez, nor is there evidence of even an informal understanding or unexpressed intention.

"Consequently, the claim that the state failed to disclose an informal agreement or understanding or expectation of leniency between the state and Gomez must fail. There also is no evidence that the state knowingly solicited false testimony from Gomez about not receiving any consideration for his testimony and allowing his false testimony to stand uncorrected. The claim in count three is denied." The court subsequently granted the petition for certification to appeal. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

On appeal, the petitioner claims that the habeas court erred in rejecting his claim that the state violated his right to due process by (1) failing to disclose an alleged cooperation agreement with Gomez to the defense and (2) knowingly soliciting Gomez' allegedly false and misleading testimony and allowing that testimony to stand uncorrected. The respondent, the Commissioner of Correction, argues that the petitioner failed to prove the existence of any implied agreement or understanding between Gomez and the state and, thus, the petitioner's due process claim fails. We agree with the respondent.

We begin by setting forth our standard of review and the relevant legal principles implicated by the petitioner's claim. "The law governing the state's obligation to disclose exculpatory evidence to defendants in criminal

cases is well established. The defendant has a right to the disclosure of exculpatory evidence under the due process clauses of both the United States constitution and the Connecticut constitution. *Brady* v. *Maryland*, 373 U.S. 83, 86, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963); *State* v. *Simms*, 201 Conn. 395, 405 [and] n.8, 518 A.2d 35 (1986). In order to prove a *Brady* violation, the defendant must show: (1) that the prosecution suppressed evidence after a request by the defense; (2) that the evidence was favorable to the defense; and (3) that the evidence was material." (Internal quotation marks omitted.) *State* v. *Ouellette*, 295 Conn. 173, 185, 989 A.2d 1048 (2010).

"The state's failure to disclose an agreement with a cooperating witness may be deemed to be the withholding of exculpatory evidence. Impeachment evidence falls within *Brady*'s definition of evidence favorable to an accused. . . . Impeachment evidence is broadly defined in this context as evidence that could potentially alter the jury's assessment of a witness' credibility. . . . Specifically, we have noted that [a] plea agreement between the state and a key witness is impeachment evidence falling within the . . . *Brady* doctrine." (Citations omitted; internal quotation marks omitted.) *Marquez* v. *Commissioner of Correction*, 330 Conn. 575, 592, 198 A.3d 562 (2019).

"The [United States] Supreme Court established a framework for the application of *Brady* to witness plea agreements in *Napue* v. *Illinois*, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959), and *Giglio* v. *United States*, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972). . . . Drawing from these cases, this court has stated: [D]ue process is . . . offended if the state, although not soliciting false evidence, allows it to go uncorrected when it appears. . . . If a government witness falsely denies having struck a bargain with the state, or substantially mischaracterizes the nature of

the inducement, the state is obliged to correct the misconception. . . . Regardless of the lack of intent to lie on the part of the witness, *Giglio* and *Napue* require that the prosecutor apprise the court when he knows that his witness is giving testimony that is substantially misleading." (Internal quotation marks omitted.) *Diaz* v. *Commissioner of Correction*, 174 Conn. App. 776, 795–96, 166 A.3d 815, cert. denied, 327 Conn. 957, 172 A.3d 204 (2017).

"The prerequisite of any claim under the *Brady*, *Napue* and *Giglio* line of cases is the existence of an undisclosed agreement or understanding between the cooperating witness and the state. . . . Normally, this is a fact based claim to be determined by the trial court, subject only to review for clear error." (Citations omitted.) *State* v. *Ouellette*, supra, 295 Conn. 186–87. "[T]he burden is on the defendant to prove the existence of undisclosed exculpatory evidence." *State* v. *Floyd*, 253 Conn. 700, 737, 756 A.2d 799 (2000).

"[W]here the factual basis of the court's decision is challenged we must determine whether the facts set out in the memorandum of decision are supported by the evidence or whether, in light of the evidence and the pleadings in the whole record, those facts are clearly erroneous. . . . 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." (Citations omitted; internal quotation marks omitted.) Id., 737–38. "[T]his court does not retry the case or evaluate the credibility of the witnesses. . . . Rather, we must defer to the [habeas] [court's] assessment of the credibility of the witnesses based on its firsthand observation of their conduct, demeanor and attitude. . . . The habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses

and the weight to be given to their testimony." (Internal quotation marks omitted.) *Brown* v. *Commissioner of Correction*, 179 Conn. App. 358, 366–67, 179 A.3d 794, cert. denied, 328 Conn. 919, 181 A.3d 91 (2018).

In order to prevail on his claim, the petitioner must first prove "the existence of an undisclosed agreement or understanding between the cooperating witness and the state." *State* v. *Ouellette*, supra, 295 Conn. 186. In support of his claim that there was such an agreement or understanding between the state and Gomez, the petitioner relies principally on our Supreme Court's decision in *Gomez* v. *Commissioner of Correction*, 336 Conn. 168, 243 A.3d 1163 (2020),[4] which he argues stands for the broad proposition that when there is "critical testimony provided by a witness," plus "conspicuous leniency delivered to a witness," there is "only one reasonable conclusion": that an agreement exists between the witness and the state. (Internal quotation marks omitted.) On the basis of that proposition, the petitioner further argues that the habeas court's finding in this case that there was no agreement or understanding between the state and Gomez was clearly erroneous because of the timeline of events that occurred prior to, during, and following Gomez' testimony at the petitioner's criminal trial. Specifically, he notes that "the state and Gomez had been in talks as early as his May 23, 2011, arraignment in part B court" and that, consistent with those discussions, "the state arranged to have Gomez' case transferred to part A court 'because of the issues with wanting statements from Gomez' regarding the murder." The petitioner further observes that there was no action in Gomez' case for nineteen months, that Gomez incriminated himself during his testimony at the

[4] We note that the petitioner in *Gomez* v. *Commissioner of Correction*, supra, 336 Conn. 168, is Jamie R. Gomez, not Samuel Gomez, the witness discussed in this opinion. We refer to the petitioner in *Gomez* as the defendant to avoid confusion with the petitioner in this appeal.

petitioner's criminal trial, and that only nine days after Moore was sentenced, Gomez pleaded guilty to reduced charges.

On the basis of these events, the petitioner contends that our Supreme Court's decision in *Gomez* required the habeas court in this case to find that there was an agreement or understanding between the state and Gomez because, "[b]ut for the state giving [Gomez] some reason to feel assured he could [testify] without risk of significant punishment, there is no plausible explanation for Gomez openly admitting to being an accessory to murder *and* explicitly admitting his guilt to the two charges pending against him at that time." (Emphasis in original.)

Because the petitioner's claim relies principally on his contention that our Supreme Court's decision in *Gomez* required the habeas court in this case to conclude that Gomez testified falsely at the petitioner's criminal trial about whether he had reached an agreement or understanding with the state about his testimony at the petitioner's criminal trial, we begin with an examination of that decision. In *Gomez*, the defendant had been convicted of murder and conspiracy to commit murder. See *Gomez* v. *Commissioner of Correction*, supra, 336 Conn. 172. The state's key witnesses at trial were two other alleged coconspirators, Angeline Valentin and James "Tiny" Smith. Id., 171. After his convictions were affirmed on direct appeal; see *State* v. *Booth*, 250 Conn. 611, 737 A.2d 404 (1999), cert. denied sub nom. *Brown* v. *Connecticut*, 529 U.S. 1060, 120 S. Ct. 1568, 146 L. Ed. 2d 471 (2000); the defendant filed a second petition for a writ of habeas corpus challenging his conviction on the ground that his prior habeas counsel provided ineffective assistance because he failed to raise the claim that the state had violated his right to due process when the prosecutor failed to correct the allegedly false testimony of Valentin and Smith at trial

concerning whether (1) the state had agreed to support a more favorable disposition of their criminal cases in exchange for their testimony at Gomez' criminal trial and (2) they received any benefit at their respective sentencing hearings in exchange for agreeing to provide such testimony. See *Gomez* v. *Commissioner of Correction*, supra, 173.

"The habeas court, *Oliver*, *J.*, denied the petition. With respect to the [defendant's] due process claim, the court found that [t]he [defendant] . . . failed to demonstrate that the underlying trial testimony of Smith and Valentin was 'false' . . . as opposed to, for example, [a reflection of] their uncertainty as to the likely posttrial sentencing scenario. The court also found that [t]he nature and circumstances of [Smith's] and Valentin's 'agreements' were thoroughly explored and dissected on both direct and cross-examination. There is no reasonable probability that the jury was misled in this regard . . . . [The court also] found that at least one other defense attorney in the consolidated trial was . . . aware of the agreement by which the prosecuting authority would bring the cooperation of Smith and Valentin to the attention of the sentencing judge posttrial and, therefore, concluded that the [defendant] had failed to demonstrate that [his attorney] was unaware of the existence of that agreement. For these reasons, the court concluded that there had been no due process violation and, therefore, that prior counsel had not performed deficiently in failing to raise the claim.

"The habeas court subsequently granted the [defendant's] petition for certification to appeal, and [this court] affirmed the judgment. *Gomez* v. *Commissioner of Correction*, [178 Conn. App. 519, 522, 176 A.3d 559 (2017), rev'd, 336 Conn. 168, 243 A.3d 1163 (2020)]. [In doing so, this court] concluded that, in light of the clear and undisputed evidence of the agreements, the habeas court's finding that the state had limited agreements

to bring the cooperation of Valentin and Smith to the attention of the trial court posttrial . . . was not clearly erroneous. . . . [This court] also concluded, however, that there had been no violation of the [defendant's] due process rights, as elucidated in *Napue* . . . and *Giglio* . . . because the agreements had been disclosed to defense counsel." (Citation omitted; internal quotation marks omitted.) *Gomez* v. *Commissioner of Correction*, supra, 336 Conn. 173–74.

The defendant appealed to our Supreme Court, which granted certification. On appeal, the defendant contended "that both Smith and Valentin provided material, false or misleading testimony and that the fact that defense counsel had actual or constructive notice thereof did not satisfy the duty of the prosecutor, under *Napue* and *Giglio*, to correct the witnesses' false testimony." Id., 175. Specifically, the defendant contended "that both witnesses falsely testified at trial that (1) the state had not promised them anything in return for their cooperation, and (2) they did not receive any benefit at their respective bond hearings in exchange for cooperating." Id., 176.

With respect to the first contention, the respondent conceded that both witnesses provided materially false testimony in this regard. With respect to the second contention, our Supreme Court held that the habeas court's finding that Valentin truthfully testified that she had received no benefit in exchange for her cooperation was clearly erroneous. In so holding, the court first recited the following exchange between Valentin and Attorney Jeremiah Donovan, who represented the codefendant Daniel Brown at the defendant's consolidated criminal trial:

"[Donovan]: After you testified against . . . [Anthony Booth, a codefendant], you were released from jail, weren't you?

"[Valentin]: Yes, I was.

"[Donovan]: Do you think there might be, there just might be, some connection between [your] testifying against . . . Booth and your not being in jail anymore?

"[Valentin]: No.

"[Donovan]: You don't see any connection at all?

"[Valentin]: (Witness nods in the negative.)" Id., 177.

According to the Supreme Court, however, the transcript from Valentin's bond hearing "flatly belie[d] her testimony that there was no connection between her cooperation and the fact that she made bail. The hearing began with [the prosecutor] informing the court of the scope and importance of Valentin's cooperation: 'We have multiple, sworn statements from her, Your Honor, and she did testify at length and, we believe, truthfully at the probable cause hearing for . . . Booth, and was instrumental in a finding of probable cause for . . . Booth.' In his argument to the court at the bond hearing, Valentin's attorney, Bernard W. Steadman, then repeatedly emphasized the significance and extent of his client's cooperation. Finally, in making his bond recommendation to the court, [the prosecutor] stated: 'I did indicate to . . . Steadman, Your Honor, that I would bring to the court's attention her cooperation, and I think I've done that. . . . I also think she should be aware that, if she [is permitted to move to New Jersey and does not remain available], and if the state has to go and seek her out . . . she will have forfeited whatever benefits she has gained from her cooperation to this point. . . . [S]o . . . she would be in serious trouble should she not cooperate and be available. Having said that, Your Honor, I'm not sure whether a promise to appear is the appropriate thing, but I think certainly a substantial reduction in her bond is appropriate. . . .

I think . . . if I were in your position, I would be considering a written promise to appear. . . . I would not be averse to a written promise to appear.'

"Consistent with the state's suggestion, the court ultimately reduced Valentin's bond from $100,000 to a written promise to appear and allowed her to move from Connecticut to New Jersey, despite the pending charge of accessory to assault in the first degree. In explaining that decision, the court stated: '[C]onsidering all of the factors . . . [and] the information relayed by counsel, particularly taking into consideration the youth and cooperative aspects of this matter, I'm going to . . . reduce the bond . . . .' " (Footnote omitted.) Id., 177–78. On the basis of its review of the transcript from Valentin's bond hearing, the court in *Gomez* ultimately concluded that, "[i]n light of the multiple references to Valentin's cooperation in the course of what was a relatively brief hearing, including [the prosecutor's] statement implying that Valentin had gained benefits from her cooperation, we do not think any reasonable conclusion may be drawn other than that her trial testimony that there was no possible connection between her cooperation and her release from jail was false." Id., 178.

As the foregoing review of our Supreme Court's decision in *Gomez* clearly demonstrates, and contrary to the petitioner's argument in this case, our Supreme Court in *Gomez* did not conclude that a habeas court must, in all cases, infer the existence of an agreement or understanding any time there is "critical testimony" from a witness at a criminal trial that is followed by "conspicuous leniency" delivered to that witness in connection with his or her own criminal case. Rather, the court in *Gomez* simply concluded that the habeas court's finding that Valentin had testified truthfully at the defendant's criminal trial was clearly erroneous based on the undisputed record from Valentin's bond

hearing. The transcripts from Valentin's bond hearing included multiple references to her cooperation in the course of a relatively brief hearing as well as the prosecutor's statements strongly implying that Valentin had, in fact, received benefits by way of a reduction in her bond in exchange for her prior cooperation at a codefendant's probable cause hearing.

Having rejected the petitioner's broad characterization of our Supreme Court's decision in *Gomez*, we now turn to the record in this case to determine whether the habeas court's finding that Gomez testified truthfully during the petitioner's criminal trial was clearly erroneous. At the habeas trial, the respondent introduced testimony from Gomez, his former attorney, and three prosecutors, all of whom testified that there was no formal or informal agreement or understanding between Gomez and the state. Gomez testified that he was never approached by Smith, Carney, or Catania about a plea agreement. He stated that the testimony that he provided at the petitioner's criminal trial was the complete truth, including his testimony that he had not received any offers from the state in exchange for his testimony. Additionally, he denied that he himself had approached the state to offer to testify in exchange for consideration in his own case but asserted that he hoped that he would benefit from his testimony.[5]

[5] The following exchange took place during the cross-examination of Gomez by the respondent's counsel:

"[The Respondent's Counsel]: You did not approach the state of Connecticut, the prosecutor or the police and offer to testify against [the petitioner] in exchange for consideration on your own case, did you?

"[Gomez]: No.

"[The Respondent's Counsel]: And, in fact, at the time you testified, you testified that by testifying you certainly were hoping it might benefit you but that no promises had been made to you; is that correct, sir?

"[Gomez]: Yes.

"[The Respondent's Counsel]: And is it fair to say that no—you never spoke to a prosecutor who offered you consideration in exchange for your testimony, right?

"[Gomez]: Yeah."

Catania, who represented Gomez in his criminal case, testified that, although there was a hope that Gomez would receive some sort of leniency from the state due to his cooperation at the petitioner's criminal trial, there had been no discussions with the state about an agreement prior to Gomez' testimony.[6]

Carney, the original prosecutor in Gomez' criminal case, also confirmed that no plea offer had been made between the state and Gomez before the petitioner's criminal trial.[7] Additionally, when asked about the recommended sentence Gomez was to receive, he stated

[6] The following exchange took place during the direct examination of Catania by the petitioner's counsel:

"[The Petitioner's Counsel]: Do you recall [Gomez] stating he hoped for the best for a deal by the state?

"[Catania]: I'm sure he said something to that effect. I don't remember what he said exactly.

"[The Petitioner's Counsel]: Okay. And do you recall [Gomez] stating yes, that he'd hoped his testimony would help his sentencing out?

"[Catania]: I don't recall him saying that, but I think the record does reflect that.

"[The Petitioner's Counsel]: Okay. And despite [Gomez] saying all of that on record, do you still maintain that no kind of lenient agreement of—or really any informal agreement had been brokered between the state and [Gomez]?

"[Catania]: There was certainly a hope that [Gomez'] testimony would put him in a better light and better favor to—to the court regarding his own case but there [were] no specific agreements. There was no—nothing set—set down. That was what our—our hope was in his cooperation but there was nothing promised from the state."

[7] The following exchange took place during the direct examination of Carney by the petitioner's counsel:

"[The Petitioner's Counsel]: Do you recall if any plea offer had been arranged between the state and [Gomez]?

"[Carney]: Well, at some point there was a plea offer. Yes.

"[The Petitioner's Counsel]: Was one provided before trial?

"[Carney]: Before [the petitioner's] trial?

"[The Petitioner's Counsel]: Correct.

"[Carney]: No. One was not.

* * *

"[The Petitioner's Counsel]: On this day—this was June 24, 2011—was there any arrangement at that time between yourself and [Catania] on behalf of [Gomez] regarding any kind of an informal agreement, a plea arrangement or anything to that effect?

"[Carney]: If this was before the [petitioner's] trial, there would not [have] been any agreement.

that he recommended it because it took into consideration the fact that Gomez had testified against the petitioner but that he did not consider this sentence during the petitioner's criminal trial.[8] Carney further testified that he is aware of his duty to disclose exculpatory evidence and any plea bargain agreements that might be made with cooperating witnesses, and that he would not make any sort of deal or agreement without disclosing it to opposing counsel.

Smith, the prosecutor in the petitioner's criminal trial, testified that he was not aware of any plea arrangement or informal agreement made by the state with Gomez in exchange for his testimony and that he did not personally solicit Gomez to provide favorable testimony against the petitioner. Additionally, Smith testified that, despite Gomez' statement that he hoped his testimony would help him during sentencing, Smith did not make any promises or informal agreements with Gomez.[9]

"[The Petitioner's Counsel]: Okay. At any time did you personally solicit from [Gomez] favorable testimony?

"[Carney]: No."

[8] The following exchange took place during the direct examination of Carney by the petitioner's counsel:

"[The Petitioner's Counsel]: [W]hat was considered to make that recommendation [for Gomez' sentence]?

"[Carney]: When I was making that recommendation, I took into consideration the fact that [Gomez] had testified against the petitioner.

"[The Petitioner's Counsel]: And you had decided that when, to your recollection?

"[Carney]: This sort of looks like the recommendation was made on that day but sometime after I spoke to [Smith] about the fact that [Gomez] had testified against the petitioner. . . .

"[The Petitioner's Counsel]: Is it possible that this was considered during [the petitioner's] trial?

"[Carney]: It definitely would not have been. . . .

"[The Petitioner's Counsel]: In general, was there any communication among prosecutors about a plea agreement in your office before or during [the petitioner's] trial?

"[Carney]: There would not have been."

[9] The following exchange took place during the direct examination of Smith by the petitioner's counsel:

"[The Petitioner's Counsel]: Do you recall [Gomez] stating quote, yes, that he hoped his testimony would help his sentencing?

"[Smith]: I—I do recall that. Yes.

Smith further testified that he is aware of his ethical obligation to disclose any plea agreements of any cooperating witnesses and that he follows that ethical obligation.

Finally, Narducci, the prosecutor in Gomez' case at the time Gomez entered his guilty plea, testified that he had no knowledge of any plea offer from the state to Gomez. He further testified that he did not personally solicit favorable testimony from Gomez in preparation for Gomez' sentencing hearing. Finally, Narducci testified that he had no recollection of having any discussions about Gomez with Smith.

Notwithstanding all of this testimony and the trial court's finding that each of these witnesses testified credibly, the petitioner argues that the timeline of events surrounding the petitioner's conviction and the subsequent resolution of Gomez' criminal case, as well as certain statements made during Gomez' sentencing following the petitioner's conviction, render the habeas court's findings clearly erroneous on the question of whether Gomez falsely testified at the petitioner's criminal trial that he had reached no agreement or understanding with the state in exchange for his testimony. The petitioner argues that "[b]ut for the state giving [Gomez] some reason to feel assured he could [testify] without risk of significant punishment, there is no plausible explanation for Gomez openly admitting to being an accessory to murder *and* explicitly admitting his guilt to the two charges pending against him at that time." (Emphasis in original.)

"[The Petitioner's Counsel]: And despite him stating that, do you still maintain there was no plea arrangement or any kind of informal agreement had between you and [Gomez] before he testified on the stand?

"[Smith]: I made no promises, no informal agreement, nothing. . . .

"[The Petitioner's Counsel]: And all that you had discussed with [Carney] before [Gomez' guilty] plea was that you just found [Gomez'] testimony to be credible and helpful in your case?

"[Smith]: I believe that was it. I—I believe I said I thought he was credible, truthful, and it was helpful in [the] case. Yes."

We reject the petitioner's assertion that the record in this case requires us to conclude that the habeas court's findings were clearly erroneous. First, as we have already explained, our Supreme Court in *Gomez* did not hold that, whenever there is "critical testimony provided by a witness" plus "conspicuous leniency delivered to a witness," a court must find that an agreement exists between the witness and the state.

Second, and contrary to the petitioner's assertions, the transcripts from Gomez' sentencing hearing that the petitioner submitted as exhibits during his habeas trial do not contradict the testimony of the witnesses who testified at the petitioner's habeas trial. Although the transcripts from that hearing reveal that the prosecutor informed the court that it was supporting a relatively lenient disposition "in consideration" for the testimony that Gomez had given at the petitioner's criminal trial, he did not state or imply that the state had reached an agreement or understanding with Gomez at the time of the petitioner's criminal trial. Moreover, the habeas court was not required to infer such an agreement or understanding under the circumstances of this case. Indeed, if we were to hold otherwise, no court could *ever* credit a witness' testimony that he or she testified truthfully and voluntarily to their own detriment without also testifying that they had received a promise or assurance from the state *even if no such promise or assurance was ever made*. We are unaware of any authority supporting such a proposition and the petitioner has not brought any such authority to our attention on appeal.[10]

[10] This is not to say, of course, that a criminal defendant or habeas petitioner may never rely on circumstantial evidence to argue that there may have been an agreement or understanding between a witness and the state in a particular case. Although a criminal defendant's counsel certainly may, as the petitioner's defense counsel did in this case, cross-examine a witness during a defendant's criminal trial about whether such testimony is truthful or credible and a habeas court certainly may take into consideration such evidence when considering whether a witness' trial testimony to that effect was truthful, such circumstantial evidence does not *require* a habeas court

On the basis of our review of the record in this case, including the testimony of all of the witnesses who testified during the habeas trial that the state did not reach a formal or informal agreement or understanding with Gomez with respect to his testimony at the petitioner's criminal trial, we conclude that the habeas court's finding was not clearly erroneous. It therefore did not err when it denied the petitioner's petition for a writ of habeas corpus.

II

The petitioner also argues that this court should revisit its prior ruling on his motion for review. Specifically, he asks that we grant the relief requested therein to rectify the record in his habeas case with the entire court file and all of the transcripts from Gomez' criminal case, even though those materials were never submitted to the habeas court. In the alternative, he asks us to take judicial notice of those materials. We reject both requests because they constitute an invitation for us to overrule a prior order of this court on an identical issue and to consider evidence that was not before the habeas court for the purpose of engaging in what amounts to fact-finding.

By way of background, on March 7, 2023, the petitioner filed with this court a motion for permission to file a late "motion for rectification and/or augmentation of the record." Specifically, in the motion for rectification and/or augmentation of the record, the petitioner asked the court to rectify or augment the record to include (1) additional transcripts from the prosecution of Gomez and (2) Gomez' court file.[11] The petitioner

in all circumstances to infer the existence of such an agreement and find testimony to the contrary to be false.

[11] In his motion for rectification and/or augmentation of the record, the petitioner also sought to rectify the record to include certain police reports authored by Detective James Curtis. Additionally, he requested an evidentiary hearing pursuant to *State* v. *Floyd*, supra, 253 Conn. 700, "to augment the record with testimony from [Curtis] concerning [his] discussions with [Gomez] prior to his testimony against [the petitioner]." The petitioner,

argued that these additional materials "clearly show that [Gomez] had been in communication with the state prior to his testimony and he had been made to understand that, by testifying against [the petitioner], he would avoid any significant penalty for his role in the murder." The petitioner claimed that he tried to obtain these materials during his habeas trial "but was told they either did not exist or could not be located." The petitioner, however, offered no evidence in support of his claim that he had previously requested these materials during his habeas trial or that those requests were denied. The respondent did not object to the petitioner's motion for permission.

On April 19, 2023, this court granted the motion in part and ordered the habeas court to consider the petitioner's motion. The respondent filed an objection to the petitioner's motion for rectification in the habeas court. In his objection, the respondent argued that (1) the petitioner was improperly seeking to create a record, rather than rectify the existing record, because none of the evidence that the petitioner sought to include was ever before the habeas court; (2) the additional materials did not reveal the existence of any undisclosed agreement or understanding between Gomez and the state; and (3) although the petitioner claimed that the materials he was seeking to include in the record constituted "new information obtained after judgment" because he allegedly was unable to obtain the materials in previous attempts prior to his habeas trial, the petitioner provided "no support for this claim," and because the materials "were matters of public record," they could not "be said to have been suppressed for *Brady* purposes." The habeas court

however, did not seek review of the habeas court's denial of these requests in his motion to this court for review of the habeas court's decision, nor does he request on appeal that this court augment and/or rectify the record with these reports.

denied the petitioner's motion on May 24, 2023, "for the reasons articulated in the respondent's objection." On June 6, 2023, the petitioner filed with this court a motion for review of the habeas court's denial of his motion. On June 22, 2023, the respondent filed an objection to the petitioner's motion for review. On July 25, 2023, this court granted the motion for review but denied the relief requested therein.

At his habeas trial, the petitioner moved into evidence various transcripts from his own criminal case, as well as three transcripts from Gomez' criminal case, which were admitted in full. He now asks this court, however, to consider the entire court file and all of the transcripts from Gomez' criminal case notwithstanding the fact that the habeas court denied his motion for rectification and this court already denied the relief requested in his motion for review of the habeas court's order. The petitioner states that, although "the existing record . . . compels the conclusion . . . that Gomez and the state indeed had an agreement or understanding . . . [t]he additional Gomez transcripts with which the petitioner seeks to rectify or augment the record—or alternatively, of which the petitioner asks this court to take judicial notice—only further demonstrates Gomez' understanding with the state." (Emphasis omitted; internal quotation marks omitted.) Specifically, the petitioner argues that the additional materials would demonstrate that Gomez' case was delayed pending resolution of the petitioner's case and that there appeared to be a consensus among the court and the parties involved with the Gomez case that they would delay taking any actions in Gomez' criminal case pending resolution of the petitioner's case and Gomez' testimony in that case. The petitioner states that "[e]veryone—Gomez, the state, and the court—were in the loop: Gomez' testimony would be rewarded once it put [the petitioner]

away. The jury should have been made aware of that, too."

We decline the petitioner's request to overrule this court's previous ruling on his motion for review of the habeas court's denial of his request to rectify/augment the record with these additional materials. The petitioner's arguments on appeal are nearly identical to those he made before this court in his motion for review. Where a party has already sought and obtained review of a motion pursuant to the proper procedure, we typically decline a second review of that claim. See *State* v. *Casiano*, 122 Conn. App 61, 71, 998 A.2d 792 (The court declined to review a claim where the "defendant already ha[d] sought and obtained review via the proper procedure of a motion for review. He cannot obtain further review of his claim on appeal. . . . To review the defendant's claim would be providing two appellate reviews of the same issue." (Citation omitted; internal quotation marks omitted.)), cert. denied, 298 Conn. 931, 5 A.3d 491 (2010); *Burke* v. *Burke*, 94 Conn. App. 416, 420–21, 892 A.2d 964 (2006) (court declined to revisit claim where party had already obtained review via motion for review).

The petitioner cites to a number of cases in support of his request that this court overrule its decision denying the relief he sought in his prior motion for review. The petitioner claims, for instance, that in *State* v. *Floyd*, supra, 253 Conn. 700, our Supreme Court "established a policy in favor of the 'rapid resolution' of *Brady* claims through rectification where a defendant discovers the nondisclosure after trial." In addition, he argues in his reply brief that "[a]n appellate court may, upon the motion of a party . . . revisit a motion for review that it has denied when *both* the underlying appeal and the motion for review are properly before that court"; (emphasis in original; internal quotation marks omitted); pointing this court to *McClintock* v.

Rivard, 219 Conn. 417, 425, 593 A.2d 1375 (1991); *PMG Land Associates, L.P.* v. *Harbour Landing Condominium Assn., Inc.*, 135 Conn. App. 710, 715 n.5, 42 A.3d 508 (2012); *Housing Authority* v. *Charter Oak Terrace/Rice Heights Health Center, Inc.*, 82 Conn. App. 18, 23, 842 A.2d 601 (2004); and *Biller Associates* v. *Rte. 156 Realty Co.*, 52 Conn. App. 18, 25, 725 A.2d 398 (1999), aff'd, 252 Conn. 400, 746 A.2d 785 (2000).

None of these cases stand for the proposition that this court should overrule itself on the question of whether the habeas court should have rectified/augmented the record in this case with materials that were not before it at the time of trial. In *Floyd*, the defendant had obtained newly discovered evidence while his direct appeal was pending regarding a key witness who had testified against him during his criminal trial. See *State* v. *Floyd*, supra, 253 Conn. 730. Our Supreme Court granted the defendant's motion for review, exercised its supervisory authority, and ordered the trial court to hold an evidentiary hearing on that newly discovered evidence. Id., 732. In doing so, the court noted: "After the defendant was convicted, the defendant's appellate counsel obtained information concerning the disposition of the drug charges against [a witness], which, the defendant claims, showed that [the witness] had, in fact, received favorable treatment from the state in the criminal proceedings against him as of the date of his testimony in this case. Specifically, appellate counsel learned that the state had not prosecuted [the witness] for a violation of his probation in connection with his June 21, 1994 arrest, and that the state had not opposed the reduction of [the witness'] $50,000 bond to a promise to appear. Appellate counsel also obtained evidence that, according to the defendant, shows that [the witness] received favorable treatment from the state after his testimony in this case. Specifically, appellate counsel learned that, at the February 2, 1996 sentencing

hearing in [the witness'] drug case, which occurred approximately two months after [the witness'] trial testimony in this case, the state indicated that it was filing a substitute information charging [the witness] with only one count of possession with intent to sell narcotics. [The witness] pleaded guilty to that charge, and the state recommended a five year prison sentence, execution suspended, and three years probation with special conditions. The trial court imposed the recommended sentence." (Footnote omitted.) Id., 730–31.

Unlike the petitioner in *Floyd*, the petitioner in this case is not asking us to consider evidence that he discovered for the first time during the pendency of his direct appeal. Instead, he asks us to grant the very relief that both the habeas court and this court previously denied pursuant to the appropriate procedures for obtaining such relief. Moreover, even assuming arguendo that *Floyd* applies in habeas proceedings, a question that neither this court nor our Supreme Court has squarely resolved, this court has made clear that it will order a *Floyd* hearing "only in the unusual situation in which a defendant was precluded from perfecting the record due to new information obtained after judgment." (Internal quotation marks omitted.) *State* v. *Ortiz*, 280 Conn. 686, 713 n.17, 911 A.2d 1055 (2006). Thus, we have rejected requests for *Floyd* hearings where a petitioner, like the petitioner in this case, failed to demonstrate that he or she was precluded from perfecting the record due to new information obtained after judgment. See *Diaz* v. *Commissioner of Correction*, 152 Conn. App. 669, 681, 100 A.3d 856 (petitioner could not use motion for rectification/augmentation to request "*Floyd* type" hearing as method of introducing new evidence to habeas court concerning witness at his criminal trial where petitioner knew about evidence at time of habeas hearing), cert. denied, 314 Conn. 937, 102 A.3d 1114 (2014); *State* v. *Hamlin*, 90 Conn. App.

445, 453, 878 A.2d 374 (declining defendant's request to remand for *Floyd* hearing when record demonstrated that "defendant was aware, prior to both the suppression hearing and trial, that the holding cell conversation had occurred"), cert. denied, 276 Conn. 914, 888 A.2d 86 (2005).

The other cases upon which the petitioner relies are no more availing, as they involved requests for *articulation* and merely held that "a second review [of a denial of a request for articulation] is not required except when plenary review of the case on the merits of the appeal discloses that our earlier decision was ill considered, and that *further articulation is necessary* for the just determination of the appeal." (Emphasis added; internal quotation marks omitted.) *McClintock* v. *Rivard*, supra, 219 Conn. 425. In this case, the petitioner is not asking us to order an articulation that was previously denied by another panel of this court that did not hear the merits of the underlying appeal. Instead, by seeking to have us revisit our prior ruling on his motion for review of the habeas court's denial of his request to rectify or augment the record with additional transcripts and a court file that existed at the time of his habeas trial, the petitioner would have this court engage in what amounts to impermissible fact-finding. It is well settled that "[a]s a reviewing court, [w]e cannot act as a [fact finder] or draw conclusions of facts from the primary facts found, but can only review such findings to determine whether they could legally, logically and reasonably be found, thereby establishing that the trial court could reasonably conclude as it did." (Internal quotation marks omitted.) *Osborn* v. *Waterbury*, 197 Conn. App. 476, 482, 232 A.3d 134 (2020), cert. denied, 336 Conn. 903, 242 A.3d 1010 (2021). Moreover, were we to grant the petitioner's request and consider evidence that was not reviewed by the habeas court or by the state, even though the petitioner had the

opportunity to present such evidence, the result would be trial by ambuscade. See *Michael T.* v. *Commissioner of Correction*, 319 Conn. 623, 636 n.7, 126 A.3d 558 (2015) ("[a] party is ambushed when that party is deprived of a fair chance to defend a claim at the trial level and create a record for appeal" (internal quotation marks omitted)); *Ochoa* v. *Behling*, 221 Conn. App. 45, 50–51, 299 A.3d 1275 (2023) ("to permit a party to raise a claim on appeal that has not been raised at trial—after it is too late for the trial court . . . to address the claim—would encourage trial by ambuscade, which is unfair to both the trial court and the opposing party" (internal quotation marks omitted)); *State* v. *Hamlin*, supra, 90 Conn. App. 453 (The court denied the defendant's request to remand the case for a *Floyd* hearing because "[o]ur rules of procedure do not allow a defendant to pursue one course of action at trial and later, on appeal, argue that a path he rejected should now be open to him. . . . To rule otherwise would permit trial by ambuscade." (Internal quotation marks omitted.)).

The petitioner also argues that this court "can and should . . . take judicial notice of the additional Gomez transcript[s] and the statements recorded therein that evidence the existence of an agreement or understanding between Gomez and the state." In support of this argument, the petitioner points to *Ajadi* v. *Commissioner of Correction*, 280 Conn. 514, 911 A.2d 712 (2006), a case in which he claims the Supreme Court "took judicial notice of Superior Court transcripts and allowed them to serve as the factual predicate for a claim on appeal." Although the petitioner is correct that the court in that case took judicial notice of Superior Court transcripts, it did so in the absence of any objection from the respondent and not for the purpose of inferring facts from evidence that was not before the habeas court to determine whether the court's findings were clearly erroneous. In *Ajadi*, the petitioner learned

during the pendency of the appeal that the habeas judge had previously represented him as an attorney with respect to one of the criminal convictions underlying his petition for a writ of habeas corpus. See *Ajadi* v. *Commissioner of Correction*, supra, 522–23. The petitioner claimed on appeal that the habeas judge improperly failed to disqualify himself. Id., 523. In support of that claim, the petitioner requested, and the Supreme Court ultimately agreed, to take judicial notice of transcripts of his arraignment proceeding that conclusively established that the habeas judge previously had represented him. Id., 522 n.13.

The petitioner also cites to *State* v. *Gaines*, 257 Conn. 695, 778 A.2d 919 (2001), for the proposition that a court may "take judicial notice of transcripts from a separate case and [allow a party] to use the judicially noticed transcript as the basis for the factual premise of the [party's] argument on appeal . . . ." Id., 712 n.12. In *Gaines*, however, the court granted the state's motion to take judicial notice of transcripts from a prior case but, in granting the request, specifically stated that "this court is not a fact-finding tribunal. Thus, although we can take judicial notice of [the] request, we cannot infer [particular facts therefrom]." Id.

In this case, the petitioner asks us to do precisely what the court in *Gaines* said we cannot do: take judicial notice of materials for the purpose of weighing evidence and inferring facts. We therefore decline the petitioner's invitation to take judicial notice of the transcripts and court file from Gomez' criminal case.

The judgment is affirmed.

In this opinion the other judges concurred.

MARCELINO LASALLE, JR. *v.* COMMISSIONER OF CORRECTION
(AC 46325)

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

Syllabus

The petitioner, who had been convicted of murder, sought a writ of habeas corpus more than two years after the judgment had become final in the petitioner's previous state habeas action. The respondent, the Commissioner of Correction, sought an order to show cause pursuant to statute (§ 52-470 (d) and (e)), asserting that the petition was untimely. At the show cause hearing, the petitioner testified that he had been diagnosed with dyslexia and attention deficit disorder and that he had reading and writing difficulties. The habeas court dismissed the petition as untimely and denied the petition for certification to appeal. On the petitioner's appeal to this court, *held* that the habeas court did not abuse its discretion in denying the petition for certification to appeal following its determination that the petitioner had failed to establish good cause to overcome the statutory presumption of unreasonable delay in the filing of his untimely habeas petition: the habeas court did not find the petitioner's testimony as to his alleged mental deficiencies credible for the purpose of establishing good cause, and this court must defer to the credibility findings of the habeas court based on its firsthand observation of a witness' conduct, demeanor, and attitude; moreover, despite the petitioner's attempt in his appellate brief to explain how his alleged mental deficiencies contributed to the delay in filing his habeas petition, he did not make such an attempt before the habeas court, asserting only that his alleged mental deficiencies affected his ability to read and write and to understand the legal process, and the record revealed that he was able to file both a first state habeas petition and a federal habeas petition as a self-represented party while struggling with the same alleged deficiencies; furthermore, although he testified that he had previously relied on certain fellow inmates acting as jailhouse lawyers to help with filing petitions, the record was devoid of evidence or explanation as to why his alleged mental deficiencies prevented him from utilizing these jailhouse lawyers to file the present petition earlier than he did.

Argued May 16—officially released August 20, 2024

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of

Tolland, where the court, *Newson*, *J.*, rendered judgment dismissing the petition; thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court. *Appeal dismissed.*

Cheryl A. Juniewic, assigned counsel, for the appellant (petitioner).

Meryl R. Gersz, assistant state's attorney, with whom, on the brief, were *Paul J. Narducci*, state's attorney, and *Elizabeth Moseley*, senior assistant state's attorney, for the appellee (respondent).

Opinion

CRADLE, J. The petitioner, Marcelino LaSalle, Jr., appeals from the denial of his petition for certification to appeal from the judgment of the habeas court dismissing his petition for a writ of habeas corpus as untimely pursuant to General Statutes § 52-470 (d) and (e).[1] On appeal, the petitioner claims that the habeas

[1] General Statutes § 52-470 provides in relevant part: "(a) The court or judge hearing any habeas corpus shall proceed in a summary way to determine the facts and issues of the case, by hearing the testimony and arguments in the case, and shall inquire fully into the cause of imprisonment and thereupon dispose of the case as law and justice require. . . .

"(d) In the case of a petition filed subsequent to a judgment on a prior petition challenging the same conviction, there shall be a rebuttable presumption that the filing of the subsequent petition has been delayed without good cause if such petition is filed after the later of the following: (1) Two years after the date on which the judgment in the prior petition is deemed to be a final judgment due to the conclusion of appellate review or the expiration of the time for seeking such review; (2) October 1, 2014; or (3) two years after the date on which the constitutional or statutory right asserted in the petition was initially recognized and made retroactive pursuant to a decision of the Supreme Court or Appellate Court of this state or the Supreme Court of the United States or by the enactment of any public or special act. For the purposes of this section, the withdrawal of a prior petition challenging the same conviction shall not constitute a judgment. The time periods set forth in this subsection shall not be tolled during the pendency of any other petition challenging the same conviction. Nothing in this subsection shall create or enlarge the right of the petitioner to file a subsequent petition under applicable law.

"(e) In a case in which the rebuttable presumption of delay . . . applies, the court, upon the request of the respondent, shall issue an order to show

court abused its discretion in denying his petition for certification to appeal following its determination that the petitioner had failed to demonstrate good cause to overcome the statutory presumption of unreasonable delay for the filing of his untimely habeas petition. We disagree and, accordingly, dismiss the appeal.

The following procedural history is relevant to the petitioner's claim on appeal. Following a jury trial, the petitioner was convicted of one count of murder in violation of General Statutes § 53a-54a (a). *State* v. *LaSalle*, 95 Conn. App. 263, 265, 897 A.2d 101, cert. denied, 279 Conn. 908, 901 A.2d 1227 (2006). On July 19, 2004, the trial court sentenced him to fifty-three years of incarceration. This court affirmed his conviction; id., 279; and our Supreme Court denied his petition for certification to appeal. *State* v. *LaSalle*, 279 Conn. 908, 901 A.2d 1227 (2006). The petitioner, then a self-represented party, commenced his first habeas action on August 15, 2006, which was denied on April 29, 2011, after a trial during which he was represented by counsel. This court dismissed the petitioner's appeal from that decision; *LaSalle* v. *Commissioner of Correction*, 139 Conn. App. 910, 56 A.3d 763 (2012), cert. denied, 308 Conn. 916, 62 A.3d 527 (2013); and our Supreme Court, on March 13, 2013, denied his petition for certification to appeal from this court. *LaSalle* v. *Commissioner of Correction*, 308 Conn. 916, 62 A.3d 527 (2013).

In November, 2013, the petitioner commenced a federal habeas action as a self-represented party, and the

cause why the petition should be permitted to proceed. The petitioner or, if applicable, the petitioner's counsel, shall have a meaningful opportunity to investigate the basis for the delay and respond to the order. If, after such opportunity, the court finds that the petitioner has not demonstrated good cause for the delay, the court shall dismiss the petition. For the purposes of this subsection, good cause includes, but is not limited to, the discovery of new evidence which materially affects the merits of the case and which could not have been discovered by the exercise of due diligence in time to meet the requirements of subsection . . . (d) of this section. . . ."

United States District Court for the District of Connecticut denied his petition for a writ of habeas corpus in a memorandum of decision dated July 8, 2014.[2] *LaSalle* v. *Murphy*, United States District Court, Docket No. 3:13CV01703 (JBA) (D. Conn. July 8, 2014).

The petitioner commenced the present habeas action as a self-represented party on October 10, 2019, and filed an amended petition on May 7, 2021. On March 23, 2022, the respondent, the Commissioner of Correction, sought an order to show cause pursuant to § 52-470 (d) and (e), asserting that the petitioner's present habeas petition was filed more than two years after the judgment became final in the petitioner's previous habeas action. The habeas court, *Oliver*, *J.*, issued an order to show cause for the delay in filing the petition and, on December 16, 2022, the court, *Newson*, *J.*, held a hearing.

At the hearing, the petitioner, who was then represented by counsel, presented only his own testimony. He testified that he had been diagnosed with dyslexia and attention deficit disorder (ADD) and that, when he was first incarcerated, he could read only at "a first grade, second grade maybe, level" and he could not write. He testified, as to his dyslexia, that "a lot of times, I'll read, I'll try to read, and things will be backwards for me like numbers. A 69, I might see it as 96. And as far as sounds . . . something that might be an 'a' I think is an 'o' and stuff like that." As to his ADD, he testified that, "unless it's something that I really like—

[2] The statutory time period, pursuant to § 52-470 (d), for filing a subsequent habeas petition begins running on the date on which the judgment in the prior *state* habeas petition is deemed to be a final judgment; see General Statutes § 52-470 (d); which, in the petitioner's case, was March 13, 2013. The petitioner's federal habeas petition did not toll the running of the statutory time period. See *Felder* v. *Commissioner of Correction*, 348 Conn. 396, 404–405, 306 A.3d 1061 (2024) (concluding that phrase "prior petition" as used in § 52-470 (d) "unambiguously refers only to prior state habeas petitions" and does not include federal habeas petitions).

for instance, I like muscle cars. If I'm reading a magazine about muscle cars, I can focus in pretty good because I enjoy them so much. But if it's something that I don't like or don't understand, while I'm trying to understand, I got three other things in my head, you know, fighting for like attention."

He also testified that the law is "nothing I can comprehend. . . . I can't make heads or tails of it." He testified that, in filing both his state habeas petitions and his federal habeas petition, he "had somebody fill it out" for him. He referred to that person as a "legal beagle" and testified that "legal beagles" are other inmates who charge for their services and do not have law degrees, and he agreed that inmates are "at the mercy of their timeline."

The habeas court dismissed the petitioner's petition in a memorandum of decision dated January 17, 2023. The court reasoned that "the present action was commenced about three years and ten months beyond the statutory period.[3] . . . Notwithstanding [the petitioner's testimony], [he], although admitting he had help, was able to file his first habeas action as a self-represented person and also made glancing mention of pursuing some sort of federal action that was heard in New York. He also admits that he received information and assistance from jailhouse lawyers with preparing legal paperwork for his prior legal actions, but offered no reason why such assistance was unavailable to guide him after his prior habeas became final in December, 2013.[4] Finally, despite his claimed . . . lack of education and knowledge of the legal system, the petitioner

[3] The record reveals that the petitioner commenced the present habeas action approximately six years and seven months after the judgment in his first state habeas case became final, which is approximately four years and seven months after the statutory filing deadline under § 52-470 (d).

[4] The record reveals that the judgment in his prior state habeas became final on March 13, 2013, when our Supreme Court denied his petition for certification to appeal from this court.

was able to manage his way self-represented through a federal habeas corpus trial challenging his conviction. . . .

"[T]he petitioner offers no truly credible evidence of any external factors outside the control of the petitioner resulting in the present petition being filed nearly four years beyond the allowable two year period. The court finds that there has been no good cause for the delay. . . . [T]he petition for writ of habeas corpus is dismissed." (Citations omitted; emphasis omitted; footnotes added; internal quotation marks omitted.) The petitioner then filed a petition for certification to appeal from the habeas court's dismissal of his petition for writ of habeas corpus, which the habeas court denied. This appeal followed.

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

consider the merits of the petitioner's underlying claims to determine whether the habeas court reasonably determined that the petitioner's appeal was frivolous. In other words, we review the petitioner's substantive claims for the purpose of ascertaining whether those claims satisfy one or more of the three criteria . . . adopted by [our Supreme Court] for determining the propriety of the habeas court's denial of the petition for certification. . . .

"[A] habeas court's determination regarding good cause under § 52-470 (e) is reviewed on appeal only for abuse of discretion. Thus, [w]e will make every reasonable presumption in favor of upholding the trial court's ruling[s] . . . . In determining whether there has been an abuse of discretion, the ultimate issue is whether the court . . . reasonably [could have] conclude[d] as it did." (Citation omitted; internal quotation marks omitted.) *Canales* v. *Commissioner of Correction*, 216 Conn. App. 827, 832–33, 286 A.3d 936 (2022), cert. denied, 348 Conn. 905, 302 A.3d 295 (2023).

Here, it is undisputed that the petitioner untimely filed the present habeas petition. On appeal, the petitioner claims that the court abused its discretion by denying his petition for certification to appeal in that it had improperly determined that he did not establish good cause for his delay in filing the present habeas petition. Specifically, the petitioner argues that he demonstrated good cause by testifying that he had been diagnosed with dyslexia and ADD and had resultantly experienced reading and writing difficulties. His alleged diagnoses, he contends, "caused the perfect storm, resulting in his inability to advocate for himself, because he lacked the reading skills, focus and organizational skills necessary to comprehend the legal system and advocate for himself . . . ." He further argues that these "mental and intellectual limitations" led him "to . . . rely on the advice of so-called 'legal beagles' or

'jailhouse lawyers' . . . who did not graduate from law school . . . ." The petitioner asserts, in conclusion, that "[t]he mere fact that [he] admittedly suffers from dyslexia and [ADD] proves that both medical conditions . . . establish good cause pursuant to the criteria as defined in . . . § 52-470, in that external forces outside of the control of the petitioner caused the delay in the filing of his pro se petition . . . ."[5] We disagree.

"[T]o rebut successfully the presumption of unreasonable delay in § 52-470, a petitioner generally will be required to demonstrate that something outside of the

[5] The petitioner asserts three additional arguments that we need not address. First, in his reply brief and, through counsel, at oral argument before this court, he argued that he was ignorant of the filing deadline and that this, combined with his alleged mental deficiencies, established good cause for the delay in filing his petition. Although the petitioner testified during his habeas trial that he was unaware of § 52-470 and that he would have filed his petition sooner if he had been aware of the statutory deadline, he did not make an argument as to ignorance of the law in his principal appellate brief. Similarly, he also argued, in his reply brief, and, through counsel, at oral argument before this court, that he was not able to timely file his petition in part because "none of his prior attorneys discussed the timeline for the filing of successive habeas petitions . . . ." We decline to address either of these arguments, which were raised before this court only in the petitioner's reply brief; see *Lewis* v. *Commissioner of Correction*, 211 Conn. App. 77, 101, 271 A.3d 1058 ("arguments cannot be raised for the first time in a reply brief" (internal quotation marks omitted)), cert. denied, 343 Conn. 924, 275 A.3d 1213 (2022), and cert. denied sub nom. *Lewis* v. *Quiros*, U.S. , 143 S. Ct. 335, 214 L. Ed. 2d 150 (2022); and at oral argument. See *Traylor* v. *State*, 332 Conn. 789, 809 n.17, 213 A.3d 467 (2019) ("[r]aising a claim at oral argument is not . . . a substitute for adequately briefing that claim").

Last, the petitioner's counsel argued at oral argument before this court that the petitioner was "not a highly intelligent individual" and that he did not have the "wherewithal" to file the petition on his own. The petitioner did not, during his habeas trial, present evidence of his alleged lack of intelligence or argue that a lack of intelligence contributed to his delayed filing. We, therefore, decline to address this argument because it was not properly preserved for review. *Martinez* v. *Commissioner of Correction*, 221 Conn. App. 852, 860, 303 A.3d 1196 (2023) ("[a]ppellate review of newly articulated claim[s] not raised before the habeas court would amount to an ambuscade of the [habeas] judge" (internal quotation marks omitted)), cert. denied, 348 Conn. 939, 307 A.3d 273 (2024).

control of the petitioner or habeas counsel caused or contributed to the delay. . . . The following nonexhaustive list of factors aid in determining whether a petitioner has satisfied the definition of good cause: (1) whether external forces outside the control of the petitioner had any bearing on the delay; (2) whether and to what extent the petitioner or [his] counsel bears any personal responsibility for any excuse proffered for the untimely filing; (3) whether the reasons proffered by the petitioner in support of a finding of good cause are credible and are supported by evidence in the record; and (4) how long after the expiration of the filing deadline did the petitioner file the petition. . . .

"It is well established that for a mental disease or disorder to constitute good cause for an untimely petition for a writ of habeas corpus, a petitioner must demonstrate how [his] deficiencies contributed to the delay in filing [his] . . . habeas petition." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Canales* v. *Commissioner of Correction*, supra, 216 Conn. App. 835–36.

In the present case, the court found the petitioner's testimony as to his alleged mental deficiencies not credible for the purpose of establishing good cause, and "we must defer to the credibility findings of the habeas court based on its firsthand observation of a witness' conduct, demeanor, and attitude." *Jaynes* v. *Commissioner of Correction*, 216 Conn. App. 412, 425, 285 A.3d 412 (2022), cert. denied, 345 Conn. 972, 286 A.3d 906 (2023).

Moreover, despite the petitioner's attempt, in his appellate brief, to explain how his alleged dyslexia and ADD contributed to the delay in filing his habeas petition, he did not make such an attempt before the habeas court. During his habeas trial, the petitioner asserted only that his alleged mental deficiencies affected his

ability to read and write and to understand the legal process. The record reveals, however, that he was able to file both his first state habeas petition and his federal habeas petition as a self-represented party while struggling with the same alleged deficiencies.[6] It appears, therefore, that his alleged mental deficiencies were not so significant as to interfere with his ability to file a petition. See *Ortiz* v. *Commissioner of Correction*, 211 Conn. App. 378, 388, 272 A.3d 692 ("[i]t is unreasonable to infer that all mental deficiencies are so significant as to interfere with the ability to file a timely habeas petition"), cert. denied, 343 Conn. 927, 281 A.3d 1186 (2022). Although he testified that he had to rely on jailhouse lawyers for help filing, the record is devoid of evidence or explanation as to why his alleged mental deficiencies prevented him from utilizing these jailhouse lawyers to file the present petition earlier than he did. See *Velez* v. *Commissioner of Correction*, 203 Conn. App. 141, 147, 153, 247 A.3d 579 ("respondent argued that the petitioner's filing of his [previous] habeas actions as a self-represented party demonstrates that he was aware of how to file a [habeas] petition" and "[t]he petitioner responded that he was able to file the [previous] habeas petitions as a self-represented party only because he received help in drafting them," but court rejected petitioner's argument because he "offered no evidence as to why he was unable to obtain that same assistance in drafting and filing the [present] habeas petition prior to the . . . statutory deadline"), cert. denied, 336 Conn. 942, 250 A.3d 40 (2021). His

[6] The petitioner's assertion, on appeal, that he is unable to comprehend the legal system and advocate for himself is further belied by the record. The petitioner made an assertion, for example, in his amended habeas petition, that he is "usually articulate and well-spoken." The petitioner also demonstrated his ability to navigate the legal process and advocate for himself. At a hearing on July 13, 2022, where his previous habeas counsel was permitted to withdraw her appearance, the petitioner adeptly asked the court, "So, after hearing [my attorney] say . . . what she's going to do, do I need to request a new attorney or that's going to be taken care of?"

testimony that he was at the mercy of the timelines of jailhouse lawyers does not explain the significant length of his delay in filing the present petition—more than six and one-half years after a final judgment was reached in his first state habeas case and more than four and one-half years after the statutory deadline. On the basis of the foregoing, we cannot conclude that the court abused its discretion in determining that the petitioner failed to demonstrate good cause for his delay in filing the present habeas petition. Therefore, the court properly dismissed the petition in accordance with § 52-470 (d) and (e).

We note that this court has repeatedly rejected arguments, like the petitioner's, that mental deficiencies establish good cause for late filing of a habeas petition, in the absence of evidence or argument connecting those mental deficiencies with the delay in filing. See *Canales* v. *Commissioner of Correction*, supra, 216 Conn. App. 836–38 (because petitioner had "failed to provide the habeas court with any information connecting her . . . mental illness . . . with her failure to timely file her habeas petition," court did not abuse its discretion in determining that petitioner had failed to establish good cause to overcome statutory presumption of unreasonable delay); *Ortiz* v. *Commissioner of Correction*, supra, 211 Conn. App. 388–89 (rejecting petitioner's argument that his mental health issues and cognitive disabilities established good cause for late filing of habeas petition because petitioner "did not provide the habeas court with any insight into how or whether the . . . deficiencies . . . affected the filing of the petition" and because there was "no authority upon which the court was bound to infer that any deficiency documented . . . caused or contributed to the untimely filing"); *Velez* v. *Commissioner of Correction*, supra, 203 Conn. App. 146, 153 (rejecting petitioner's argument that his "working memory deficits, poor

deployment of attention, and executive dysfunction" established good cause for delay in filing his second habeas petition, because he presented no evidence of how his mental deficiencies contributed to delay in filing (internal quotation marks omitted)).

The petitioner argues that his case is distinguishable from *Canales* and *Ortiz*, because his "mental . . . deficiencies were so pronounced that he was unable to draft and file a pro se petition without . . . assistance . . . ." He also argues that *Velez* is distinguishable because the petitioner in *Velez* "had a higher level of functioning . . . ." Even assuming that these cases are distinguishable in the ways the petitioner contends, he was still required to demonstrate how his alleged deficiencies contributed to the significant delay in filing his habeas petition. See *Canales* v. *Commissioner of Correction*, supra, 216 Conn. App. 836. Given the petitioner's failure to make the requisite connection between his alleged mental deficiencies and his late filing of the present petition, we cannot conclude that the resolution of the petitioner's claims involves issues that are debatable among jurists of reason, that a court could resolve in a different manner, or that are adequate to deserve encouragement to proceed further. Accordingly, the habeas court did not abuse its discretion in denying the petitioner's petition for certification to appeal.

The appeal is dismissed.

In this opinion the other judges concurred.

KATHRYN A. BRIGGS *v.* DAVID L. BRIGGS
(AC 46158)

Cradle, Suarez and Clark, Js.

Syllabus

The plaintiff appealed to this court from the judgment of the trial court dissolving her marriage to the defendant and issuing various orders. *Held*:

1. The trial court did not err in awarding the defendant the entirety of his limited partnership interest in S Co., which had been issued to the defendant by his former employer as part of his compensation: the court expressly stated that it considered the factors listed in the applicable statute (§ 46b-81) in dividing the marital property, and it explained its consideration of several of those factors; moreover, contrary to the plaintiff's claim that the court treated the defendant's interest in S Co. as an "income-producing asset," it was clear from the court's decision that it understood that the defendant's interest was comprised of his past earnings and it treated that interest as property; furthermore, the court was not required to evenly divide the marital property, and its other financial orders sufficiently provided for the plaintiff's future financial support.
2. The trial court did not abuse its discretion in establishing the parenting schedule for the parties' four minor children: contrary to the plaintiff's contention, the court was not required to adopt one of the parenting schedules proposed by the parties or the guardian ad litem, as the wishes and desires of the parties comprised only one factor for the court's consideration; moreover, it was evident that the court carefully considered the proposed schedules and all of the testimony presented in establishing a schedule that it deemed to be in the best interests of the children.
3. This court declined to review the plaintiff's claim that the trial court erred in its orders concerning decision-making authority and expenses related to the extracurricular activities of the parties' children, the plaintiff having raised the claim for the first time on appeal.

Argued May 23—officially released August 20, 2024

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk and tried to the court, *Moukawsher, J.*; judgment dissolving the marriage and granting certain other relief, from which the plaintiff appealed to this court. *Affirmed.*

Dana M. Hrelic, with whom was *Stacie L. Provencher*, for the appellant (plaintiff).

Dyan M. Kozaczka, with whom was *Ross M. Kaufman*, for the appellee (defendant).

Opinion

CRADLE, J. The plaintiff, Kathryn A. Briggs, appeals from the judgment of the trial court dissolving her marriage to the defendant, David L. Briggs. On appeal, the plaintiff claims that the court erred in (1) awarding to the defendant the entirety of his interest in Sunriver Fund, LP (Sunriver Fund);[1] (2) establishing a parenting schedule unsupported by the evidence and in contrast to the schedules suggested by both parties; and (3) issuing orders concerning final decision-making authority as to the children's extracurricular activities. We affirm the judgment of the trial court.

The following facts, which are either undisputed or were found by the trial court, and procedural history are relevant to our consideration of the claims on appeal. The parties were married in 2007 and have four minor children born issue of the marriage. The plaintiff commenced this action for dissolution on June 3, 2020.

By way of a memorandum of decision filed on November 9, 2022, following a trial at which both parties and the children's guardian ad litem testified, the court, *Moukawsher, J.*, rendered judgment dissolving the parties' marriage. The court ordered that the parties would share joint legal and physical custody of the children and that they would have a parenting schedule that gave each of them parenting time on both the weekdays and the weekends. The court reasoned that its schedule, which was different than the schedules proposed by the parties, would prevent the defendant from being a "weekend dad," as the plaintiff had essentially proposed, and that it would require fewer transitions from one household to the other, which the court found was better for the children than the multiple transitions

[1] The Sunriver Fund is an entity through which the defendant's former employer provides incentive fees and bonuses to its employees in the form of carried interest.

proposed by the defendant. The court awarded decision-making authority over the children's extracurricular activities to one party for spring/fall and to the other for summer/winter with the seasons rotated on an annual basis, despite the plaintiff's request that the parties be required to agree upon all extracurricular activities.

In issuing its financial orders, the court found that the defendant had learned during the pendency of the dissolution proceedings that he would be terminated from his then employment with Sunriver Capital Management on November 30, 2022, and, upon the termination of his employment, the defendant was to redeem in cash the entirety of his interest in the Sunriver Fund, which consisted primarily of bonuses paid as carried interest. The court awarded the entirety of the defendant's interest to him, observing that "it is the money that [the defendant] periodically takes as a capital gain to create the annual income that he is to share with [the plaintiff]" and that "[h]e will keep this money—even though he must take it out of [the] Sunriver [Fund]—so [that] she can keep getting a portion of it."

Despite the defendant's impending unemployment, the court attributed to him an earning capacity of $1.5 million per year, one half of which would likely be taxed as capital gains, leaving him $915,000 per year in after-tax income. The court found that, during the pendency of the dissolution action, the defendant had taken out a mortgage on the marital residence to purchase the plaintiff a $1.4 million home outright. The court ordered that the plaintiff, who stayed home with the parties' four children, would keep the new house and that the defendant would retain the marital residence, along with the debt associated therewith. The court awarded the plaintiff $6000 per month in child support[2] until the

[2] Specifically, the court explained: "It finds the presumptive amount in agreement with [the plaintiff's] guideline calculation of $921 a week or $3991 a month. Because the court rejects her suggestion that she receive additional

parties' youngest children turn eighteen years old and $3230.77 per week in alimony until November, 2031. In issuing this alimony order, the court rejected several of the expenses the plaintiff listed on her financial affidavit.

On November 28, 2022, the plaintiff filed a motion to reargue/reconsider focused solely on the court's parenting schedule, which the court, *Moukawsher*, *J.*, summarily denied. This appeal followed.

On January 9, 2023, the plaintiff timely appealed. Subsequently, on June 9, 2023, she filed a motion for articulation of the court's dissolution judgment, to which the defendant objected. The court, *Moukawsher*, *J.*, denied the plaintiff's motion, adopting the reasoning provided in the defendant's objection, which will be discussed herein as necessary.

Before turning to the plaintiff's claims on appeal, we first set forth our standard of review and other applicable legal principles. "[T]he standard of review in family matters is well settled. An appellate court will not disturb a trial court's orders in domestic relations cases unless the court has abused its discretion or it is found that it could not reasonably conclude as it did, based on the facts presented. . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action. . . . Appellate review of a trial court's findings of fact is governed by the clearly erroneous standard of review.

child support as a percentage of [the defendant's] income, it agrees with her that a deviation from the guidelines is merited by the high cost of living in Darien, where both parties live. Therefore, from roughly $4000 a month in child support the court deviates upward to $6000 a month in child support, modifiable but payable until the youngest children [who are twins] become eighteen years old. The deviation includes any adjustment that might otherwise be merited by the parenting time ordered below." Neither party has challenged the child support order on appeal.

. . . 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 deferential standard of review, however, does not extend to the court's interpretation of and application of the law to the facts. It is axiomatic that a matter of law is entitled to plenary review on appeal. . . . As has often been explained, the foundation for [our deferential] standard is that the trial court is in a clearly advantageous position to assess the personal factors significant to a domestic relations case . . . ." (Citation omitted; internal quotation marks omitted.) *F. S.* v. *J. S.*, 223 Conn. App. 763, 785, 310 A.3d 961 (2024). With these principles in mind, we address the plaintiff's claims in turn.

I

The plaintiff first claims that the court erred in awarding the defendant the entirety of his interest in the Sunriver Fund. We disagree.

On November 4, 2022, prior to trial, the parties filed with the court a joint list of stipulated facts pertaining to, inter alia, the Sunriver Fund. They stipulated: "The defendant is currently employed at Sunriver Capital Management in Greenwich, Connecticut but received notice that he will be terminated from Sunriver Capital Management effective November 30, 2022. . . . The defendant's compensation from Sunriver Capital Management consisted of wages, bonuses and incentive fees. Incentive fees were received through Sunriver GP, [LLC] and are transferred from Sunriver [GP, LLC] to [the] Sunriver Fund . . . . The defendant's [limited partnership] interests in [the] Sunriver Fund . . . and Sunriver GP, LLC, will be redeemed, incident to his termination, at the capital balance as of October 31,

2022. . . . The defendant will receive a payment from the redemption of his [limited partnership] interests in [the] Sunriver Fund . . . and Sunriver GP, LLC, not later than November 30, 2022, which payment will be taxable to the defendant at ordinary income tax rates and investment [tax rates]. . . . The defendant's capital account balance for . . . [the] Sunriver Fund . . . as of August 31, 2022, was $4,348,621."[3]

In issuing its financial orders, the court, as noted, attributed to the defendant an earning capacity of $1.5 million per year. After noting that the defendant had purchased a home for the plaintiff, the court posited: "What other property is available to divide?" The court found that the defendant had "around $182,000 in the bank, $546,000 in stocks, bonds and the like, and around $1.2 million in retirement plans" and ordered the parties to divide those assets equally. The court then explained: "[The plaintiff] also wants [one] half of [the defendant's] interest in [the] Sunriver Fund . . . . His interest in [the] Sunriver Fund . . . is where his carried interest resides. It was in his prior employer's fund and carried over to his most recent employer. It is the money that he periodically takes as a capital gain to create the annual income that he is to share with [the plaintiff]. He will keep this money—even though he must take it out of [the] Sunriver [Fund]—so she can keep getting a portion of it. This money will not be counted when the parties divide accounts under the earlier provisions of this order . . . ." The court indicated that it "will leave [the defendant] the rest of his business interests as well. They aren't nearly as substantial, and the court is satisfied that its other orders have provided [the plaintiff] with reasonable funds to make a future with."

In the plaintiff's June 9, 2023 motion for articulation, the plaintiff asked the court to articulate, inter alia,

[3] According to the defendant's financial affidavit, his interest in the Sunriver Fund had a net value of $2,117,431.

whether it considered the defendant's interest in the Sunriver Fund to be property pursuant to General Statutes § 46b-81, and, if not, why not. The plaintiff also asked the court to articulate the factual and legal bases for its order awarding the entire interest in the Sunriver Fund to the defendant "for the express purpose of paying his support despite assigning [him] an earning capacity."

In his objection to the plaintiff's motion for articulation, the defendant asserted that there was no ambiguity in the court's memorandum of decision that warranted articulation. Specifically, as to the plaintiff's requests for articulation regarding the court's orders pertaining to the Sunriver Fund, the defendant argued that there was no ambiguity in the court's decision in that "[t]here has never been a dispute that the interest in [the] Sunriver Fund . . . is property. The court acknowledged it was property and both parties acknowledged the same in their proposed orders." The defendant also argued that there is no ambiguity as to the legal and factual bases for the court's award of the interest in the Sunriver Fund to him. Specifically, the defendant recounted: "The court found that the money in [the] Sunriver Fund . . . 'is the money that [the defendant] periodically takes as a capital gain to create the annual income he is to share with [the plaintiff].' . . . Additionally, the court found that '[the defendant] can expect around $1,500,000 of annual income in the years to come.' . . . 'The percentage of his income that comes in the form of capital gains has varied in recent years. The court believes it likely that 50 percent of his income—$750,000—will continue to receive capital gains treatment . . . .'" (Citations omitted.) The defendant further noted that "[t]he court also provided the legal basis for [its] orders when it stated as follows: 'None of the court's rulings . . . will reflect automatic assumptions about gender roles nor will they reflect

percentage property division assumptions that may pertain in community property states but not in this state. Instead, our General Statutes §§ 46b-81 and 46b-82 create a fact flexible scheme for considering alimony and property distributions that focuses on what the parties contributed to the marriage, the length of the marriage, the parties' needs, their ages, their health, along with their prospects of making money and acquiring property as shaped by their opportunities, their education, and their work experience. This needed to be said here because several of the factors happen to yield some outcomes that conform to old stereotypes about how courts craft their orders, but they come to that based on these unique facts, not because they fit most circumstances.' . . . [T]he trial court is required to consider the statutory criteria, as the court expressly acknowledged [that] it did . . . . The court has provided both factual and legal bases for its decision and there is no ambiguity that needs clarification." (Citations omitted.) The court summarily denied the plaintiff's motion for articulation and expressly stated that it "agrees with and adopts the reasoning of the objection to articulation filed by [the defendant]."

The following legal principles govern our resolution of the plaintiff's challenge to the court's order pertaining to the defendant's interest in the Sunriver Fund. "In dissolution proceedings, the court must fashion its financial orders in accordance with the criteria set forth in . . . § 46b-81 (division of marital property) . . . . Pursuant to § 46b-81 (c), the court shall consider the length of the marriage, the causes for the annulment, dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income. The court shall also

consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates. . . .

"While the trial court must consider the delineated statutory criteria . . . no single criterion is preferred over others, and the court is accorded wide latitude in varying the weight placed upon each item under the peculiar circumstances of each case. . . . A trial court . . . need not give each factor equal weight . . . or recite the statutory criteria that it considered in making its decision or make express findings as to each statutory factor. . . .

"Importantly, § 46b-81 (a) permits the farthest reaches from an equal division as is possible, allowing the court to assign to either the husband or wife all or any part of the estate of the other. . . . On the basis of the plain language of § 46b-81, there is no presumption in Connecticut that marital property should be divided equally prior to applying the statutory criteria. . . . Additionally, [i]ndividual financial orders in a dissolution action are part of the carefully crafted mosaic that comprises the entire asset reallocation plan. . . . Under the mosaic doctrine, financial orders should not be viewed as a collection of single disconnected occurrences, but rather as a seamless collection of interdependent elements. . . . [W]e will not disturb a trial court's orders in domestic relations cases unless the court has abused its discretion or it is found that it could not reasonably conclude as it did, based on the facts presented." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Pencheva-Hasse* v. *Hasse*, 221 Conn. App. 113, 129–30, 300 A.3d 1175 (2023).

"[W]hen a trial court states in its memorandum of decision that it has considered the factors listed in § 46b-81 (c) in fashioning an order distributing marital

property, the judge is presumed to have performed [his or her] duty unless the contrary appears [from the record].'' (Internal quotation marks omitted.) *Kammili* v. *Kammili*, 197 Conn. App. 656, 672, 232 A.3d 102, cert. denied, 335 Conn. 947, 238 A.3d 18 (2020).

We first note that the court expressly stated that it considered the factors listed in § 46b-81 and expressly explained its consideration of several of them. Therefore, at the outset, we presume that the court properly fulfilled its mandate to equitably distribute the marital assets. The plaintiff nevertheless challenges the court's award of the entirety of the defendant's interest in the Sunriver Fund to the defendant.

The plaintiff's challenge to the court's award of the defendant's interest in the Sunriver Fund is twofold. First, the plaintiff argues that the court's order was based on an erroneous factual finding that the Sunriver Fund " 'create[s] the annual income' " that the defendant needs to satisfy the financial orders. The plaintiff argues that the court erroneously found that the Sunriver Fund was, and treated it as, an " 'income producing asset . . . .' " This argument merits little discussion. It is clear from the court's decision that it understood that the defendant's interest in the Sunriver Fund was comprised of the defendant's past earnings and, accordingly, treated his interest in the fund as property in awarding it to him. The court confirmed this when it expressly adopted the rationale in the defendant's objection to the plaintiff's request for articulation, wherein the defendant posited that the court found that his interest in the Sunriver Fund was property. We thus reject the plaintiff's contention that the court erroneously characterized and treated the defendant's interest in the Sunriver Fund as an income producing asset when it awarded it to the defendant.[4]

[4] The plaintiff argues that the court's allegedly erroneous finding was the sole basis for the court's order awarding the interest in the Sunriver Fund in its entirety to the defendant. This argument is belied by the court's express

The plaintiff also argues that the court's award of the defendant's entire interest in the Sunriver Fund to the defendant "results in an inequitable windfall to the defendant" that constituted an abuse of its discretion. The plaintiff contends that the court erred in awarding the defendant his interest in the Sunriver Fund in its entirety because it had "divided all other marital property mostly equally between the parties." She contends that the court only mentioned § 46b-81 at the beginning of its decision and that it failed to "expressly state that it considered all of the statutory criteria at any point in its decision." As stated previously in this opinion, it is well established that the court was not required to do so. The court also thoroughly explained the basis for its financial orders, citing many of those statutory factors that the plaintiff complains the court did not consider, including the parties' respective ages, employability and contributions to the marriage.

The plaintiff complains that the court's financial orders, particularly its award of the entire interest in the Sunriver Fund to the defendant, "precludes [her] from meeting the existing standard of living to which she and her family were accustomed." (Emphasis omitted.) The plaintiff's argument ignores the court's other financial orders that provided for her future financial support. First, the defendant took out a mortgage on the marital residence, his home going forward, to purchase a new home for the plaintiff in Darien, where the parties lived during the marriage, that was unencumbered by a mortgage. The court ordered that the plaintiff would retain that home for herself, free and clear of any claim by the defendant. Although the defendant retained the marital home, that home now was encumbered by a substantial mortgage that did not exist prior to the commencement of this action. Thus, not only did

consideration of several of the enumerated statutory factors that govern the distribution of marital property.

the plaintiff receive $1.4 million of marital assets by virtue of that transaction, but the defendant assumed a liability in that amount. The court also deviated from the child support guidelines on the basis of the high cost of living in Darien, the location of the unencumbered home that the defendant purchased for the plaintiff, and awarded the plaintiff $2000 per month more child support than contemplated by the guidelines. The court also awarded the plaintiff a significant amount of periodic alimony. The court found that the defendant had "around $182,000 in the bank, $546,000 in stocks, bonds and the like, and around $1.2 million in retirement plans," which he ordered the parties to divide equally.

In short, this is not a case in which the plaintiff was left with nothing, and, as stated herein, the court was not required to split the marital assets equally. See *O'Brien* v. *O'Brien*, 326 Conn. 81, 122–23, 161 A.3d 1236 (2017) (court upheld property distribution ratio of 78 percent to 22 percent); *Sweet* v. *Sweet*, 190 Conn. 657, 664, 462 A.2d 1031 (1983) (court upheld distribution awarding 90 percent of marital estate to one party). Given the entire mosaic of the court's financial orders, we are not persuaded by the plaintiff's argument that the court's orders were inequitable. Accordingly, we conclude that the court did not abuse its discretion in awarding the defendant the entirety of the interest in the Sunriver Fund.

II

The plaintiff next claims that the court erred in establishing a parenting schedule that was "unsupported by the evidence and in contrast to the schedules suggested by both parties."[5] We disagree.

[5] The three parenting schedules proposed to the court, one by each party and one by the guardian ad litem, all provided for shared legal and physical custody of the minor children and shared several similarities.

In considering the parties' access to the minor children, the court set forth the following facts. "The parties and the [guardian ad litem] agree that the . . . children are stable and adaptable. The parties will have joint legal and physical custody of their four children . . . .

"The children have been splitting time between their parents' homes for around two years while the divorce has been pending. Under the agreement they made during the lawsuit, they spend more weekday time with [the plaintiff] and more weekend time with [the defendant].

"[The plaintiff] has more time with the children now, but she does have more time for them. [The defendant] has more time than he used to, but he still does not have the unlimited time [that the plaintiff] does.

"Naturally, [the plaintiff] has this free time only because [the defendant] labors to create it for her. Doubtless, he resents that his obligation to do this also puts him in a subordinate position as a parent. He might even see this subordination as a kind of competition between them that [the plaintiff] wants to win. And perhaps it is. [The plaintiff] is a good parent. In most ways a reasonable parent. But parenting is her only job, and she wants to dominate it. If true, this isn't good for the children, and it isn't fair to [the defendant].

"Dividing time here is a tough question. Perhaps [the plaintiff] should dominate the children's schedule because she does have more time for them. But perhaps she is keeping the children too much from being part of [the defendant's] everyday world, including his work obligations and their school obligations. Indeed, while the [guardian ad litem] leaned toward the existing schedule with a minor difference, she fully acknowledged the reasonableness of the [defendant's] view and felt the children would fully adapt to it or any other reasonable approach.

"In the end, the court thinks [the plaintiff's] proposed schedule leaves [the defendant] a weekend dad. But [the defendant's] schedule shifts the children around too much. It makes some sense that both parents enjoy weekend time with the children, but his version of it means they can't settle in with a parent for a continuous stretch of days. They bounce around more. This happens too with the [plaintiff's] suggestion of periodic dinners with [the defendant] on Mondays. The court believes that fewer transitions are better and that it is good when those transitions can happen mostly at school to reduce the chilly interactions between the parties the court has heard about."

The court then set forth a parenting schedule rotating every two weeks, which provided more weekday parenting time to the plaintiff and more weekend parenting time with the defendant.[6] The court explained: "This schedule will be simple for the children to learn. It will keep them together for longer blocks with each parent. [The defendant] does get a lot of his time on the weekend, but [the plaintiff] picks up a Sunday and [the defendant] increases his weekday time."[7]

In the plaintiff's June 9, 2023 motion for articulation, the plaintiff asked the court to articulate, inter alia,

[6] Specifically, the court ordered the following parenting schedule:

"Week one:

"[The Plaintiff]: Monday from 9 a.m. or pickup at school on school days until 9 a.m. on Thursday or drop off at school on school days. ([The plaintiff] has three overnights).

"[The Defendant]: Thursday from 9 a.m. or pick up from school on school days to Monday at school drop off on school days or 9 a.m. ([The defendant] has four overnights).

"Week two:

"[The Plaintiff]: Sunday at 9 a.m. until 9 a.m. on Thursday or drop off at school on school days. ([The plaintiff] has four overnights).

"[The Defendant]: Thursday from pickup at school on school days or 9 a.m. to Sunday at 9 a.m. ([The defendant] has three overnights)."

[7] The court also issued orders as to holidays and vacation, which are not at issue in this appeal.

the factual and legal bases for its finding that " 'fewer transitions are better' " for the minor children. The defendant filed an objection to the plaintiff's motion, arguing, as to the particular request, that "[t]he [plaintiff] testified herself that 'it is most important for our children to have structure and stability and less transitions . . . .' " He further argued that the plaintiff "also testified that 'our children do best without a lot of transitions.' . . . Additionally, the guardian ad litem testified that, 'based on my conversations with the children's therapists, any schedule that's predictable and has, you know, a limited number of transitions is in their best interest.' . . . It is disingenuous for the [plaintiff] to make assertions to the court that, in turn, the court accepts and essentially adopts and then seek the factual basis for the court subscribing to her own claims. . . . The [plaintiff's] attempt to change her position from trial on appeal is disingenuous and there is no ambiguity for the court to clarify. Therefore, articulation of this issue is unnecessary." (Citations omitted.) As noted herein, the court summarily denied the plaintiff's motion for articulation and expressly stated that it "agrees with and adopts the reasoning of the objection to articulation filed by [the defendant]."

The plaintiff claims on appeal that the court's order was improper in that it was not requested by either party or the guardian ad litem[8] and it was not supported by the evidence. Our Supreme Court has explained that "[it] has consistently held in matters involving child custody [and visitation] . . . that while the rights, wishes and desires of the parents must be considered it is nevertheless the ultimate welfare of the child [that] must control the decision of the court. . . . In making this determination, the trial court is vested with broad

[8] On November 16, 2022, the court issued the following order: "The trial having concluded and with no motions remaining regarding custody, the appointment of the guardian ad litem is hereby terminated."

discretion which can . . . be interfered with [only] upon a clear showing that that discretion was abused. . . . Thus, a trial court's decision regarding child custody [or visitation] must be allowed to stand if it is reasonably supported by the relevant subordinate facts found and does not violate law, logic or reason. . . . Under [General Statutes] § 46b-56 (c), the court, in determining custody, must consider the best interests of the child and, in doing so, may consider, among other factors, one or more of the [seventeen] factors enumerated in the provision.[9]

[9] General Statutes § 46b-56 (c) provides: "In making or modifying any order as provided in subsections (a) and (b) of this section, the court shall consider the best interests of the child, and in doing so, may consider, but shall not be limited to, one or more of the following factors: (1) The physical and emotional safety of the child; (2) the temperament and developmental needs of the child; (3) the capacity and the disposition of the parents to understand and meet the needs of the child; (4) any relevant and material information obtained from the child, including the informed preferences of the child; (5) the wishes of the child's parents as to custody; (6) the past and current interaction and relationship of the child with each parent, the child's siblings and any other person who may significantly affect the best interests of the child; (7) the willingness and ability of each parent to facilitate and encourage such continuing parent-child relationship between the child and the other parent as is appropriate, including compliance with any court orders; (8) any manipulation by or coercive behavior of the parents in an effort to involve the child in the parents' dispute; (9) the ability of each parent to be actively involved in the life of the child; (10) the child's adjustment to his or her home, school and community environments; (11) the length of time that the child has lived in a stable and satisfactory environment and the desirability of maintaining continuity in such environment, provided the court may consider favorably a parent who voluntarily leaves the child's family home pendente lite in order to alleviate stress in the household; (12) the stability of the child's existing or proposed residences, or both; (13) the mental and physical health of all individuals involved, except that a disability of a proposed custodial parent or other party, in and of itself, shall not be determinative of custody unless the proposed custodial arrangement is not in the best interests of the child; (14) the child's cultural background; (15) the effect on the child of the actions of an abuser, if any domestic violence, as defined in section 46b-1, has occurred between the parents or between a parent and another individual or the child; (16) whether the child or a sibling of the child has been abused or neglected, as defined respectively in section 46b-120; and (17) whether the party satisfactorily completed participation in a parenting education program estab-

"[T]he authority to exercise the judicial discretion [authorized by § 46b-56] . . . is not conferred [on our appellate courts], but [on] the trial court, and . . . we are not privileged to usurp that authority or to substitute ourselves for the trial court. . . . A mere difference of opinion or judgment cannot justify our intervention. Nothing short of a conviction that the action of the trial court is one [that] discloses a clear abuse of discretion can warrant our interference." (Citations omitted; footnote added; internal quotation marks omitted.) *Zhou* v. *Zhang*, 334 Conn. 601, 632–33, 223 A.3d 775 (2020). "[T]rial courts have a distinct advantage over an appellate court in dealing with domestic relations, where all of the surrounding circumstances and the appearance and attitude of the parties are so significant. . . . It is a rare case in which a disappointed litigant will be able to demonstrate abuse of a trial court's broad discretion in . . . matters [concerning the care and custody of children]." (Citations omitted; internal quotation marks omitted.) *Yontef* v. *Yontef*, 185 Conn. 275, 279, 440 A.2d 899 (1981).

In challenging the parenting schedule ordered by the court, the plaintiff argues that "the court's decision appears to elevate its own wisdom above not only the respective positions of the parties but also that of the guardian ad litem." She complains that the parenting schedule ordered by the court "was created of its own volition." This argument ignores the fundamental principle that it is the court's role and responsibility to determine the best interests of the minor children. A court's failure to do so would constitute a dereliction of its statutory duty. The plaintiff's claim that the court should have adopted a parenting schedule that was suggested by one of the parties or the guardian ad litem

lished pursuant to section 46b-69b. The court is not required to assign any weight to any of the factors that it considers, but shall articulate the basis for its decision."

finds no support in the law. At trial, the court was presented with three proposed parenting schedules, one from each party and one from the guardian ad litem. The plaintiff testified that she did not believe that the schedule proposed by the guardian ad litem was in the children's best interests. She likewise did not support the defendant's proposed schedule. Thus, the plaintiff's real complaint is that the court did not order her proposed schedule. It is axiomatic that the court was not required to do so. As noted previously in this opinion, the wishes and desires of the parents are only one factor for the court's consideration and that factor is overridden by the court's consideration of the best interests of the children, which the court expressly considered.

The plaintiff's claim that the court's schedule was unsupported by the record also is misplaced. As the defendant noted in his objection to the plaintiff's request for articulation, the plaintiff and the guardian ad litem both testified that the children would fare best under a schedule with fewer transitions, and the court credited that testimony and established a parenting schedule that minimized transitions. Additionally, the plaintiff testified that she was better suited to meeting the children's weekday needs and providing the structure and routine that they need during the school week whereas the defendant "shines" on the weekends. She repeatedly emphasized that she is very organized and ensures that the children have the structured routine that they need during the school week. She also testified that her schedule is flexible and allows her to adapt to changes that occur in the children's schedules. She stated that she was proposing that the defendant get "a disproportionate amount of the weekend parenting time" just as he had by way of the pendente lite schedule. She testified that it was important for the defendant to have more weekend time with the children than she

because "[h]is parenting skills during downtime are very strong" and the children enjoy spending their downtime with the defendant.

On the basis of the testimony of the parties and the guardian ad litem, we cannot conclude that the parenting schedule ordered by the court was unsupported by the evidence. Although the schedule ordered by the court was not the exact schedule that either party requested and leaves the plaintiff with minimal weekend time with the children, it is evident from the court's decision that it carefully considered the schedules proposed by the parties and the guardian ad litem and all of the testimony presented and ordered a schedule that it deemed to be in the best interests of the children. We cannot conclude that the court abused its discretion in doing so.

III

The plaintiff also claims that the court erred by alternating final decision-making authority as to the children's extracurricular activities evenly between the parties because it also required the parties to equally divide the costs of all the children's extracurricular activities rather than only those expenses on which they mutually agreed.[10]

[10] General Statutes § 46b-56a provides in relevant part: "(a) For the purposes of this section, 'joint custody' means an order awarding legal custody of the minor child to both parents, providing for joint decision-making by the parents and providing that physical custody shall be shared by the parents in such a way as to assure the child of continuing contact with both parents. The court may award joint legal custody without awarding joint physical custody where the parents have agreed to merely joint legal custody.

* * *

"(d) In any proceeding before the Superior Court involving a dispute between the parents of a minor child with respect to the custody, care, education and upbringing of such child, the parents shall file with the court, at such time and in such form as provided by rule of court, a proposed parental responsibility plan that shall include, at a minimum, the following: (1) A schedule of the physical residence of the child during the year; (2) provisions allocating decision-making authority to one or both parents regarding the child's health, education and religious upbringing; (3) provi-

In the proposed orders that the defendant filed with the court and at trial, the defendant asked the court to issue an order affording each party an opportunity to be the final decision maker as to the children's participation in extracurricular activities if they could not come to an agreement. In her trial testimony, the guardian ad litem also recommended that the court issue such an order. In the plaintiff's proposed orders, she proposed that the parties equally share the cost of any agreed upon extracurricular activities. She did not propose any order as to decision-making authority.

In its memorandum of decision, the court explained: "Sometimes the parties can't agree on extracurricular activities and camps. The court agrees with the [guardian ad litem] that alternating final decision-making authority can work here because the parties are both reasonable. Therefore, when they can't agree, in odd years [the plaintiff] will make final decisions about fall and spring activities and [the defendant] will make final decisions about winter and summer activities. Each year they will switch the two seasons allocated to them. The parties will evenly divide all extracurricular expenses."

The plaintiff argues that the court should have put a cap on the cost of extracurricular activities and that the court's order is not fair to her because the defendant

sions for the resolution of future disputes between the parents, including, where appropriate, the involvement of a mental health professional or other parties to assist the parents in reaching a developmentally appropriate resolution to such disputes; (4) provisions for dealing with the parents' failure to honor their responsibilities under the plan; (5) provisions for dealing with the child's changing needs as the child grows and matures; and (6) provisions for minimizing the child's exposure to harmful parental conflict, encouraging the parents in appropriate circumstances to meet their responsibilities through agreements, and protecting the best interests of the child.

"(e) The objectives of a parental responsibility plan under this section are to provide for the child's physical care and emotional stability, to provide for the child's changing needs as the child grows and to set forth the authority and responsibility of each parent with respect to the child. . . ."

has more money than she does to pay for the extracurricular activities and allowing him to have final decision-making authority for one half of each year as to which activities the children will participate in exposes her to a financial burden that improperly diminishes the court's child support order. The plaintiff did not, however, raise these arguments before the trial court. Despite the fact that this issue was clearly raised by the defendant, in both his proposed orders and at trial, and the guardian ad litem,[11] the plaintiff did not, at any time, express opposition to or concern with the imposition of such an order. She did not argue that she would be unduly burdened by an order affording both parties the opportunity to make the final decisions as to the children's extracurricular activities, nor did she ask the court to issue an order imposing a cap on the cost of the children's extracurricular activities. We therefore decline to review this claim that the plaintiff is raising for the first time on appeal.[12] *Dessa, LLC* v.

[11] At trial, the guardian ad litem testified: "The one addition I would make to the joint legal custody paradigm is I would include language that provides for either [the plaintiff] or [the defendant] in an alternating way to be final decision makers over extracurricular activities for the children should they be unable to reach consensus so that there isn't a stalemate with regard to what activities the children can participate in.

"The [defendant] has suggested a paradigm that I think the court should adopt, which is one that provides for an alternating schedule based on spring and summer activities—or, I'm sorry—winter and summer activities with one parent and fall and spring activities with the other and then flipping on the alternate year so that there would be . . . an alternating schedule." She explained: "I'm hoping that they can work cooperatively. It's really a fallback default protocol. You know, they have to work cooperatively to reach consensus and if they can't, then there's a fallback."

[12] The plaintiff argues that "[t]he court did not articulate the reasons for its orders, including why it did not establish a cap on the fees for any particular extracurricular activity or require that all extracurricular activities be agreed upon by the parties, despite being asked to by the plaintiff." In so arguing, the plaintiff cites to her motion for articulation and her motions for review of the denial of her motion for articulation. Contrary to the plaintiff's representation, she did not, in either of those filings, ask the court to articulate its order pertaining to extracurricular activities.

Riddle, 223 Conn. App. 457, 464, 308 A.3d 1051 (2024) ("It is well known that this court is not bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial. Practice Book § 60-5. The requirement that [a] claim be raised distinctly means that it must be so stated as to bring to the attention of the court the precise matter on which its decision is being asked. . . . The reason for the rule is obvious: to permit a party to raise a claim on appeal that has not been raised at trial—after it is too late for the trial court . . . to address the claim—would encourage trial by ambuscade, which is unfair to both the trial court and the opposing party." (Internal quotation marks omitted.)).

The judgment is affirmed.

In this opinion the other judges concurred.

KEREN PRESCOTT *v.* YULIYA GILSHTEYN
(AC 46350)

Alvord, Seeley and Bear, Js.

Syllabus

The plaintiff filed an application for a prejudgment remedy and a verified complaint in which she sought to recover damages from the defendant for assault, battery, intentional infliction of emotional distress and intimidation based on bigotry or bias. The plaintiff, a Black woman who suffered from multiple sclerosis, was attending a protest at the Capitol building in January, 2021, in the midst of the COVID-19 pandemic, to demonstrate her support of the Black Lives Matter movement. The defendant, a white woman, approached the plaintiff and, inter alia, asked her about "Black on Black" crime. After a brief exchange of words between the parties, the defendant spat directly into the plaintiff's face. During the hearing on her application, the plaintiff, inter alia, introduced testimony from G, a professor of criminology and social justice, as an expert on issues related to racism and social justice. The trial court granted the application, and the defendant appealed to this court. *Held*:

1. The trial court did not err in awarding the plaintiff a prejudgment remedy of $75,000 in emotional distress damages; the plaintiff's testimony that she experienced severe emotional distress and humiliation as a result

of being spat on, that the experience reawakened trauma of a past sexual assault, and that she had increased concerns that she might contract COVID-19, which could worsen her multiple sclerosis symptoms, afforded a reasonable basis for the prejudgment remedy.

2. The trial court did not abuse its discretion in admitting G's expert testimony: pursuant to the standard set forth in *Weaver* v. *McKnight* (313 Conn. 393) for the admission of nonscientific evidence, the court found that G had special knowledge that was directly applicable to the matter at issue, his testimony offered the court a historical and sociological perspective on race and racism that would not have been within the knowledge of the average person, and his testimony providing context for how the defendant's statements could be construed was helpful to the court in its determination of whether the defendant exhibited racial bigotry or bias; moreover, the defendant's challenges to the admission of G's testimony in part concerned the substance of G's testimony, which related to the weight his testimony should be given and not its admissibility.

3. This court concluded that there was sufficient evidence before the trial court to support its determination that there was probable cause to believe that the defendant's actions and/or statements were motivated in whole or substantial part by the plaintiff's race: G's testimony, which was properly admitted and was credited by the trial court, explained how some of the defendant's language could be interpreted as racist tropes indicating a racist attitude; moreover, the trial court reasonably could have determined that a person of ordinary judgment could conclude that the white defendant's conduct in spitting on the Black plaintiff was motivated in substantial part by race, as evidence showed that the defendant moved toward the plaintiff after the plaintiff began chanting, "Black lives matter," stood directly next to the plaintiff, and used the phrases "Black on Black" crime and "all lives matter," which could suggest the defendant had a level of racial animus.

4. The defendant could not prevail on her unpreserved claim that the trial court committed plain error in granting the plaintiff's application for a prejudgment remedy in a case involving freedom of speech and first amendment principles: this case involved allegations against the defendant for her conduct in spitting on the plaintiff, not for making a verbal threat, and the court used the defendant's statements made just prior to the spitting incident solely to help determine her intent and whether she was motivated in whole or part by the plaintiff's race; moreover, the defendant did not demonstrate that the claimed error was so clear, obvious, and indisputable as to warrant the extraordinary remedy of reversal, as there are no exceptions within the statutes (§§ 52-278c and 52-278d) governing prejudgment remedies for cases involving first amendment principles.

Argued February 6—officially released August 20, 2024

Procedural History

Action to recover damages for, inter alia, intimidation based on bigotry or bias, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Budzik*, *J.*, granted the plaintiff's application for a prejudgment remedy, and the defendant appealed to this court. *Affirmed.*

Norman A. Pattis, for the appellant (defendant).

Kenneth J. Krayeske, for the appellee (plaintiff).

Opinion

SEELEY, J. The defendant, Yuliya Gilshteyn, appeals from the judgment of the trial court granting the application for a prejudgment remedy filed by the plaintiff, Keren Prescott, upon findings of probable cause that the defendant committed a civil assault and battery against the plaintiff, that the defendant intentionally inflicted emotional distress on the plaintiff, that the defendant maliciously and intentionally harassed and intimidated the plaintiff by spitting in the plaintiff's face and that her actions in doing so were motivated, in whole or in substantial part, by the plaintiff's race. On appeal, the defendant claims that the court (1) improperly determined that the plaintiff was entitled to a prejudgment remedy in the amount of $295,239.60, (2) abused its discretion in permitting testimony from the plaintiff's expert concerning the racist import of certain statements made by the defendant, and (3) committed plain error in granting the plaintiff's application for a prejudgment remedy in a case involving freedom of speech and first amendment principles. We disagree and affirm the judgment of the court.

In its memorandum of decision granting the plaintiff's application for a prejudgment remedy, the court made the following factual findings and credibility determinations. "[The plaintiff] is a forty-one year old [Black]

woman. She suffers from Multiple Sclerosis (MS) and is immunocompromised. [The plaintiff] is a sexual assault survivor [and] . . . testified that stress and viral infections can produce an increase or flare-up of her MS condition. [The plaintiff] testified that two members of her family have died from MS. On January 6, 2021, [the plaintiff] attended a political protest at the Connecticut State Capitol building with her friend Melina Floyd-Torres. Both [the plaintiff] and . . . Floyd-Torres describe themselves as activists who frequently attend protests to demonstrate against racism and espouse the views of the Black Lives Matter movement and an organization called PowerUp CT. January 6, 2021, was the date that Connecticut state legislators were due to be sworn in for their new terms at the Capitol building. Neither [the plaintiff] nor . . . Floyd-Torres was involved in organizing the protest at the Capitol building on January 6. Nevertheless, [the plaintiff] and . . . Floyd-Torres decided to attend the protest because they saw it as an opportunity to express their views to state legislators and to the public. Upon entering the Capitol grounds on January 6, [the plaintiff] and . . . Floyd-Torres made their way through the crowd to the north side front entrance to the Capitol building. While they were walking, and throughout the entire time period relevant to this memorandum of decision, [the plaintiff] and . . . Floyd-Torres were videotaping their actions and surroundings with their iPhones, as well as live streaming their actions and what they were seeing via Facebook. [The plaintiff] and . . . Floyd-Torres made their way to a metal 'bicycle' fence surrounding the exterior of the Capitol building. Upon arriving at the fencing, [the plaintiff] began using a bullhorn or megaphone to loudly shout slogans such as 'Black lives matter,' 'racism is a public health crisis,' and other similar statements.

"[The defendant] is an approximately forty year old Caucasian woman [and] . . . is Jewish. [The defendant] is originally from Lithuania but immigrated to the United States when she was a teenager shortly after the fall of the Soviet Union. [The defendant] experienced instances of persecution and antisemitism in the Soviet Union, and such experiences were among the reasons she immigrated to the United States. [The defendant] also has experienced antisemitism in the United States. [The defendant] has two young children, one of whom is a baby. [The defendant] supports the ideas of the medical freedom movement, which, as relevant to this memorandum of decision, generally opposes medical mandates such as required vaccinations and masking requirements. [The defendant] found out about the January 6 protest at the state Capitol building via Facebook and attended the protest in order to express her support for the ideas of the medical freedom movement.

"At the time [the plaintiff] and . . . Floyd-Torres began shouting their slogans, [the defendant] was also at the metal 'bicycle' fence and about twenty feet to [the right of the plaintiff] and . . . [Floyd-Torres] . . . . Four people separated [the defendant] from [the plaintiff] and . . . Floyd-Torres, who were standing together along the metal fence. At all times relevant to this memorandum of decision, [the defendant] was holding one of her children, a baby, who was strapped to the front of [the defendant], wrapped in a blanket, and facing inward.

"On the videos of the incident at issue, [the defendant] can be seen standing along the metal fence and looking in the direction of [the plaintiff] as [the plaintiff] shouts, 'Black lives matter' and similar slogans into her megaphone. Another protestor (not [the defendant]) can be heard on the video shouting, 'All lives matter.' After a short period of time (forty seconds or so), [the defendant] can be seen leaving her previous position

at the metal fence and walking over to stand next to . . . Floyd-Torres. [The plaintiff] was standing next to . . . Floyd-Torres. At the prejudgment remedy hearing, [the defendant] testified that she moved toward . . . Floyd-Torres and [the plaintiff] because she was concerned that [the plaintiff's] loud shouts regarding Black Lives Matter were overshadowing what [the defendant] understood as the protest's intended purpose of espousing support for the medical freedom movement. The court credits [the defendant's] testimony on this point.

"The videos of the incident show that when [the defendant] walked over to stand next to . . . Floyd-Torres . . . Floyd-Torres was wearing a mask [and] [the plaintiff] was wearing a mask and glasses. [The defendant] was not wearing a mask. At this point, [the defendant] leaned over to . . . Floyd-Torres and asked . . . Floyd-Torres about 'Black on Black crime.' [The plaintiff] responded that there is no such thing as 'Black on Black crime' and asked [the defendant] why she did not ask about 'white on white crime.'[1] [The defendant] responded that she is more of a minority than either . . . Floyd-Torres or [the plaintiff].[2] [The defendant] then used her hand to push . . . Floyd-Torres' megaphone away from [the defendant].[3] . . . Floyd-Torres

[1] "The court accepted Professor Charles Gallagher as an expert on sociology and issues related to racism and criminal justice. Professor Gallagher testified that the phrases 'all lives matter' and 'Black on Black crime' can be seen as racist tropes indicating that individuals who use those phrases may hold racist attitudes. The court credits Professor Gallagher's testimony on these points."

[2] "[The defendant] testified that she was referring to her understanding that the Jewish population of the United States is smaller than the [Black] population of the United States. The court credits [the defendant's] testimony on this point. The court also credits the testimony of [the plaintiff] and . . . Floyd-Torres that they were unaware on January 6, 2021, that [the defendant] [is] Jewish."

[3] "[The defendant] testified that, given . . . Floyd-Torres' continued shouting through her megaphone, [the defendant] was concerned about potential damage to her child's hearing and that she and her views were

and [the plaintiff] shouted through their megaphones at [the defendant] to back away from them. More words were exchanged between the parties. [The plaintiff] shouted through her megaphone at [the defendant] to 'back the fuck up' and remarked that [the defendant] was unmasked. [The plaintiff] continued shouting her slogans [and] . . . again shouted through her megaphone at [the defendant] to back up. . . . Floyd-Torres shouted through her megaphone at [the defendant] to back up and remarked that [the defendant] was unmasked and had a baby. [The defendant], who had essentially remained stationary since walking over to . . . Floyd-Torres' and [the plaintiff's] position, took a step forward toward the metal fence. [The plaintiff] again shouted through her megaphone at [the defendant] to back up and remarked that [the defendant] was unmasked. [The defendant] turned suddenly toward [the plaintiff], spat directly into [the plaintiff's] face, and walked away hurriedly.

"[The plaintiff] was struck by [the defendant's] spit on her mask, glasses, and megaphone. [The defendant] testified that she was spitting at [the plaintiff's] megaphone, not at [the plaintiff's] person. The court does not credit [the defendant's] testimony on this point. The court concludes, as a factual matter, that [the defendant] intended to spit at and on [the plaintiff]. [The plaintiff] testified that she experienced severe emotional distress as a result of being spat upon by [the defendant]. [The plaintiff] testified that she experienced severe emotional distress over increased concerns that she may contract COVID-19,[4] emotional distress over

being, in effect, shouted down. The court credits the second reason proffered by [the defendant] but not the first."

[4] "The court takes judicial notice that COVID-19 can be transmitted through saliva. See https://www.cdc.gov/coronavirus/2019-ncov/your-health/about-covid-19/basics-covid19.html."

We note that the website address visited by the trial court is no longer available. We also note, however, that "factual findings . . . are squarely within the trial court's purview [and] we afford them great deference."

concerns that COVID-19 might worsen her MS, humiliation over being spat upon in public, and that the bodily violation of being spat upon reawakened the trauma of her past sexual assault. The court credits [the plaintiff's] testimony.[5]

"After [the defendant] spat on [the plaintiff] and walked away hurriedly, [the plaintiff] and . . . Floyd-Torres pursued [the defendant]. A small crowd began to form. Some members of the crowd appeared to want to protect [the defendant] from [the plaintiff] and . . . Floyd-Torres, while some members of the crowd appeared to want [the defendant] detained. In the midst of this somewhat chaotic scene, [the defendant] can be heard to say on the videotape, 'Get these crazy Black Lives Matter activists away from me.' Police eventually arrived on the scene, and sometime later that day, [the defendant] was arrested. The time period between when [the defendant] approached [the plaintiff] and . . . Floyd-Torres and when [the defendant] spat on [the plaintiff] and walked away is approximately one minute." (Footnote altered; footnote omitted; footnotes in original.)

The plaintiff subsequently brought this action by filing an application for a prejudgment remedy along with a verified complaint. The verified complaint has four counts and alleges claims for assault, battery, intentional infliction of emotional distress, and intimidation based on bigotry or bias pursuant to General Statutes § 52-571c.[6] A remote hearing was held on the plaintiff's

(Internal quotation marks omitted.) *Kazemi* v. *Allen*, 214 Conn. App. 86, 108, 279 A.3d 742 (2022), cert. denied, 345 Conn. 971, 286 A.3d 906 (2023).

[5] "The court credits the counseling bills submitted by [the plaintiff]. . . ."

[6] General Statutes § 52-571c provides in relevant part: "(a) Any person injured in person or property as a result of an act that constitutes a violation of section 53a-181j, 53a-181k or 53a-181*l* may bring a civil action against the person who committed such act to recover damages for such injury.

"(b) In any civil action brought under this section in which the plaintiff prevails, the court shall award treble damages and may, in its discretion, award equitable relief and a reasonable attorney's fee. . . ."

application over the course of four nonconsecutive days, at which the court took into evidence fourteen exhibits, which included three videos showing the incident at issue. Following the hearing, the court issued a memorandum of decision dated March 15, 2023, in which it granted the plaintiff's application for a prejudgment remedy in the amount of $295,239.60. In its decision, the court made probable cause findings as to each of the counts of the verified complaint. Specifically, with respect to the counts alleging assault and battery, the court found that there was probable cause that "[the defendant] committed a civil assault and battery against [the plaintiff]" when the defendant "caused her spit to land on [the plaintiff's] person." Next, the court found probable cause that the defendant "intentionally inflicted emotional distress on [the plaintiff]" when the defendant "intentionally spat in [the plaintiff's] face—an outrageous act that goes beyond all possible bounds of decency . . . ." The court further found that the defendant knew that what she had done would cause the plaintiff to suffer emotional distress, and that was "particularly so in the midst of a global pandemic wherein the deadly virus at issue can be transmitted to other persons through an infected person's saliva." The court specifically credited the plaintiff's testimony that she suffered emotional distress as a result of the incident.

Pursuant to General Statutes § 53a-181k (a), "[a] person is guilty of intimidation based on bigotry or bias in the second degree when such person maliciously, and with specific intent to intimidate or harass another person or group of persons motivated in whole or in substantial part by the actual or perceived race, religion, ethnicity, disability, sex, sexual orientation or gender identity or expression of such other person or group of persons, does any of the following: (1) Causes physical contact with such other person or group of persons . . . ."

Although the legislature has amended § 53a-181k since the events underlying this case; see Public Acts 2021, No. 21-78, § 18; that amendment has no bearing on the merits of this appeal. In the interest of simplicity, all references herein are to the current revision of the statute.

Finally, the court made a finding that probable cause existed that "[the defendant] maliciously and intentionally harassed and intimidated [the plaintiff] by intentionally spitting in [the plaintiff's] face and that [the defendant's] actions in so doing were motivated, in whole or in substantial part, by [the plaintiff's] race. In making this finding, the court relie[d] on the following specific facts. [The plaintiff] is [Black]. [The defendant] is white. [The plaintiff] was actively expressing her support for the Black Lives Matter movement at the time in question. After hearing [the plaintiff] express her support for the Black Lives Matter movement, [the defendant] intentionally left her initial position at the metal fence and walked over to stand next to [the plaintiff]. Upon reaching [the plaintiff] and . . . Floyd-Torres, [the defendant] immediately expressed her disagreement with [the plaintiff's] views by using what an expert witness testified is a racist trope—asking about so-called 'Black on Black crime.' Seconds later, [the defendant] spat on [the plaintiff]. Stated plainly, when a white person spits on a Black person while that Black person is expressing views in support of the Black Lives Matter movement, and the white person disputes those views by expressing a racist trope, a person of ordinary judgment would, at a minimum, entertain the idea that the white person's decision to spit on the Black person was motivated in substantial part by race." In reaching this conclusion, however, the court noted that it was not expressing a "view on whether the facts found by the court . . . meet the standard of preponderance of the evidence."

After considering any defenses, counterclaims or setoffs, the court concluded that the damages suffered by the plaintiff primarily were for emotional distress. It awarded the plaintiff a prejudgment remedy in the amount of $75,000 for emotional distress damages. In light of the court's finding of probable cause to sustain

count four alleging a violation of § 52-571c, the court trebled the damages award to $225,000. Thereafter, the court concluded that there was probable cause that the plaintiff incurred $5700 in expenses when seeking counseling regarding the incident and trebled that amount, for a total of $17,100 in economic damages. Finally, the court awarded the plaintiff $53,139.60 in attorney's fees. The total amount of the prejudgment remedy awarded is $295,239.60. This appeal followed. Additional facts and procedural history will be set forth as necessary.

Before addressing the claims raised on appeal, we first set forth the law governing prejudgment remedies and our limited standard of review in such cases. "A prejudgment remedy means any remedy or combination of remedies that enables a person by way of attachment, foreign attachment, garnishment or replevin to deprive the defendant in a civil action of, or affect the use, possession or enjoyment by such defendant of, his property prior to final judgment . . . . General Statutes § 52-278a (d). A prejudgment remedy is available upon a finding by the court that there is probable cause that a judgment in the amount of the prejudgment remedy sought, or in an amount greater than the amount of the prejudgment remedy sought, taking into account any defenses, counterclaims or set-offs, will be rendered in the matter in favor of the plaintiff . . . . General Statutes § 52-278d (a) (1). . . . Proof of probable cause as a condition of obtaining a prejudgment remedy is not as demanding as proof by a fair preponderance of the evidence. . . . The legal idea of probable cause is a bona fide belief in the existence of the facts essential under the law for the action and such as would warrant a [person] of ordinary caution, prudence and judgment, under the circumstances, in entertaining it. . . . Probable cause is a flexible common sense standard. It does not demand that a belief be correct or more likely true

than false. . . . Under this standard, the trial court's function is to determine whether there is probable cause to believe that a judgment will be rendered in favor of the plaintiff in a trial on the merits. . . . *TES Franchising, LLC* v. *Feldman*, 286 Conn. 132, 136–37, 943 A.2d 406 (2008).

"Section 52-278d (a) explicitly requires that a trial court's determination of probable cause in granting a prejudgment remedy include the court's taking into account any defenses, counterclaims or set-offs . . . . Therefore, it is well settled that, in determining whether to grant a prejudgment remedy, the trial court must evaluate both parties' evidence as well as any defenses, counterclaims and setoffs. . . . Such consideration is significant because a valid defense has the ability to defeat a finding of probable cause. . . . Id., 141.

"As for our standard of review, our Supreme Court has stated that an appellate court's role on review of the granting of a prejudgment remedy is very circumscribed. . . . In its determination of probable cause, the trial court is vested with broad discretion which is not to be overruled in the absence of clear error. . . . Since *Augeri* [v. *C. F. Wooding Co.*, 173 Conn. 426, 429, 378 A.2d 538 (1977)] . . . we have consistently enunciated our standard of review in these matters. In the absence of clear error, this court should not overrule the thoughtful decision of the trial court, which has had an opportunity to assess the legal issues which may be raised and to weigh the credibility of at least some of the witnesses. . . . [On appeal], therefore, we need only decide whether the trial court's conclusions were reasonable under the clear error standard. . . . *TES Franchising, LLC* v. *Feldman*, supra, 286 Conn. 137–38. Additionally, we do not conduct a plenary review of the merits of defenses . . . raised, but rather our review is confined to a determination of whether the trial court's finding of probable cause constitutes clear error."

(Emphasis omitted; internal quotation marks omitted.) *Konover Development Corp.* v. *Waterbury Omega, LLC*, 214 Conn. App. 648, 657–58, 281 A.3d 1221, cert. denied, 345 Conn. 919, 284 A.3d 627 (2022).

I

The defendant's first claim is that the court improperly awarded the plaintiff a prejudgment remedy in the amount of $75,000 for emotional distress. Specifically, the defendant argues that there is little to no evidence supporting the plaintiff's claim of emotional distress "other than [her] self-serving statements [as] an activist," which were not sufficient to meet her burden of establishing the extent of her damages. We do not agree.

The following additional facts are relevant to the defendant's claim. In its memorandum of decision, the court stated that, "[i]n setting an appropriate initial emotional distress damage amount, [it] relie[d] on the following facts. [The plaintiff] was spat upon in public. The court also [found], as set forth [previously], that [the plaintiff] was spat upon because she is [Black]. The court credit[ed] [the plaintiff's] testimony that these events are deeply humiliating to [her], caused [her] severe emotional distress, and reawakened trauma related to a prior sexual assault. Additionally, [the plaintiff] is immunocompromised as a result of her MS diagnosis, and, on January 6, 2021, Connecticut was still in the midst of the COVID-19 pandemic. COVID-19 can be spread by saliva, and a COVID-19 diagnosis for [the plaintiff] would not only be emotionally distressing in and of itself but especially so for [the plaintiff] because COVID-19 could aggravate [the plaintiff's] preexisting MS, a disease that [she] had seen kill two of her family members. [The plaintiff] also had to wait a period of time before a test could confirm [that] she was COVID-19 negative."

We next set forth general legal principles that guide our resolution of this claim. "Generally, a trial court [must] make a probable cause determination as to both the validity of the plaintiff's claim and the amount of the remedy sought . . . ." (Internal quotation marks omitted.) *J.E. Robert Co.* v. *Signature Properties, LLC*, 309 Conn. 307, 339, 71 A.3d 492 (2013). In the present case, the defendant's claim as to the emotional distress damages concerns the latter. "[A]lthough the likely amount of damages need not be determined with mathematical precision . . . the plaintiff bears the burden of presenting evidence [that] affords a reasonable basis for measuring her loss . . . ." (Internal quotation marks omitted.) Id., 339–40; see also *Burkert* v. *Petrol Plus of Naugatuck, Inc.*, 5 Conn. App. 296, 301, 497 A.2d 1027 (1985) ("damages need not be established with precision but only on the basis of evidence yielding a fair and reasonable estimate" (internal quotation marks omitted)). Moreover, trial courts have "broad legal discretion in awarding emotional distress damages"; *Commission on Human Rights & Opportunities ex rel. Cortes* v. *Valentin*, 213 Conn. App. 635, 656, 278 A.3d 607, cert. denied, 345 Conn. 962, 285 A.3d 389 (2022); and in our very limited review of the granting of a prejudgment remedy, we are mindful that the trial court, "[i]n its determination of probable cause . . . is vested with broad discretion which is not to be overruled in the absence of clear error." (Internal quotation marks omitted.) *TES Franchising, LLC* v. *Feldman*, supra, 286 Conn. 137. We, therefore, do not examine the court's decision under an abuse of discretion standard but, rather, "need only decide whether the trial court's conclusions were reasonable under the clear error standard." (Internal quotation marks omitted.) Id., 138. "[T]he clear error standard in this context is a heightened standard of deference that exceeds the level of deference afforded under the abuse of discretion

standard. Therefore, this court will overrule the trial court's determination on a prejudgment remedy only if we are left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Landmark Investment Group, LLC* v. *Calco Construction & Development Co.*, 141 Conn. App. 40, 50, 60 A.3d 983 (2013).

In *Giordano* v. *Giordano*, 39 Conn. App. 183, 664 A.2d 1136 (1995), this court explained that "[a]n award of damages for emotional distress may be valid even though it is not substantially based on incurred medical expenses. *Berry* v. *Loiseau*, 223 Conn. 786, 811, 614 A.2d 414 (1992). A plaintiff may recover damages in a personal injury action for pain and suffering *even when such pain and suffering is evidenced exclusively by the plaintiff's subjective complaints*. . . . [There is] no reason to subject a claim of mental suffering, which is ordinarily evidenced by subjective complaints, to stricter scrutiny or greater care than a claim of physical suffering evidenced by the same type of complaints. . . . Plaintiffs claiming damages as a result of emotional distress are *not* required to present expert medical testimony or psychiatric bills to substantiate their claims of noneconomic damages such as pain and suffering. . . . This rule also applies to other areas of tort law where noneconomic damages are claimed. See, e.g., *Harris* v. *Forklift Systems, Inc.*, 510 U.S. 17, [22, 25], 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993) (holding that in cases alleging discriminatory work environment, there cannot be a mathematically precise test, noting in concurrence that the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment. . . . It suffices to prove that a reasonable person subjected to the discriminatory conduct would feel as the plaintiff did . . . . [Ginsberg, J., concurring])." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Giordano* v. *Giordano*,

supra, 207–208. As a result, we rejected a claim of the defendant in that case "that because noneconomic damages cannot be estimated as precisely as economic damages, prejudgment remedies are inappropriate in emotional distress cases. The defendant's case is not, as he implies, the first case where a prejudgment remedy has been awarded in a claim for noneconomic damages. The very nature of some civil claims *makes the amount of a prejudgment remedy award a reasonable estimation rather than an estimation of reasonable certainty*." (Emphasis added.) Id., 208.

Similarly, in *Commission on Human Rights & Opportunities ex rel. Cortes* v. *Valentin*, supra, 213 Conn. App. 654–56, this court rejected a claim that there was insufficient evidence to support an award of emotional distress damages when the award was based on the testimony of the intervening plaintiff alone. In doing so, we noted that, "[i]n garden variety emotional distress claims, the evidence of mental suffering is generally limited to the testimony of the plaintiff." (Internal quotation marks omitted.) Id., 655; see also *Patino* v. *Birken Mfg. Co.*, 304 Conn. 679, 707, 41 A.3d 1013 (2012) (same).

"Viewing the evidence before the court in the light most favorable to the plaintiff"; *Alpha Beta Capital Partners, L.P.* v. *Pursuit Investment Management, LLC*, 193 Conn. App. 381, 453, 219 A.3d 801 (2019), cert. denied, 334 Conn. 911, 221 A.3d 446 (2020), and cert. denied, 334 Conn. 911, 221 A.3d 446 (2020); as we are required to do, we conclude that the court's prejudgment remedy award of damages for emotional distress was not clear error. Although the defendant describes as self-serving the plaintiff's testimony concerning the humiliating nature of the incident and the emotional distress she claims to have suffered as a result, the court specifically found credible the plaintiff's testimony that she experienced severe emotional distress as a result of

being spat upon by the defendant and due to increased concerns that she may contract COVID-19 and that contracting COVID-19 might worsen her MS. The court also found credible her testimony that she felt "humiliation over being spat upon in public, and that the bodily violation of being spat upon reawakened the trauma of her past sexual assault."[7] It is not the role of an appellate court to disturb that credibility determination. See *Companions & Homemakers, Inc.* v. *A&B Homecare Solutions, LLC*, 348 Conn. 132, 148, 302 A.3d 283 (2023) ("[i]n a case tried before a court, the trial judge is the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony" (internal quotation marks omitted)); *Deutsche Bank AG* v. *Sebastian Holdings, Inc.*, 346 Conn. 564, 594 n.9, 294 A.3d 1 (2023) ("[The trial] court, as the trier of fact and thus the sole arbiter of credibility, was free to accept or reject, in whole or in part, the testimony offered by either party. . . . Questions of whether to believe or to disbelieve a competent witness are beyond our review." (Citation omitted; internal quotation marks omitted.)). Moreover, the court reasonably could have inferred from that testimony that her emotional distress resulted from the incident with the defendant. See *Commission on Human Rights & Opportunities ex rel. Cortes* v. *Valentin*, supra, 213 Conn. App. 655 ("[i]t is the right of the trier of fact to draw reasonable and logical inferences from the facts that it finds to be proved" (internal quotation marks omitted)).

[7] Specifically, the plaintiff testified that her "biggest triggers" for her MS "are stress." When asked what are the emotional and physical reactions that she has suffered since the incident, she responded, "a lot of crying . . . [a] lot of embarrassment . . . [a] lot of public humiliation." She also described being in "[a] lot of physical pain" starting about a week after the incident when she "started noticing patches of [her] hair coming out in different parts of [her scalp]," and that she believed it was from stress. As a result, she went to her doctor, who diagnosed her with shingles. Thereafter, she suffered a flare-up of her MS. Further, the plaintiff testified that she has incurred expenses for therapy needed related to the incident, and that the incident felt like "attempted murder" to her.

The plaintiff's testimony, therefore, afforded a reasonable basis for the prejudgment remedy of $75,000 in emotional distress damages. See *Carrol* v. *Allstate Ins. Co.*, 262 Conn. 433, 448, 815 A.2d 119 (2003) (jury reasonably could have concluded that plaintiff suffered emotional distress on basis of plaintiff's testimony that "he could not sleep, had frequent nightmares, had a loss of appetite, and experienced depression and a sense of isolation from his community because of the investigation" by defendant insurer into origins of fire at plaintiff's home); *Iino* v. *Spalter*, 192 Conn. App. 421, 477–78, 218 A.3d 152 (2019) ("[a] plaintiff may recover damages in a personal injury action for pain and suffering even when such pain and suffering is evidenced exclusively by the plaintiff's subjective complaints" (internal quotation marks omitted)). As the plaintiff established a reasonable basis for the court's conclusions regarding emotional distress, its decision to award a prejudgment remedy of $75,000 for emotional distress was not clear error.

II

The defendant's next claim concerns the court's admission of expert testimony from Charles A. Gallagher, a professor of sociology and criminal justice at LaSalle University, concerning issues of race and the racial import of certain statements made by the defendant—specifically, the defendant's statement that "all lives matter" and reference to "Black on Black crime." First, the defendant argues that Gallagher's testimony should not have been admitted into evidence because Gallagher, as a nonscientific expert, did not have any special skill or knowledge directly applicable to the matter in issue, which concerned the defendant's intent at the time she spat on the plaintiff, he "had nothing but attenuated general knowledge of the discussion of race in the United States," and he offered no meaningful assistance to the court given that his testimony shed

no light on the defendant's intent. Second, the defendant argues that there was no evidence that the defendant's statements "were inspired by racial animus other than the highly conjectural and virtually meaningless testimony of [Gallagher]," whose testimony should not have been permitted, and that, in the absence of that testimony, the plaintiff offered no evidence establishing that the defendant's conduct was motivated by a specific intent to intimidate and harass the plaintiff on account of her race, as required to treble the damages under § 52-571c. We disagree with both claims and address them in turn.

A

The following additional facts are relevant to the defendant's claim concerning the admission of Gallagher's testimony. Following the first two days of the hearing on the plaintiff's application for a prejudgment remedy, the defendant filed a motion on July 1, 2022, to preclude Gallagher's expert testimony. The court denied the motion in a written order dated July 25, 2022. In that order, the court determined that the proffered expert testimony was not scientific in nature[8] and, thus,

[8] In her motion to preclude the expert testimony, the defendant also requested a hearing pursuant to *State* v. *Porter*, 241 Conn. 57, 80–90, 698 A.2d 739 (1997), cert. denied, 523 U.S. 1058, 118 S. Ct. 1384, 140 L. Ed. 2d 645 (1998), to determine the admissibility of the proffered expert testimony. In *Porter*, our Supreme Court "followed the United States Supreme Court's decision in *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and held that testimony based on scientific evidence should be subjected to a flexible test to determine the reliability of methods used to reach a particular conclusion. . . . A *Porter* analysis involves a two part inquiry that assesses the reliability and relevance of the witness' methods." (Internal quotation marks omitted.) *State* v. *Raynor*, 337 Conn. 527, 529 n.2, 254 A.3d 874 (2020). The trial court in the present case denied the defendant's request, concluding that, because Gallagher's testimony was not scientific in nature, no *Porter* hearing was required. In her appellate brief, the defendant makes a passing reference to the court's determination that Gallagher's testimony was not scientific in nature and asserts that it constituted clear error. In her appellate brief, the plaintiff asserts that the defendant's claim that a *Porter* hearing was required is inadequately briefed. We agree with the plaintiff. "We repeatedly

was subject to admissibility under the standard set forth in *Weaver* v. *McKnight*, 313 Conn. 393, 405–406, 97 A.3d 920 (2014). After applying that standard, the court stated: "[T]he court finds . . . Gallagher is an expert in racial justice, racial criminal justice and related topics based on the curriculum vitae and report attached to [the plaintiff's] expert disclosure. . . . Because [the plaintiff] seeks treble damages pursuant to . . . § 52-571c for intimidation based on racial bigotry or bias, the possible racial import of [the defendant's] words and/or actions are directly relevant to the amount of the prejudgment remedy the court may order. Thus, the issue becomes whether any testimony . . . Gallagher might be qualified to offer would be helpful to the determination of an issue to be decided by the fact finder, here, the court. The court concludes that, in this case, the answer to that question is 'yes.'

"In setting an appropriate amount of a prejudgment remedy, the court is required to determine, based on a standard of probable cause, whether [the defendant's] words and/or actions are based on racial bigotry or bias. At the June 16, 2022 hearing on this matter, there was testimony to the effect that [the defendant] used the phrase 'all lives matter' in response to [the plaintiff's] use of the phrase 'Black Lives Matter.' Additionally, at the June 16, 2022 hearing, there was testimony to the effect that [the defendant] made statements

have stated that [w]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly." (Internal quotation marks omitted.) *In re Javonte B.*, 226 Conn. App. 651, 653 n.2, A.3d (2024). The defendant has provided only a cursory analysis in a few sentences with no citation to authority supporting her assertions that the testimony was scientific in nature and that the court committed clear error. Accordingly, we decline to review the claim. See *In re A. H.*, 226 Conn. App. 1, 31 n.23, 317 A.3d 197 (declining to review claim that was inadequately briefed), cert. denied, 349 Conn. 918, 317 A.3d 784 (2024).

regarding 'Black on Black crime' in response to [the plaintiff's] statements. In the exercise of its discretion to admit trial testimony, the court concludes that it would be helpful to the court to hear expert testimony as to whether any statements or actions by [the defendant] may exhibit a racial bigotry or bias." (Citation omitted.)

The test for admitting nonscientific expert testimony was set forth by our Supreme Court in *Weaver* v. *McKnight*, supra, 313 Conn. 405–406. Under that test, "[e]xpert testimony should be admitted when: (1) the witness has a special skill or knowledge directly applicable to a matter in issue, (2) that skill or knowledge is not common to the average person, and (3) the testimony would be helpful to the court or jury in considering the issues. . . . [Id.] We review a trial court's decision to [admit] expert testimony for an abuse of discretion. . . . We afford our trial courts wide discretion in determining whether to admit expert testimony and, unless the trial court's decision is unreasonable, made on untenable grounds . . . or involves a clear misconception of the law, we will not disturb its decision." (Internal quotation marks omitted.) *R.T. Vanderbilt Co.* v. *Hartford Accident & Indemnity Co.*, 171 Conn. App. 61, 110, 156 A.3d 539 (2017), aff'd, 333 Conn. 343, 216 A.3d 629 (2019).

In the present case, applying the test set forth in *Weaver*, we conclude that the court did not abuse its wide discretion in admitting Gallagher's testimony. As to the first prong of *Weaver*, Gallagher is a professor of sociology with an expertise on issues related to race and criminal justice, and the court explicitly accepted Gallagher as an expert on those issues. See footnote 1 of this opinion. Because the plaintiff sought treble damages pursuant to § 52-571c for intimidation based on racial bigotry or bias, the court determined that testimony by Gallagher concerning the possible racial

import of the defendant's words and/or actions would be directly relevant to the amount of any prejudgment remedy ordered by the court. Accordingly, Gallagher had special knowledge that was directly applicable to the matter at issue.

Second, after the court accepted Gallagher as an expert in sociology and racial justice, Gallagher testified regarding his knowledge of the sociological significance of the Black Lives Matter and All Lives Matter[9] movements, as well as literature regarding "Black on Black crime." He further testified regarding hallmarks of racist tropes and differentiating between racism, bias, and bigotry, and the historical conditions that were relevant to the circumstances in the present case. Although the defendant claims that Gallagher offered "nothing but attenuated general knowledge of the discussion of race in the United States" and that his "expertise is of a watercooler variety," his testimony and academic credentials belie such a claim. There is a difference between Gallagher's academic experience in these fields and the knowledge that the average person might have. Gallagher offered the court a historical and sociological perspective on race and racism that not only helped inform the court's conclusion regarding racial animus but would not have been within the knowledge of the average person, despite their own experience with these concepts. We conclude, therefore, that Gallagher's testimony is not common to the average person.

Finally, as to the third prong of *Weaver*, the court specifically found that, given Gallagher's background in racial criminal justice, his testimony would be helpful to the court in its determination of whether the defendant's words and/or actions were primarily motivated

[9] Gallagher testified that the research he had seen shows that "people [who] embrace the moniker 'all lives matter' tend to have certain ideas about race. They tend to be more anti-Black."

by race, which was directly relevant to the amount of the prejudgment remedy ordered by the court. As the defendant points out, Gallagher could not and did not provide testimony as to what the defendant's specific intent or motivation was during the incident; his testimony, however, provided context for how the defendant's statements could be construed, which the court found to be helpful in its determination of whether the defendant exhibited racial bigotry or bias. Moreover, the defendant's challenges to the admission of Gallagher's testimony in part concern the substance of his conclusions, which relates more to the weight that his testimony should be given, not its admissibility. See *Kohl's Dept. Stores, Inc.* v. *Rocky Hill*, 219 Conn. App. 464, 490–91, 295 A.3d 470 (2023). Accordingly, we conclude that it was not an abuse of the court's discretion to admit Gallagher's testimony.

B

The defendant next claims that there was no evidence that her statements "were inspired by racial animus other than the highly conjectural and virtually meaningless testimony of [Gallagher]," whose testimony should not have been permitted, and that, in the absence of that testimony, the plaintiff offered no evidence establishing that the defendant's conduct was motivated by a specific intent to intimidate and harass the plaintiff on account of her race, as required to treble the damages under § 52-571c. We first find this claim unavailing in light of our determination that the admission of Gallagher's testimony was not improper. Second, in its memorandum of decision, the court referred to Gallagher's testimony "that the phrases 'all lives matter' and 'Black on Black crime' can be seen as racist tropes indicating that individuals who use those phases may hold racist attitudes," and credited his testimony on those points. "[T]he trial court is free to accept or reject, in whole or in part, the evidence presented by any witness, having

the opportunity to observe the witnesses and gauge their credibility. . . . This court defers to the trial court's discretion in matters of determining credibility and the weight to be given to a witness' testimony." (Internal quotation marks omitted.) *L. K.* v. *K. K.*, 226 Conn. App. 279, 309–10, A.3d (2024).

Nevertheless, even without Gallagher's testimony, there was other evidence before the court to support its determination that there was probable cause to believe that the defendant's actions and/or statements were motivated by race. First, the court viewed video recordings of the incident, which showed that the defendant left her initial position and walked over to the plaintiff and stood by her. This occurred right after the plaintiff began expressing her support for the Black Lives Matter movement by shouting into her megaphone, "Black Lives Matter" and similar slogans. Although the court credited the defendant's testimony that the reason she moved toward the plaintiff was because "she was concerned that [the plaintiff's] loud shouts regarding Black Lives Matter were overshadowing what [the defendant] understood as the protest's intended purpose of espousing support for the medical freedom movement," the exchange between the plaintiff and the defendant quickly became contentious when the defendant expressed disagreement with the plaintiff's views and asked her about "Black on Black crime." That was compounded by the fact that the defendant used the phrase "all lives matter,"[10] which, in combination with the defendant's question about "Black on

[10] "The phrase 'All Lives Matter' gained popularity in response to the growth of the Black Lives Matter movement . . . a social movement protesting violence against Black individuals and communities, with a focus on police brutality." *B.B.* v. *Capistrano Unified School District*, Docket No. 8:23-CV-00306 (DOC/ADS), 2024 WL 1121819, *4 n.4 (C.D. Cal. February 22, 2024). " '[A]ll [L]ives [M]atter' " can be seen as an offensive response to Black Lives Matter because that phrase obscures "the fact that [B]lack people have not yet been included in the idea of 'all lives.' " D. Victor, "Why 'All Lives Matter' is Such a Perilous Phrase," (July 15, 2016), available at

Black crime," could suggest a level of racial animus on behalf of the defendant. Given these circumstances, the court reasonably could have determined that a person of ordinary judgment could conclude that the conduct of the defendant, a white woman, in spitting on the plaintiff, a Black woman, was motivated in substantial part by race.

The defendant is correct that, for the plaintiff to receive treble damages under § 52-571c following a trial of this matter, she must establish at trial that, when the defendant spit on the plaintiff, she did so with the specific intent to intimidate or harass the plaintiff and was motivated in whole or in substantial part by the plaintiff's race. See General Statutes § 53a-181k (a). General Statues § 53a-3 (11) provides that "[a] person acts 'intentionally' with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct . . . ." It follows that, at a trial on this matter, the plaintiff will have to establish, by a preponderance of the evidence, that the defendant's motivation and intent during the incident meet those requirements. The present case, however, involves an application for a prejudgment remedy, under which the evidentiary standard is that of probable cause, which is lower than the preponderance of the evidence standard that must be met at trial. See *TES Franchising, LLC* v. *Feldman*, supra, 286 Conn. 137 (" '[p]roof of probable cause as a condition of obtaining a prejudgment remedy is not as demanding as proof by a fair preponderance of the evidence' ").

As we have stated, "a prejudgment remedy hearing is not contemplated to be a full scale trial on the merits, which necessarily will mean that the evidence presented at the hearing will not be as well developed as

https://www.nytimes.com/2016/07/16/us/all-lives-matter-black-lives-matter.html (last visited August 8, 2024).

it would be at trial . . . .'' Id., 143. At such a hearing, a plaintiff need only establish ''that there is probable cause to sustain the validity of the claim''; (internal quotation marks omitted) *Calfee* v. *Usman*, 224 Conn. 29, 37, 616 A.2d 250 (1992); and the probable cause standard ''does not demand that a belief be correct or more likely true than false.'' (Internal quotation marks omitted.) *Landmark Investment Group, LLC* v. *Calco Construction & Development Co.*, supra, 141 Conn. App. 49. In fact, the trial court in the present case noted that it was not expressing a ''view on whether the facts found by the court . . . meet the standard of preponderance of the evidence.''

As previously stated in this opinion, probable cause, for purposes of an application for a prejudgment remedy, ''is a flexible and common sense standard.'' (Internal quotation marks omitted.) *TES Franchising, LLC* v. *Feldman*, supra, 286 Conn. 137. ''The legal idea of probable cause is a bona fide belief in the existence of the facts essential under the law for the action and such as would warrant a [person] of ordinary caution, prudence and judgment, under the circumstances, in entertaining it.'' (Internal quotation marks omitted.) Id. In the present case, the court applied that standard and determined that there was probable cause to conclude that the defendant violated §§ 52-571c and 53a-181k, which supported its determination to treble the damages. Viewing the evidence before the court in the light most favorable to the plaintiff, we conclude that it was not clear error for the court to find that there was probable cause to conclude that the defendant's actions were motivated in whole or substantial part by the plaintiff's race.

III

The defendant's final claim is that the court committed plain error in granting the plaintiff's application for

a prejudgment remedy in a case involving freedom of speech and first amendment principles. The defendant argues that, "given the importance of freedom of speech and expression in the United States, decisions involving speech acts ought to be decided by juries, and not, as here—even in the limited fashion afforded by a prejudgment remedy—in a preliminary hearing decided by a judge." The defendant acknowledges that this claim is unpreserved and raises it pursuant to the plain error doctrine. In making the claim, the defendant relies on the decision of the United States Supreme Court in *Counterman* v. *Colorado*, 600 U.S. 66, 143 S. Ct. 2106, 216 L. Ed. 2d 775 (2023), which is a case involving true threats of violence. In *Counterman*, "[t]he question presented [was] whether the [f]irst [a]mendment still requires proof that the defendant had some subjective understanding of the threatening nature of his statements." Id., 69. In holding that it does, the court explained that "a mental state of recklessness is sufficient," and that "[t]he [s]tate must show that the defendant consciously disregarded a substantial risk that his communications would be viewed as threatening violence. The [s]tate need not prove any more demanding form of subjective intent to threaten another." Id. According to the defendant, the trial court in the present case "applied an objective standard in determining the intent of the defendant when making what the plaintiff's expert contend[ed] were racially charged comments. These comments were used to infer the intent behind the spitting. . . . [T]his use of an objective standard is unsustainable under *Counterman* . . . [and] it should be a jury, not the court, that decides an issue penalizing political speech."

The plaintiff counters that "the words a person utters are properly used as evidence to determine intent and motive" and that, nonetheless, "spit is not speech" and the present case is not a threatening speech case. The

plaintiff further asserts that "the defendant was not arrested for shouting 'All lives matter' or 'Black on Black crime.' . . . She . . . is being sued for assaulting the plaintiff with bodily fluids," and that, even though her "words were . . . used as evidence of motive," that was "entirely appropriate." In support of this claim, the plaintiff relies on *Wisconsin* v. *Mitchell*, 508 U.S. 476, 489, 113 S. Ct. 2194, 124 L. Ed. 2d 436 (1993), in which the United States Supreme Court held that "[t]he [f]irst [a]mendment . . . does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent. Evidence of a defendant's previous declarations or statements is commonly admitted in criminal trials subject to evidentiary rules dealing with relevancy, reliability, and the like."

We begin with a brief discussion of 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). "[The plain error] doctrine . . . is an extraordinary remedy used by appellate courts to rectify errors committed at trial that, although unpreserved, are of such monumental proportion that they threaten to erode our system of justice and work a serious and manifest injustice on the aggrieved party. . . . [T]he 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. . . . Plain error is a doctrine that should be invoked sparingly." (Internal quotation marks omitted.) *M. C.* v. *A. W.*, 226 Conn. App. 444, 448 n.4, A.3d (2024). The defendant cannot prevail on her claim under the plain error doctrine unless she demonstrates "the existence of an error that is obvious in the sense of not debatable. . . . [T]his inquiry entails a relatively high standard, under which it is not enough for the defendant simply to demonstrate that [her] position is correct. Rather, the party seeking plain error review must demonstrate that the claimed impropriety was so clear, obvious and indisputable as to warrant the extraordinary remedy of reversal." (Internal quotation marks omitted.) *Marafi* v. *El Achchabi*, 225 Conn. App. 415, 438, 316 A.3d 798 (2024). On the basis of the record before us and for the following reasons, we conclude that the defendant has not "met the stringent standard for relief pursuant to the plain error doctrine." (Internal quotation marks omitted.) *Lafferty* v. *Jones*, supra, 572 n.26.

First, the defendant's reliance on *Counterman* is misplaced, as the facts of *Counterman* easily differentiate it from the present case. In *Counterman*, a defendant sent Facebook messages to a woman over a period of two years, some of which "envisaged harm befalling her . . . ." *Counterman* v. *Colorado*, supra, 600 U.S. 70. The messages caused the woman to be fearful she would get hurt and to suffer from severe anxiety. Id. The defendant was charged criminally under a Colorado statute that makes "it unlawful to [r]epeatedly . . . make . . . any form of communication with another person in a manner that would cause a reasonable person to suffer serious emotional distress and does cause that person . . . to suffer serious emotional distress."

(Internal quotation marks omitted.) Id. After the defendant was convicted, he appealed, eventually to the United States Supreme Court, which held that, although "[t]rue threats of violence . . . lie outside the bounds of the [f]irst [a]mendment's protection"; id., 72; the first amendment nevertheless requires the state to "prove in true-threats cases that the defendant had some understanding of his statements' threatening character." Id., 73. In contrast, the present case involves allegations against the defendant for her *conduct* in spitting on the plaintiff, not for a verbal threat. The defendant's statements, made just prior to the spitting incident, were used by the court solely to help determine her intent at the time of the incident and whether she was motivated in whole or part by the plaintiff's race, which is consistent with *Wisconsin* v. *Mitchell*, supra, 508 U.S. 489; crucially, they were not construed as conduct *in and of themselves*. Nor can the defendant's statements be characterized as true threats of violence, which are " 'serious expression[s]' conveying that a speaker means to 'commit an act of unlawful violence,' " and "subject individuals to 'fear of violence' and to the many kinds of 'disruption that fear engenders.' " *Counterman* v. *Colorado*, supra, 74.

Moreover, the defendant's argument that the prejudgment remedy hearing should have been decided by a jury, not the court, because first amendment issues are implicated is equally unavailing. The defendant provided no authority in support of this assertion. Prejudgment remedies are governed by statute. See General Statutes § 52-278a et seq. Those statutes specifically require that an application for a prejudgment remedy be directed to the Superior Court; General Statutes § 52-278c; and that a party shall have a right to a hearing on such application, which is limited to a determination by a court of certain factors. General Statutes § 52-278d. There are no exceptions within the relevant statutes

for cases involving first amendment issues. Consequently, the defendant has not demonstrated "that the claimed impropriety was so clear, obvious and indisputable as to warrant the extraordinary remedy of reversal"; (internal quotation marks omitted) *Marafi* v. *El Achchabi*, supra, 225 Conn. App. 438; and her plain error claim, therefore, fails.

The judgment is affirmed.

In this opinion the other judges concurred.

CHELSEA GROTON BANK *v.* GATES REALTY HOLDINGS, LLC, ET AL.
(AC 46032)
(AC 46034)

Alvord, Moll and Suarez, Js.

Syllabus

The plaintiff in error, W, the initial successful bidder and a nonparty in the underlying foreclosure action brought by the defendant in error, C Co., filed two writs of error with this court challenging the trial court's orders granting C Co.'s motion to forfeit his deposit and denying his motion to intervene as of right. W failed to close on the sale of the property within thirty days from the notice of the court's approval of the sale, and C Co. filed the motion to forfeit, a motion to reset the sale date, and a caseflow request seeking expedited adjudication of the motions, but did not serve any of the filings on W. The court granted the motions and, the property was sold to another entity. *Held*:

1. The trial court improperly granted C Co.'s motion to forfeit W's deposit: in determining whether to order the forfeiture or the return of a deposit, the court, sitting in equity, may consider a variety of factors, and, because forfeiture is not automatic and is subject to the balancing of the equities, a defaulting, nonparty purchaser is entitled to notice of a motion to enforce the forfeiture of a deposit; moreover, the proper procedural mechanism and the manner of service of the notice of a motion to forfeit a deposit to which a defaulting purchaser is entitled necessarily depend on whether the defaulting purchaser already has a party appearance in the case, and, here, W, a nonparty, was entitled to assume that the proper legal procedure would be followed and that an order to show cause would be issued, citing him to appear and to be heard, such that the lack of service of the motion on W was legally insufficient to render

W subject to the jurisdiction of the court; accordingly, on remand, it will be for the trial court, applying equitable principles, to consider whether W's deposit should in fact be forfeited, this court holding only that W was entitled to notice and an opportunity to be heard on the motion to forfeit.

2. The second writ of error, challenging the trial court's denial of W's motion to intervene as of right was dismissed as moot; in light of this court's granting of the first writ of error, this court could not afford W any additional practical relief with respect thereto.

Argued October 2, 2023—officially released August 20, 2024

Procedural History

Writ of error from the order of the Superior Court in the judicial district of New London, *Young*, *J.*, granting a motion by the defendant in error to forfeit the deposit in a foreclosure action, and writ of error from the order of the Superior Court in the judicial district of New London, *S. Jacobs*, *J.*, denying a motion by the plaintiff in error to intervene as of right, filed by the plaintiff in error in this court. *Writ of error granted in AC 46032*; *further proceedings*; *writ of error dismissed in AC 46034*.

Frank J. Liberty, for the plaintiff in error (Ross Weingarten).

Brian D. Rich, for the defendant in error (Chelsea Groton Bank).

Opinion

MOLL, J. These writs of error were commenced by the plaintiff in error, Ross Weingarten, who was, with respect to property located at 15 Elm Street in Groton, the initial successful bidder in the underlying foreclosure action in which the trial court rendered a judgment of foreclosure by sale. In Docket No. AC 46032, the plaintiff in error challenges the court's order granting the motion, filed by the defendant in error, Chelsea Groton Bank, to forfeit his deposit; in Docket No. AC 46034, the plaintiff in error challenges the court's order

denying his motion to intervene as of right. In Docket No. AC 46032, we grant the writ of error; in Docket No. AC 46034, we dismiss the writ of error on the ground of mootness.[1]

The following facts and procedural history are relevant to our resolution of these writs of error. On October 16, 2019, the defendant in error commenced this action seeking, among other things, the foreclosure of mortgages on several properties. In count one of its complaint, the defendant in error sought the foreclosure of a mortgage on property located at 15 Elm Street in Groton. On November 23, 2021, the trial court, *Young, J.*, rendered a judgment of foreclosure by sale with respect to count one "as per [the] stipulation of the parties . . . ." The judgment set (1) the amount of the debt, costs, and attorney's fees at $1,795,098.98; (2) the fair market value at $3,670,000; (3) the sale date as January 29, 2022; and (4) a required deposit amount of $367,000. The sale date was continued to March 12, 2022.

Following the plaintiff in error's successful bid of $3,520,000, the foreclosure committee submitted the plaintiff in error's $367,000 deposit to the clerk of the Superior Court in New London. On March 31, 2022, the court, *Hon. Emmet L. Cosgrove*, judge trial referee, approved the sale and the committee deed. Pursuant to paragraph 20 of the Uniform Standing Orders for Foreclosure by Sale (standing orders), the plaintiff in error was required to close on the sale no later than thirty days from the notice of the court's approval of the sale.[2] The plaintiff in error failed to do so. Consequently, on May 3, 2022, the defendant in error filed a

[1] The plaintiff in error's respective writs of error, although not consolidated, were heard together at oral argument before this court pursuant to an order issued by this court on September 28, 2023.

[2] Paragraph 20 of the standing orders provides in relevant part: "The high bidder/purchaser must close no sooner than 21 days but no later than 30 days from the date of notice of the [c]ourt's approval of the committee sale.

motion to forfeit the deposit (motion to forfeit) and a motion to reset the sale date, and on May 4, 2022, it filed a caseflow request seeking expedited adjudication of the motions. The defendant in error did not serve any of these filings on the plaintiff in error. On May 10, 2022, the court, *Young*, *J.*, granted the two motions and the caseflow request (May 10 orders).

On May 11, 2022, the plaintiff in error filed an appearance through counsel as "other."[3] On May 13, 2022, the plaintiff in error filed a motion to vacate the May 10 orders, which the court denied on August 18, 2022. On May 25, 2022, the plaintiff in error filed a motion to reargue the May 10 orders, which the court denied on June 9, 2022. A new sale date was set for October 22, 2022. On October 24, 2022, the plaintiff in error filed a motion to intervene as a party defendant as a matter of right, which the court, *S. Jacobs*, *J.*, denied. Thereafter, as approved by the court, the property was sold to Captain's Mansion LLC for the sum of $3,050,000, with the closing on the property held on December 29, 2022. Meanwhile, the plaintiff in error filed these writs of error.[4]

AC 46032

In the first writ of error, the plaintiff in error claims that the trial court improperly granted the motion to forfeit without affording him notice thereof and an opportunity to be heard. We agree.

Whether the plaintiff in error was entitled to notice and an opportunity to be heard with respect to the

The deposit may be forfeited if the purchaser does not close within 30 days of the notice of approval. . . ."

[3] The trial court's electronic case detail reflects the plaintiff in error's status as "successful bidder."

[4] Although significant motions practice relating to the property subsequently has occurred in the trial court, it is unnecessary to recite it for purposes of this appeal.

motion to forfeit presents a question of law over which we exercise plenary review. See *Commissioner of Environmental Protection* v. *Farricielli*, 307 Conn. 787, 819, 59 A.3d 789 (2013) (applying plenary review to nonparty's due process claim predicated on lack of notice and opportunity to be heard).

Our analysis of the plaintiff in error's claim proceeds in two parts. We first address the threshold question of whether notice to a defaulting purchaser of a motion to enforce forfeiture is required beyond the notice set forth in paragraph 20 of the standing orders and the notice contained in the Judicial Branch Form "Foreclosure by Sale Fact Sheet—Notice to Bidders" (notice to bidders).[5] We answer that question in the affirmative.

Paragraph 20 of the standing orders provides in relevant part: "The high bidder/purchaser must close no sooner than 21 days but no later than 30 days from the date of notice of the Court's approval of the committee sale. *The deposit may be forfeited* if the purchaser does not close within 30 days of the notice of approval. . . ." (Emphasis added.) Relatedly, the notice to bidders provides in relevant part: "The successful bidder must be prepared to pay the balance of the purchase price within thirty (30) days after the approval of the sale. *The deposit may be ordered forfeited* if the successful bidder fails to complete the transaction within the thirty-day period." (Emphasis added.) It is undisputed, and we agree, that the use of the term "may" in the foregoing clauses means that "[s]uch forfeiture provision is not self-executing . . . but must be enforced by court order to that effect . . . ." 1 D. Caron & G. Milne, Connecticut Foreclosures (12th Ed. 2022) § 8-3:2, p. 629.

In determining whether to order the forfeiture or the return of a deposit (in full, in part, or not at all), the

[5] The record reflects that a notice to bidders was posted to the Judicial Branch Pending Foreclosure Sales webpage in connection with, and prior to, the March 12, 2022 foreclosure sale.

court, sitting in equity,[6] may consider, inter alia, the circumstances surrounding the defaulting purchaser's failure to close within the requisite time period, any notice provisions relating to forfeiture and/or other consequences in the event of a default, whether the second sale brought a higher sale price than the first, whether the second sale brought a lower sale price than the first (and, if so, whether the deposit exceeds the amount of any deficiency from the second sale), and whether a particular result would yield a windfall on a creditor or owner. See id., pp. 629–31; see also *Citicorp Mortgage, Inc.* v. *Burgos*, 227 Conn. 116, 121, 629 A.2d 410 (1993) ("In the event of default by the purchaser, several alternatives are open to the trial court. . . . [These include] holding the purchaser liable for any deficiency arising out of the resale."); *Wilcox* v. *Willard Shopping Center Associates*, 23 Conn. App. 129, 135–36, 579 A.2d 130 (1990) (in equitable action for partition by sale, affirming trial court's exercise of equitable powers in ordering forfeiture of deposit and limiting defaulting purchasers' liability to that amount). Thus, because forfeiture is not automatic and is subject to the balancing of the equities, we conclude that a defaulting, nonparty purchaser is entitled to notice of a motion to enforce the forfeiture of a deposit.

We next address the nature of the notice to which the plaintiff in error was entitled. In considering this question, we are not left to write on a blank slate. We begin with our Supreme Court's decision in *Banca Commerciale Italiana Trust Co.* v. *Westchester Artistic Works, Inc.*, 109 Conn. 23, 145 A. 20 (1929) (*Banca*

[6] "It is well established that a foreclosure action constitutes an equitable proceeding. . . . In an equitable proceeding, the trial court may examine all relevant factors to ensure that complete justice is done. . . . The determination of what equity requires in a particular case, the balancing of the equities, is a matter for the discretion of the trial court." (Citation omitted; internal quotation marks omitted.) *Citicorp Mortgage, Inc.* v. *Burgos*, 227 Conn. 116, 120, 629 A.2d 410 (1993).

Commerciale). In *Banca Commerciale*, a foreclosure by sale action, the first purchaser, the G. F. Beach Realty Company (company), paid a deposit at the time of the sale but defaulted in making payment to complete the sale. Id., 25. The foreclosure committee (committee) thereafter filed a motion requesting that its report be accepted, the sale be confirmed, the company be adjudged in default, a resale be ordered, and the company be held liable for the difference between the original foreclosure sale price and the price realized upon a second foreclosure sale, less the amount of the company's deposit (motion for resale and deficiency order). Id. The committee personally served a notice of the motion on the treasurer of the company, who delivered the notice to the company's president, an attorney. Id. Upon the court's granting of the motion and its entry of judgment, the committee sold the property at a price less than the original foreclosure sale price. Id. The committee reported the second sale and the deficiency, and the court rendered judgment confirming the second sale and finding the company liable for the deficiency. Id. Thereafter, the company moved to open the judgments, and the motion was granted "because before the order of resale was made no rule was served upon the [company] to show cause why it should not be held in default and an order of resale be made charging it with any deficiency in the price realized." Id., 25–26.

The plaintiff claimed on appeal therefrom that the personal service of a notice of the committee's motion for resale and deficiency order on the company's treasurer, which was subsequently delivered to the company's president, was sufficient to subject the company to the judgments of the court. Id., 26. Our Supreme Court disagreed and, in affirming the setting aside of the judgments, reaffirmed the principle set forth in *Mariners Savings Bank* v. *Duca*, 98 Conn. 147, 158, 118 A. 820 (1922), that requiring a "procedure by a rule to

show cause was the orderly and fair method" to bring a defaulting purchaser within the jurisdiction of the court such that it would be bound by the court's judgment. See *Banca Commerciale Italiana Trust Co.* v. *Westchester Artistic Works, Inc.*, supra, 109 Conn. 26.

The court in *Banca Commerciale* explained: "By his purchase, the purchaser does become so far a party to the action that he submits himself to the jurisdiction of the court. But before any order may be made for a resale of the premises at his charge, he is entitled to present any facts which may lead the court, acting upon equitable principles, to hold him not to be in default of his obligation under his purchase. . . . He is not so far a party that by statute or practice he is called upon to enter an appearance and his failure to do so does not place him in a position where he may be treated as one in default of appearance. Before he may be adversely affected by a judgment of the court he is entitled to legal notice and hearing. . . . The necessity of a proceeding by a rule to show cause issuing from the court, or a like process, with proper service and return, is apparent. . . . [U]nless a procedure is followed such that the giving of notice to the purchaser definitely appears in the record of the court, any judgment rendered ordering a resale and charging the deficiency to him would on the face of the record appear to be erroneous, and subject to reversal by writ of error." (Citations omitted.) Id., 26–27. In sum, the court held that the company, as a defaulting, nonparty purchaser, was entitled to notice by way of service of a rule or order to show cause, giving it an opportunity to appear and be heard. Id., 28.

In contrast, in *Mariners Savings Bank* v. *Duca*, supra, 98 Conn. 147, because a defaulting purchaser was also an appearing fourth mortgagee on the foreclosed property, customary service of a motion concerning the resale was deemed sufficient. Id., 158. Our Supreme

Court stated: "Under our practice, with the purchaser in court, as was the fact in the instant case, a motion placed on the short calendar would properly serve the function of an order to show cause." Id.

In sum, the proper procedural mechanism and the manner of service of the notice of a motion to forfeit a deposit to which a defaulting purchaser is entitled necessarily depend on whether the defaulting purchaser already has a party appearance in the case. See *Banca Commerciale Italiana Trust Co.* v. *Westchester Artistic Works*, *Inc.*, supra, 109 Conn. 26 (recognizing this dichotomy in distinguishing *Mariners Savings Bank* on ground that, in that case, notice afforded to defaulting purchaser by placing of motion on short calendar was deemed sufficient because defaulting purchaser was party to that action). Here, as in *Banca Commerciale*, the plaintiff in error, a nonparty, "was entitled to assume that the proper legal procedure would be followed"; id., 28; and that an order to show cause would be issued, citing him to appear and be heard. The lack of service of the motion on the plaintiff in error was, ergo, legally insufficient to render the plaintiff in error subject to the jurisdiction of the court.

The defendant in error argues that "the central flaw" in the plaintiff in error's claim on appeal is that he did not "do anything to protect his interest in the first place." This argument fails. "One is not guilty of laches who lacks knowledge of the facts which makes action on his part of concern to him . . . nor does it lie in the mouth of the [defendant in error], which failed to take the proper steps to bring the [plaintiff in error] before the court, now to complain that the latter is guilty of laches in failing to do something which [he] was concerned to do only if [he] knew the nature of the order of the court." (Citation omitted.) *Banca Commerciale Italiana Trust Co.* v. *Westchester Artistic Works*, *Inc.*, supra, 109 Conn. 28–29.

On remand, it will be for the trial court, applying equitable principles, to consider whether the plaintiff in error's deposit should in fact be forfeited. See id., 29. We hold only that the plaintiff in error was entitled to notice as discussed in this opinion and an opportunity to be heard on the motion to forfeit, which this decision leaves pending by virtue of the vacatur of the May 10, 2022 order granting the motion.

AC 46034

In this writ of error, the plaintiff in error challenges the trial court's denial of his motion to intervene as of right. In light of our granting of the writ of error in Docket No. AC 46032, we dismiss this writ of error as moot.

"Mootness is a question of justiciability that must be determined as a threshold matter because it implicates [this] court's subject matter jurisdiction . . . . The fundamental principles underpinning the mootness doctrine are well settled. We begin with the four part test for justiciability . . . . 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 be capable of being adjudicated by the judicial power . . . and (4) that the determination of the controversy will result in practical relief to the complainant. . . .

"[I]t 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. . . . In determining mootness, the dispositive question is whether a successful appeal would benefit the plaintiff or defendant in any

way." (Internal quotation marks omitted.) *State* v. *Marsala*, 204 Conn. App. 571, 575–76, 254 A.3d 358, cert. denied, 336 Conn. 951, 251 A.3d 617 (2021).

In light of our granting of the writ of error in Docket No. AC 46032, we dismiss the writ of error in Docket No. AC 46034 as moot, as we cannot afford the plaintiff in error any additional practical relief with respect thereto.

In Docket No. AC 46032, the writ of error is granted and the case is remanded with direction to vacate the May 10, 2022 order granting the defendant in error's motion to forfeit the deposit, to vacate the August 18, 2022 order denying the plaintiff in error's motion to vacate, and to conduct further proceedings consistent with this opinion; in Docket No. AC 46034, the writ of error is dismissed.

In this opinion the other judges concurred.

Cumulative Table of Cases
Connecticut Appellate Reports
Volume 227

(Replaces Prior Cumulative Table)

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.

Benchmark Municipal Tax Services, Ltd. *v.* 899 ETG Associates, LLC 474
Foreclosure; motion for summary judgment; standing; whether appeal should be dismissed as to defendant guarantors for lack of standing; whether trial court properly granted plaintiff's motion for summary judgment as to liability; whether affidavit submitted in opposition to plaintiff's motion for summary judgment sufficiently raised genuine issue of material fact as to defendants' special defense of unclean hands.

Briggs *v.* Briggs 531
Dissolution of marriage; claim that trial court erred in awarding defendant entirety of his interest in limited partnership; claim that trial court abused its discretion in establishing parenting schedule that differed from those proposed by parties and guardian ad litem; claim that trial court erred in issuing orders concerning expenses and final decision-making authority related to extracurricular activities of parties' children.

Chelsea Groton Bank *v.* Gates Realty Holdings, LLC 583
Writ of error; foreclosure by sale; claim that trial court improperly granted defendant in error's motion to forfeit plaintiff in error's deposit without affording nonparty plaintiff in error notice thereof and opportunity to be heard; whether second writ of error claiming that trial court improperly denied plaintiff in error's motion to intervene as of right was moot.

Dorfman *v.* Liberty Mutual Fire Ins. Co. 347
Vexatious litigation; Connecticut Unfair Trade Practices Act (CUTPA) (§ 42-110a et seq.); Connecticut Unfair Insurance Practices Act (CUIPA) (§ 38a-815 et seq.); summary judgment; litigation privilege; claim that defendant insurance company's litigation conduct in prior action involving parties gave rise to common-law and statutory (§ 52-568 (1) and (2)) causes of action for vexatious litigation; claim that remedy for untrue or unfounded allegations in complaint alleging vexatious litigation was limited to sanctions under applicable statute (§ 52-99) and rule of practice (§ 10-5); claim that phrase, "asserts a defense," in § 52-568 should not be applied to defendant's answer, denial or plea; claim that trial court improperly rendered summary judgment as to vexatious litigation counts of complaint when court applied improper legal standard in making probable cause determination; claim that trial court, in relying on prior probable cause determination, improperly rendered summary judgment on CUTPA and CUIPA counts of complaint; § 674 of Restatement (Second) of Torts and continuation theory of common-law and statutory vexatious litigation actions, discussed.

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.

Grotto, Inc. *v.* Liberty Mutual Ins. Co. 314
Negligent misrepresentation; negligence; violation of Connecticut Unfair Insurance Practices Act (§ 38a-815 et seq.); violation of Connecticut Unfair Trade Practices

Act (§ 42-110a et seq.); summary judgment; res judicata; whether trial court improperly granted defendant's motion for summary judgment; claim that trial court improperly concluded that doctrine of res judicata barred action.

LaSalle *v.* Commissioner of Correction 520
Habeas corpus; claim that habeas court abused its discretion in denying petition for certification to appeal; whether habeas court properly exercised its discretion in determining that petitioner had failed to establish good cause to excuse untimely filing of second state habeas petition sufficient to overcome statutory (§ 52-470 (d) and (e)) presumption of unreasonable delay.

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.

Moore *v.* Commissioner of Correction 487
Habeas corpus; claim that habeas court erroneously rejected petitioner's claim that state violated his right to due process by failing to disclose alleged cooperation agreement with witness and knowingly soliciting witness' allegedly false and misleading testimony and allowing that testimony to stand uncorrected; request by petitioner that this court revisit prior ruling on motion for review or, alternatively, take judicial notice of certain evidence that was not before habeas court.

New London *v.* Speer 221
Action to collect municipal water and sewer fees; bankruptcy; counterclaim; motion to dismiss; subject matter jurisdiction; claim that trial court improperly granted plaintiff's motion to dismiss; claim that trial court improperly concluded that it lacked subject matter jurisdiction to adjudicate counterclaim seeking damages pursuant to federal statute (11 U.S.C. § 362 (k)) for violation of automatic stay imposed by United States Bankruptcy Code; whether 11 U.S.C. § 362 (k) provides independent cause of action for damages that survives disposition of underlying bankruptcy case; whether cause of action for damages under 11 U.S.C. § 362 (k) is within exclusive jurisdiction of federal courts under federal statute (28 U.S.C. § 1334).

Premier Auto, LLC *v.* American Trading Co. (See Meineke Bristol, LLC *v.* Premier Auto, LLC) 64

Prescott *v.* Gilshteyn 553
Application for prejudgment remedy; assault; battery; intentional infliction of emotional distress; intimidation based on bigotry or bias; whether trial court erred in awarding plaintiff prejudgment remedy for emotional distress damages; whether trial court abused its discretion in admitting testimony of witness who was expert in issues related to racism and social justice; whether there was sufficient evidence before trial court to support its determination that there was probable cause to believe that defendant's actions and/or statements were motivated in whole or substantial part by plaintiff's race; claim that it was plain error for trial court to grant application for prejudgment remedy in case involving freedom of speech and first amendment principles.

Ryder *v.* JPMorgan Chase Bank, National Assn.. 114
Breach of contract; motion to set aside verdict; motion for judgment notwithstanding verdict; motion for additur; motion to consolidate; whether plaintiff's claims that trial court improperly denied motions to set aside verdict and for judgment notwithstanding verdict were preserved; whether plaintiff's claim that trial court improperly precluded him from presenting evidence relevant to damages incurred after certain date was reviewable; claim that trial court improperly denied motions to set aside verdict and for additur; whether there was reasonable basis in evidence for jury's verdict; claim that trial court improperly denied plaintiff's postverdict motion to consolidate underlying action with defendant's related foreclosure action.

S. C. *v.* J. C. 326
Dissolution of marriage; claim that trial court erred in granting defendant's postdissolution motion to continue previously issued emergency order of temporary custody; claim that trial court erred in granting defendant's postdissolution motion for contempt for plaintiff's failure to comply with court order requiring her to transfer physical custody of parties' minor child to defendant.

State *v.* Anthony V. 281
Manslaughter first degree with firearm; claim that evidence was insufficient to support judgment of conviction; unpreserved claim that trial court's failure to instruct jury on general intent constituted plain error; whether consequences of trial court's instructional error were so grievous as to be fundamentally unfair or manifestly unjust, depriving defendant of fair trial and reliable verdict.
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.
State *v.* Purvis 188
Possession of controlled substance with intent to sell by person who is not drug-dependent; possession of controlled substance; possession of drug paraphernalia with intent to use; claim that evidence adduced at trial was insufficient to sustain conviction of possession of controlled substance with intent to sell and possession of drug paraphernalia with intent to use; claim that pieces of plastic surrounding bits of crack cocaine were not "bags" and could not constitute drug paraphernalia as defined in statute (§ 21a-240 (2) (A)); whether defendant's conviction of both possession of controlled substance with intent to sell and possession of controlled substance violated his constitutional protection against double jeopardy and deprived him of fair trial.
State *v.* Roberts 159
Reckless endangerment second degree; threatening second degree; breach of peace second degree; intimidation based on bigotry or bias third degree; harassment second degree; motion to withdraw plea; whether trial court correctly concluded that its plea canvass of defendant was sufficient; whether trial court erred in failing to hold evidentiary hearing with respect to defendant's claim of ineffective assistance of counsel prior to ruling on motion to withdraw plea; whether trial court properly determined that defendant failed to demonstrate ineffective assistance of counsel.
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.
Walton *v.* Walton 251
Dissolution of marriage; contempt; claim that trial court improperly found defendant in contempt for various alleged violations of automatic orders and pendente lite orders; claim that trial court improperly denied defendant's request for production of appraisal completed by appraiser retained by plaintiff; claim that trial court improperly awarded plaintiff his entire federal pension without assigning value to it; claim that trial court improperly distributed marital estate in disproportionate and inequitable manner.

NOTICE OF CONNECTICUT STATE AGENCIES

DEPARTMENT OF HOUSING

Notice Under the Affordable Housing Appeals Procedure Receipt of a Completed 2024 Application for a Moratorium in the Town of Waterford

In accordance with C.G.S. 8-30-g, the Connecticut Department of Housing is in receipt of a completed application (8/1/2024) for a Certificate of Affordable Housing Project Completion (aka, a Moratorium) for the Town of Waterford. As per Connecticut General Statutes Section 8-30g(1)(4)(B), upon publication in the Connecticut Law Journal, a thirty (30) day public comment period will begin on August 20, 2024 and end on September 19, 2024. Under the statute, DOH has ninety (90) days (November 10, 2024) to review the completed application, along with any public comments submitted during the thirty (30) day comment period. DOH will accept electronic input/comment on the completed application at CT.HOUSING.PLANS@ct.gov. DOH will not act as intermediary but shall take into consideration all input and comments received. A copy of this completed application, along with all comments received will be available for viewing electronically at the Department of Housing website (www.ct.gov/doh) or at the Connecticut Department of Housing by appointment. For information please e-mail Laura Watson, Economic and Community Development Agent, at laura.watson@ct.gov

CT PAID FAMILY & MEDICAL LEAVE INSURANCE AUTHORITY

NOTICE OF INTENT TO ADOPT REVISIONS TO CONSOLIDATED POLICIES

In accordance with sections 1-121 and 31-49h of the Connecticut General Statutes, notice is hereby given that the Board of Directors of the Connecticut Paid Family and Medical Leave Insurance Authority ("hereinafter the CT Paid Leave Authority") intends to adopt revisions to their Consolidated Policies, which provide details related to the administration of the CT Paid Leave Program. The revisions are made by the CT Paid Leave Authority in order to update policies and procedures related to definitions, eligibility, contributions, benefit calculation, claim submission processes, benefit payment, appeals and penalties, private plans, sole proprietors/self-employed individuals, and audits. Many of the changes are being made in order to comply with Public Act No. 24-5.

All of the proposed revisions can be found on the CT Paid Leave Authority's website at https://www.ctpaidleave.org/about-us/law-and-policies?language=en_US.

If you are unable to access the revisions at the above link and would like to request a copy, please email michael.cisar@ct.gov, including "Revised Consolidated Policies" in the subject line.

To submit comments regarding the Revised Consolidated Policies, please email the comments to michael.cisar@ct.gov. All written comments regarding the revisions must be submitted by September 20, 2024. Please include "Revised Consolidated Policies" in the subject line.

CT PAID FAMILY & MEDICAL LEAVE INSURANCE AUTHORITY

NOTICE OF INTENT TO ADOPT REVISIONS TO FINANCE AND ACCOUNTING POLICY

In accordance with sections 1-121 and 31-49h of the Connecticut General Statutes, notice is hereby given that the Board of Directors of the Connecticut Paid Family and Medical Leave Insurance Authority ("hereinafter the CT Paid Leave Authority") intends to adopt revisions to their Finance and Accounting Policy, which provide details related to the financial practices of the CT Paid Leave Authority. The proposed revisions consist of updates to provisions relating to the following:

- The date of annual reports;
- The credit card expense approval process;
- Presentation of financial statements to the CT Paid Leave Authority's Board of Directors;
- Reconciliation of the CT Paid Leave Authority's administrative fee.

Changes were also made to correct formatting, clarify abbreviations, reflect operating budget's internal schedule, and update the daily deposit journal entry template.

All of the proposed revisions can be found on the CT Paid Leave Authority's website at https://www.ctpaidleave.org/about-us/law-and-policies?language=en_US.

If you are unable to access the revisions at the above link and would like to request a copy, please email michael.cisar@ct.gov, including "Revised Finance and Accounting Policy" in the subject line.

To submit comments regarding the Revised Finance and Accounting Policy, please email the comments to michael.cisar@ct.gov. All written comments regarding the revisions must be submitted by September 20, 2024. Please include "Revised Finance and Accounting Policy" in the subject line.

OFFICE OF STATE ETHICS

Office of State Ethics advisory opinions are published herein pursuant to General Statutes Sections 1-81 (3) and 1-92 (5) and are printed exactly as submitted to the Commission on Official Legal Publications.

Advisory Opinion No. 2024-3 August 15, 2024

Question Presented: **The petitioner, a Compliance Specialist II for the Pesticide Management Program (''PMP'') at the Department of Energy and Environmental Protection (''DEEP''), asks whether she may receive compensation to teach a structural pest control course, outside of her state position, to individuals who have not yet obtained a pesticide applicator occupational license from PMP, in order to prepare them for the licensure exams.**

Brief Answer: **Based on the facts presented, the Code prohibits the petitioner from receiving compensation to teach such a course to individuals who are seeking occupational licensure from PMP and who, once licensed, will be directly regulated by the petitioner and PMP.**

At its June 20, 2024 regular meeting, the Citizen's Ethics Advisory Board (''Board'') granted the petition for an advisory opinion submitted by Wendy Martel, a DEEP employee. The Board now issues this advisory opinion under General Statutes § 1-81 (a) (3) of the Code of Ethics for Public Officials (''Code'').

Background

In her petition, Ms. Martel provides the following facts for our consideration:

> I began my career in structural pest control 32 years ago. What started to be a part-time job became a passion. When I tested for the Supervisory License, which allows one to purchase restricted use pesticides and allows one to apply themselves of oversee licensed applicators apply pesticides with specific written instruction.
>
> I owned and operated with a partner Advanced Pest Control Technologies LLC. As time moved forward my partner went to a new career and I restructured the corporation to Black Widow Pest Management, LLC. During that time, I became involved with different associations pertaining to the pesticide industry. I was President of the CT Pest Control Association. I was re-elected for a second term. I served as the VP of the Environmental Industry Council, who represented the pesticide industry for CT legislation. I served as the Regional Director with the National Pest Management Association, representing the Northeast. While at that position I became the Chair for the National Residential Committee. I write this to show I really have a passion for this industry.
>
> I am completing my career in this great industry with coming to the DEEP Pesticide Management Program as a Compliance Specialist II.

My responsibilities are to follow up on complaints, inspect businesses, retail stores and application companies of all sorts. I am versed in different pesticide application type. IE: Pool distributors, golf courses, aquatic, right of way, arborist, lawncare. I believe you get the point. During my years as a government employee I experience the pulse of the industries.

Supervisory Certification is a specialized license. I am certified to apply pesticides structurally, with General Pest, Rodent, Termite. I also earned the supervisory category for Turf/Ornamental. One must take a written exam and when passed sit in front of the PMP oral exam board, by passing both you receive your certification through the Pesticide Management Program of DEEP.

The written exam is a 150-question with two parts. CORE or safety and then the category you are trying to attain. Our State is known around the Country as one of the toughest exam processes along with CA. Once you are certified to keep your certification active one must earn 12 credited educational units, or, CEUs per category in a five-year time frame for certification renewal. I must earn 48 CEUs to keep my certification active.

Our State no longer affords sponsoring 3-hour classes for the structural pest control individuals. Some organizations hold an annual seminar that offers CEUs or manufactures have on-line courses to take.

The turf, arborist and golf course industry has fall/winter classes one can signup for and be taught how to apply chemicals safely, how to diagnose problems and prescribe the correct materials to be used. How to operate the standard field equipment and teach the CGS Chapter 441 22a-66z pertinent statutes that regulate the industries. Those categories pertain to exterior pesticide applications and provide a sound basis of learning.

The structural pest applicator has no classes available to them. When I complete field inspections for this particular industry, I am always asked if I know if there are classes to take. My answer is always unfortunately no, but there are on-line classes created outside of CT and are rather generic but it's a start. Those on-line classes never touch upon the uniqueness of CT and the statutes/regulations.

I am asking permission to begin teaching specifically for structural pest control. There are several different categories each category obtained involves pesticide applications in, hospitals, day-cares, businesses', schools, elderly housing, restaurants, residences and so forth. I am amazed that in a field that applies pesticide in and around buildings, in or around children, pets and other humans there are no classes.

I would be teaching individuals that the DEEP PMP has no regulatory authority over. My classes will be specific to our State's requirements. My experience will help create responsible stewards of the environment and human health.

In a subsequent email communication, Ms. Martel provides the following additional facts:

I conduct on-site inspections of any person or business in CT that manufactures pesticides, sells pesticides, stores pesticides and applies pesticides. I review and evaluate records and reports that contain lab analysis to determine compliance of applications and/or facilities.

Recommend and/or draft Notices of Violation; I participate in enforcement activities to obtain compliance with regulations; I prepare correspondence, inspection reports, enforcement reports and documents.

I speak with representatives of companies, consultants, municipalities and State officials in matters relevant to cases to ensure compliance. I conduct follow up enforcement activities to ensure compliance with relevant regulations.I review the State IPM Plan schools and State facilities. I follow up on complaints involving pest control, lawn care, golf courses,farms,waterways, Right of way applications. Applications conducted on railroads, aircraft, etc. I respond to on-site incidents.

I review the pertinent State statutes and regulations Title 441 CGS 22a-66z and 23-61a-61a-7. With pest control, lawn care, arborists,golf courses.and aquatic pesticide applicators.

Do any of my job duties involve any part of the certification process? NO, there are Environmental Analysts who deal with the certification process and none of these individuals report to me.

Once an individual becomes certified in pest control does the PMP have an on-going regulatory relationship with the individual? Yes, please refer to my job description.

Does my job duties involve the regulation of those in pest control? Yes.I conduct inspections and follow up on complaints.

Describe any other interaction I or the PMP may have with an individual once certified? Those individuals will only have contact through the certification and licensing and applying for a business registration for the application of pesticides. Those certified will be contacted for renewal processes. My interaction would be for compliance or enforcement as I currently do now.

2008 I joined the DEEP Pesticide Management Program. I was told my experience in the industry was very valuable. For fifteen years I have inspected and written up many businesses and individuals I had and still have a relationship with through the industry.

DEEP, by and through Commissioner Katherine S. Dykes, submitted a response to the petition on July 11, 2024. The response sets forth as follows, in pertinent part:

Pesticide applicators can engage in different categories of ''service'': ornamental and turf, general pest (sometimes also called ''structural pest''), right-of-way pest control, mosquito and biting fly, rodent, termite and wood-destroying organism, and arborist. Classes are available in Connecticut for ''ornamental and turf'' and ''arborist.'' For ''general pest,'' Purdue University offers a distance learning course, and many libraries offer the textbook for that course. Previously, DEEP staff have participated in ''arborist'' training, but only as volunteers. One DEEP inspector has, from time to time, volunteered to teach a portion of an Arboriculture 101 class, sponsored by the Connecticut Tree Protection

> Association. This was done outside of the inspector's usual work hours with DEEP.
>
> Once a person has obtained an occupational license and is working as a pesticide applicator, DEEP is involved in regulating their activities. A Compliance Specialist II role, which is the petitioner's job, consists of conducting inspections of commercial pesticide applicator businesses like extermination businesses, landscapers, and farms. Compliance Specialists perform both scheduled and unscheduled inspections. If, in the course of inspecting a property, a Compliance Specialist sees a pesticide applicator van or truck out doing business, they may do an unscheduled inspection on the spot.
>
> Inspections are done to make sure that pesticides are registered and applied properly, among other things. The Compliance Specialist then submits reports to her supervisor, who then makes the final decision as to whether the company is deemed to be compliant with relevant statutes and regulations or whether enforcement action is taken.
>
> Despite this regulatory structure, there are opportunities for Compliance Specialists to exercise discretion in ways that could be problematic for specialists who do not exercise impartiality. Compliance Specialists, for example, can be selective in their inspections, such as when they see a pesticide applicator van or truck. A Compliance Specialist also could overlook violations for inspectors whom she had trained.

DEEP also submitted a copy of an agency directive, dated August 23, 2021, pertaining to ''Outside Employment of DEEP Employees'' (hereinafter, ''Outside Employment Directive'').

Additional facts will be set forth as necessary.

Analysis

We start, as we generally do, with the issue of jurisdiction. Section 1-81 (a) (3) enables the Board to issue advisory opinions to ''any person subject to the provisions of'' the Code, including ''State employees.'' The Code defines ''State employee'' to include, among others, ''any employee in the executive . . . branch of state government, whether in the classified or unclassified service and whether full or part-time . . . .'' General Statutes § 1-79 (13). According to the Connecticut State Register and Manual (2023), DEEP is part of the executive branch of state government. Here, Ms. Martel is a DEEP employee and, as such, is subject to the Code. Accordingly, the Board is statutorily authorized to issue an advisory opinion to Ms. Martel concerning the Code's application to her proposed outside employment.

Ms. Martel asks whether she may ''provide a class for individuals who are not yet certified or regulated by DEEP'' to prepare them for the PMP licensure process, in light of the fact that she is a Compliance Specialist II for DEEP's PMP and is responsible for ''follow[ing] up on complaints, [and] inspect[ing] businesses, retail stores and application companies of all sorts.'' For the reasons outlined herein, we conclude that the answer is no.

The Code does not contain a blanket prohibition against outside employment but does contain several restrictions on such employment. As pertinent to this inquiry, a state employee may not accept outside employment that would impair her independence of judgment as to her official duties, or that would induce disclosure of

confidential information[1] acquired in the course of those official duties. General Statutes § 1-84 (b). In addition, a state employee may not use her state position, or confidential information garnered from such position, for personal financial gain. General Statutes § 1-84 (c). ''These provisions do not, however, prevent a . . . state employee from using . . . her expertise, including expertise gained in state service, for personal gain.'' Advisory Opinion No. 91-6. Generally, § 1-84 (b) and (c) are violated when a state employee accepts outside employment ''with an individual or entity which can benefit from the state servant's official actions (e.g., the individual in . . . her state capacity has specific regulatory, contractual, or supervisory authority over the private person).'' Regs., Conn. State Agencies § 1-81-17.

The former State Ethics Commission (''Commission'') ''consistently held'' that ''outside paid instruction of a group over which the State employee wields official authority is too fraught with conflicts to be permitted under the Code.'' Advisory Opinion No. 88-16, citing Advisory Opinion Nos. 84-10 and 83-5. In Advisory Opinion No. 88-16, the Commission was asked whether the Fair Housing Coordinator for the Commission on Human Rights and Opportunities—whose job was to ''coordinat[e] and conduct[ ] audit and investigative tests of housing opportunities within the state''—could engage in outside employment teaching fair housing courses. The Commission concluded that she could not and the reasons provided were as follows: First, such outside work could impair her independence of judgment as to her official duties, for ''[w]hen selecting targets for audit tests, it would be only natural for [her] to pass over those who have taken her course.'' Second, such outside employment would place her in a position ''where inadvertent use of office for financial gain is almost inevitable.'' The Commission reasoned:

> It would make little sense for those involved in Connecticut's real estate industry to take a fair housing course from anyone but [the Fair Housing Coordinator], when they have the opportunity to ingratiate themselves with the individual who has such significant discretionary State authority over their business interests. Furthermore, those subjected to audit and complaint who had not taken [her] course would be in a position to claim that they had been chosen because of their failure to provide the Fair Housing Coordinator with additional private income.

In the same vein is Advisory Opinion No. 94-6, where the Commission considered whether senior employees of the Real Estate Division of the Department of Consumer Protection (''DCP'') could ''teach courses which [would] either serve as a necessary prerequisite to Real Estate licensure or provide required continuing education credit for licensees.'' The Commission noted that the DCP Real Estate Division ''has broad statutory authority over real estate practices in Connecticut, including the power to suspend or revoke licenses,'' and, in addition:

> In the exercise of this authority the eight member citizen Commission is, of course, aided in various substantive ways by its full-time senior staff. Most particularly, in investigating and sanctioning possible violations of the State's Real Estate statutes the Commission utilizes the Division's Director and Assistant Director to investigate and present

[1] '' 'Confidential information' means any information in the possession of the state, a state employee or a public official, whatever its form, which (A) is required not to be disclosed to the general public under any provision of the general statutes or federal law; or (B) falls within a category of permissibly nondisclosable information under the Freedom of Information Act, as defined in section 1-200, and which the appropriate agency, state employee or public official has decided not to disclose to the general public.'' General Statutes § 1-79 (21).

> its most sensitive and complex cases. (Senior Staff also oversees the Division's Real Estate Examiners' work on all other cases of possible misconduct.)

The Commission concluded that ''such authority precludes the public servant from simultaneously offering his services for profit to those he regulates,'' as the conflict presented is ''quite literally, inevitable.'' The Commission reasoned:

> It is impossible to ignore, or counteract, the obvious advantage such a person has in offering his compensated services to those whose careers he oversees. And it is equally impossible to ignore, or counteract, the obvious possibility that Real Estate license applicants or practitioners will select a course offered by the Real Estate Division's Director or Assistant Director in order to ingratiate themselves with those state officials who possess such significant authority over their profession. Lastly, allowing the employment at issue creates a situation where many of those coming before the Real Estate Commission will either have chosen or declined the senior staff's outside, compensated services; thereby unavoidably impairing these regulatory employees' independence of judgment in the performance of their official duties in violation of . . . § 1-84(b).

Similar questions regarding whether public officials or state employees may teach paid courses to persons currently or potentially regulated by their respective agencies have been asked informally of staff of both the Commission and the Board, and, based on this reasoning, the answer has consistently and resoundingly been no.[2] As will be discussed more fully below, we see no reason to depart from over 30 years of precedent in this instance.

In her petition, Ms. Martel asserts that there are no courses available for structural pesticide applicators, and that ''[o]ur State no longer affords sponsoring 3-hour classes for the structural pest control individuals.'' She concedes that ''[s]ome organizations hold an annual seminar that offers CEUs or manufactures have on-line courses to take'' and that ''there are on-line classes created outside of CT,'' but argues that they are ''rather generic'' and ''never touch upon the uniqueness of CT and the statutes/regulations.'' She notes that, while ''the turf, arborist and golf course industry ha[ve] fall/winter classes one can signup for and be taught how to apply chemicals safely, how to diagnose problems and prescribe the correct

[2] See Request for Advisory Opinion No. 15461 (2017) (opining that the Code prohibits a Department of Public Health (''DPH'') employee from teaching a community college course for persons interested in becoming EMS instructors where, in their DPH position, the employee has regulatory authority over EMS instructors); Request for Advisory Opinion No. 10697 (2012) (opining that the Code prohibits a member of the state Board of Chiropractic Examiners from owning a business which provided fee-based continuing education courses to licensed chiropractors, as he had statutory authority to hear and decide suspension and revocation of license matters, to adjudicate complaints against chiropractors, and to impose sanctions against the same, as such courses present concerns under both § 1-84 (b) and (c)); Request for Advisory Opinion No. 6612 (2009) (''[b]ecause in this instance the body of potential students will include individuals who are licensed in Connecticut, and because the employee in question has a role in enforcement of DCP rules, the proposed outside employment would run afoul of the Code . . . and would thus not be permissible under the Code''); Request for Advisory Opinion No. 3324 (2003) (opining that an expert member of the Home Inspection Licensing Board (''Licensing Board'') could not appear as a guest lecturer for a continuing education course without running afoul of the Code, in part, because the audience members were licensed home inspectors, unlicensed home inspectors and interns seeking to obtain a license from the Licensing Board).

materials to be used,'' ''[t]he structural pest applicator has no classes available to them.''[3]

At first blush, if there are no equivalent courses available to individuals seeking a structural pest control license in the state, this might appear to mitigate the concern that a student may select Ms. Martel, as opposed to a different instructor, to teach his or her course. On closer inspection, however, this fact, even if true, does not fully mitigate the profound concerns evident here under the Code and, in fact, presents its own concerns. Put simply, where a state employee simultaneously offers her services for profit (such as the course at issue) to either those she regulates, or to those seeking to be part of her regulated community, as is discussed below, conflicts under the Code are ''quite literally, inevitable.'' Advisory Opinion No. 94-6.

First, there is the risk that individuals will choose to take the course because they hope to obtain favorable treatment by Ms. Martel and/or DEEP in the future. The individuals inquiring about these courses are presumably those interested in taking such a course. Because such individuals, as well as others in the industry or seeking to be in the industry, may be aware of Ms. Martel specifically (or at least in part) because of her state position, they may believe that, in taking her class, they will have an ''insider'' at the agency. See Advisory Opinion No. 94-7 (''[I]t is also troublesome that the state employee may be offered a position at least in part because the outside employer believes that the state employee may have an 'in' at the agency, thereby allowing the outside employer to receive special treatment. This results in an inappropriate, albeit unintentional, use of position by the state worker, in violation of § 1-84 (c).'') Here, Ms. Martel's stated regulatory duties at DEEP include, as pertinent to this petition, ''conduct[ing] on-site inspections of any person or business in CT that manufactures pesticides, sells pesticides, stores pesticides and applies pesticides.'' In addition, as to the PMP enforcement process, her stated duties include: (1) ''prepar[ing] correspondence, inspection reports, enforcement reports and documents,'' (2) ''conduct[ing] follow up enforcement activities to ensure compliance with relevant ''care, golf courses,farms,waterways, Right of way applications [and] [a]pplications conducted on railroads, aircraft, etc.'', and (4) ''respond[ing] to on-site incidents.''

Thus, here, Ms. Martel's extensive involvement in both the inspection and enforcement processes for pesticide applicators who are licensed and regulated by DEEP presents a particularly attractive ''insider'' to those who intend to seek a structural pest control license as she will potentially be inspecting their work should they pass the requisite exams and obtain the license. She also necessarily possesses information about the inspection and enforcement processes that would be unavailable to an outside instructor. Accordingly, such students might very well choose to pay Ms. Martel to take her course, at least in part, to ingratiate themselves with her (and DEEP).

Second, there is the risk that Ms. Martel, while engaged in her state regulatory duties (i.e., conducting inspections and contributing to both the complaint and post-complaint processes), will treat her former students (even unintentionally) differently than those individuals who did not take her course. As DEEP outlined in its response to the petition, Compliance Specialists, like Ms. Martel, hold some level of discretion in carrying out their inspection duties. They ''perform both scheduled and unsched-

[3] Of note, DEEP identifies, in its response to the petition, that ''[f]or 'general pest,' [sometimes called structural pest] Purdue University offers a distance learning course, and many libraries offer the textbook for that course.''

uled inspections'' and ''[i]f, in the course of inspecting a property, a Compliance Specialist sees a pesticide applicator van or truck out doing business, they may do an unscheduled inspection on the spot.'' They can thus ''be selective in their inspections, such as when they see a pesticide applicator van or truck.'' In addition, as DEEP observed, ''[a] Compliance Specialist also could overlook violations for inspectors whom she had trained.''

Thus, as with the Fair Housing Coordinator in Advisory Opinion No. 88-16, Ms. Martel maintains discretion when conducting her state regulatory duties that could, even if inadvertently, positively impact her former students (or negatively impact those who chose not to take her course). She could very well overlook violations when conducting a scheduled inspection of a former student. And, if she came across a former student's ''van or truck'' in the field, she could overlook violations or even decline to inspect the former student's work at all. As their former teacher, Ms. Martel may believe she can trust the work quality of such former students because she was the one who taught them. She will also naturally maintain a high opinion of her instruction and may not want to undermine this by finding issue with her former students' work.

Should Ms. Martel be permitted to teach the proposed course, this measure of discretion in her state position would create the unmitigated potential for a lapse in impartiality, as to both her former students and those who did not take her course. Simply put, there would be an unavoidable impairment of Ms. Martel's independence of judgment in the performance of her official duties in violation of § 1-84 (b). See Advisory Opinion No. 94-6 (''allowing the employment at issue creates a situation where many of those coming before the Real Estate Commission will either have chosen or declined the senior staff's outside, compensated services; thereby unavoidably impairing these regulatory employees' independence of judgment in the performance of their official duties in violation of . . . § 1-84 (b)'').

Third, there are necessarily ''use of office'' concerns where, as here, Ms. Martel has admittedly been approached by individuals about the availability of the course at issue, while she is ''on the clock'' completing her state inspection duties. In her submissions, Ms. Martel outlines her 15 years of experience in the pesticide industry predating her state employment in 2008, and represents that, although she has since served as a state inspector for the past 15 years, she is ''not *known* for being an inspector for the state.'' (Emphasis added.) She also notes, however, that ''[w]hen [she] complete[s] field inspections for this particular industry, [she is] *always asked* if [she] know[s] if there are classes to take.'' (Emphasis added.) Thus, it appears that Ms. Martel has already interacted with potential students while conducting field inspections for DEEP and these potential students are aware of her position as an inspector. If she now provides the requested course for compensation, she will have both used her state position to identify the need for the course *and* used it to identify a ready pool of interested students, in direct contravention of § 1-84 (c). See Advisory Opinion No. 2002-9 (finding where (amongst other factors) an opportunity for outside employment arose from the dealings of the parent company of the potential outside employer with the employee's state agency, ''it is essentially unavoidable that acceptance of the outside employment in question will engender an improper use of position, however inadvertent, in violation of § 1-84 (c)''). And, as Ms. Martel repeatedly asserts, her course would be the only one of its kind available, i.e., the only game in town. Those individuals who have already inquired about a course would be easy acquisitions for her roster of students.

Finally, Ms. Martel provides:

> On the one hand, at the time of teaching the course, the DEEP employee would not be employed by someone whom she also regulates. On the other hand, *the express purpose of the course is to prepare them for such a position and therefore regulation.*

(Emphasis added.) She appears to be asking that we distinguish between individuals who are currently part of DEEP's (and thus her) regulated community and those who are necessarily seeking to be part of it by becoming licensed. This we cannot do.[4] The latter class triggers essentially the same issues under the Code as the former, and, accordingly, we find no reason to distinguish between the two. In fact, individuals who have not yet obtained licensure from DEEP, a process which necessitates that they pass a written and oral exam, may be more greatly incentivized to establish an ''insider'' at DEEP, as discussed above.

We recognize that Ms. Martel is attempting to fill a perceived educational need for the state. However well-intentioned this endeavor, we cannot permit it at the Code's expense. Accordingly, Ms. Martel's proposed outside employment teaching a course to individuals who are seeking to obtain structural pest control licensure from PMP is not permissible under the Code.

It is worth noting that DEEP reached the same conclusion when declining to grant Ms. Martel's request to teach the course at issue last fall, relying on both the Commission's analysis in Advisory Opinion No. 88-16 and language in its own Outside Employment Directive.[5] In its response to the petition, DEEP aptly noted:

> The question here is not merely whether the Compliance Specialist is teaching a class to people who are, at the time of the class, not currently regulated by DEEP. Here, the students are not merely likely to be

[4] Of significant note, the Commission (formally) and Board staff (informally) have not distinguished between existing and potential members of the regulated community when determining that the Code prohibits state employees from teaching an outside course to such students. See Advisory Opinion No. 94-6 (finding that members of the senior staff of the DCP Real Estate Division could not ''teach courses which *either* serve as a necessary prerequisite to Real Estate licensure *or* provide required continuing education credit for licensees'' [emphasis added]); Request for Advisory Opinion No. 15461 (2017) (opining that a DPH employee may not teach a community college course ''for persons *interested in becoming* EMS instructors'' where, in their DPH position, the employee has regulatory authority over EMS instructors [emphasis added]).

[5] DEEP's Outside Employment Directive provides the following, in pertinent part:

> DEEP employees are permitted to seek outside employment provided that employment does not present an actual or perceived conflict of interest. Actual or perceived conflict of interest means any work that relates to or affects, or might relate to or affect, the department's work or interests. This directive applies to all outside employment, including consulting work, but is especially critical for those employees seeking to do outside work for a lobbyist, an individual or entity doing business or seeking to do business with DEEP, *or any individual or entity regulated by DEEP.*
>
> . . .
>
> DEEP employees may not use their position for their own financial gain, or the gain of a family member such as a spouse, child, child's spouse, parent, sibling, or an associated business, however inadvertent that use may be. See Conn. Gen. Stat. § 1-84(c). *A violation of the Code of Ethics and this directive may occur when a DEEP employee accepts outside employment with an entity that can benefit from his or her DEEP position, such as when the DEEP employee has specific regulatory, contractual or supervisory authority over the person or entity.*

(Emphasis added.) DEEP concluded that Ms. Martel was not permitted, under this policy, to teach the course at issue, where her students would be necessarily seeking occupational licensure from DEEP and, once licensed, will be subject to her (and DEEP's) regulatory authority.

> regulated in the future – *they are taking the class for the express purpose of being regulated by DEEP.*

(Emphasis added.) They concluded: ''For those reasons, plus DEEP's outside employment directive, DEEP's position relative to the petition remains that a Compliance Specialist II should not teach paid classes preparing students for licensure by DEEP.'' Although the Board does not have jurisdiction to interpret DEEPs Outside Employment Directive, we note that ''[s]tate agencies may formulate and implement internal polices to govern ethical behavior of its employees . . . [and, in doing so,] are permitted to adopt ethics policies that are more restrictive than the Ethics Code.'' Advisory Opinion No. 2014-6. Nevertheless, as the Board does not interpret or enforce other agencies' ethics policies, we will not opine as to the application of DEEP's Outside Employment Directive here. See Advisory Opinion No. 2008-3 (''the Citizen's Ethics Advisory Board does not interpret and is without authority to enforce other agencies' ethics policies'').

It is also worth noting that there are a few permissible options under the Code for Ms. Martel, should she still wish to teach the course at issue or one similar. First, although this may not be permitted under DEEP policy, there is no Code provision that would prevent Ms. Martel from volunteering her time and services to teach an *uncompensated* course, even to potential members of DEEP's regulated community.[6] See Advisory Opinion No. 2011-4 (''[t]he Ethics Code's conflict provisions, 1-84 through 1-86, are all grounded on a single rationale: namely, that public service is a public trust and must not be used for personal financial gain or the financial gain of certain family members or a 'business with which he is associated.' Absent this requisite financial gain, the tenets of the Ethics Code do not apply and the jurisdiction of this office is lacking''); see also Request for Advisory Opinion No. 20157 (2023) (''provided that the Region 3 EMS Coordinator will not be compensated in any way, nothing in the Code prohibits this state employee from volunteering his personal time and services to teach these [refresher and Continuing Medical Education] courses'').

In addition, although this also may not be permitted under DEEP policy, the Code would not preclude Ms. Martel from teaching such a course as part of her state position.[7]

Finally, the Code would not preclude Ms. Martel from teaching such a course to students who are outside DEEP's current or potential regulatory authority, e.g., an

[6] Of note, in its response to the petition, DEEP provided the following with respect to historical practice at the agency permitting employees to teach uncompensated courses on a volunteer basis:

> Previously, DEEP staff have participated in ''arborist'' training, but only as volunteers. One DEEP inspector has, from time to time, volunteered to teach a portion of an Arboriculture 101 class, sponsored by the Connecticut Tree Protection Association. This was done outside of the inspector's usual work hours with DEEP.

[7] We cannot opine on whether such a course, taught by someone in Ms. Martel's position at DEEP, who is involved in both the inspection and complaint processes of DEEP licensees, would be permitted by DEEP's internal policies or any other state policies. See Request for Advisory Opinion No. 1258 (1994) (''[i]f the Department of Public Health and Addiction Services is awarded the contract, it would be beyond the jurisdiction of the Ethics Commission to determine whether what you now propose to undertake on behalf of the Health Center or the CSAT would then be considered part of your DPHAS responsibilities''); Request for Advisory Opinion No. 20783 (2024) (''[p]lease note that the OSE Legal Division has the authority to issue advice concerning the Code only, and you may want to direct any questions about a state employee's appropriate job duties to DESPP's Human Resources personnel or the Department of Administrative Services'').

out-of-state person seeking certification or licensure in another jurisdiction.[8] Again, we cannot opine as to whether any of these options would contravene DEEP's Outside Employment Directive or any other DEEP policy, and Ms. Martel, should she wish to pursue such an option, must petition DEEP directly.

Conclusion

Based on the facts presented, the Code prohibits Ms. Martel from receiving compensation to teach a structural pest control course to individuals who are seeking occupational licensure from PMP and who, once licensed, will be directly regulated by both her and PMP.

By order of the Board,

Dated **August 15, 2024** **/s/Dena Castricone**
Chairperson

[8] Again, we cannot opine on whether such a course, taught by someone in Ms. Martel's position at DEEP, would be permitted by DEEP's internal policies or any other state policies. Of significant note, however, in its response to the petition, DEEP provided the following, quoting its Outside Employment Directive: ''DEEP's Outside Employment Directive contemplates a situation similar to this one, noting that, '[f]or example, an employee may provide consulting services to an out-of-state person or entity not subject to the department's jurisdiction or to any person or entity on a matter *in which the department is unlikely to ever have an interest*.' '' (Emphasis in original.)