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IV

Pattis' final claim is that the trial court's disciplinary order suspending him from the practice of law for a period of six months was arbitrary and disproportionate. In light of our conclusion in part III of this opinion that the court improperly determined, in whole or in part, that Pattis violated rules 1.15 (b), 3.4 (3), and 5.1 (c) of the Rules of Professional Conduct, we further conclude that (1) the court's disciplinary order, which was not predicated on Pattis' violation of any particular rule, cannot stand, and (2) we must remand the case for a new hearing on sanctions before a different judge. See General Statutes § 51-183c;[54] Practice Book § 1-22 (a); see also *O'Brien* v. *Superior Court*, 105 Conn. App. 774, 797 and n.27, 939 A.2d 1223 (citing Practice Book § 1-22 (a) in remanding case to trial court for further hearing on certain sanctions after concluding that evidence did not establish that plaintiff in error violated two out of four Rules of Professional Conduct), cert. denied, 287 Conn. 901, 947 A.2d 342 (2008).[55]

The writ of error is granted in part and the case is remanded with direction to vacate the trial court's findings that the plaintiff in error violated Rules of Professional Conduct 1.15 (b), 3.4 (3), and 5.1 (c) in part, as well as the court's disciplinary order, and for further proceedings consistent with this opinion; the writ of error is denied in all other respects.

In this opinion the other judges concurred.

[54] General Statutes § 51-183c provides: "No judge of any court who tried a case without a jury in which a new trial is granted, or in which the judgment is reversed by the Supreme Court, may again try the case. No judge of any court who presided over any jury trial, either in a civil or criminal case, in which a new trial is granted, may again preside at the trial of the case."

[55] To be clear, our decision to remand the matter to a different judge should not be construed in any manner as calling into question Judge Bellis' impartiality in conducting the disciplinary proceedings against Pattis.

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CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

EDGAR TATUM *v.* COMMISSIONER OF CORRECTION (SC 20727)

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

Syllabus

The petitioner, who had been convicted of murder in 1990, filed a habeas petition, claiming, inter alia, that the trial court's admission of unduly suggestive and unreliable eyewitness identification evidence at his criminal trial violated his due process rights. The petitioner also claimed that advances in the science of eyewitness identification since his conviction highlighted the unreliability of the eyewitness identifications in his own criminal case and called into question the validity of his conviction, which the habeas court interpreted as an actual innocence claim. The habeas court granted in part the motion to dismiss filed by the respondent, the Commissioner of Correction, concluding, inter alia, that the petitioner's due process and actual innocence claims were barred by the doctrine of res judicata. The habeas court also concluded that this court's decisions in *State* v. *Guilbert* (306 Conn. 218), which held that expert testimony on eyewitness identification is admissible under certain circumstances, and *State* v. *Dickson* (322 Conn. 410), which overruled

this court's holding regarding first-time, in-court identifications in the petitioner's direct appeal, *State* v. *Tatum* (219 Conn. 721), and concluded that such identifications violate procedural due process, did not indicate that those decisions were to be retroactively applied on collateral review. The habeas court then addressed the petitioner's remaining claims and subsequently dismissed in part and denied in part the petitioner's habeas petition, from which the petitioner, on the granting of certification, appealed to the Appellate Court. The Appellate Court disagreed with the petitioner's claim that the decisions in *Guilbert* and *Dickson* could be applied retroactively to his due process and actual innocence claims on collateral review, and affirmed the habeas court's judgment. The petitioner, on the granting of certification, appealed to this court.

Held that the Appellate Court, which lacked the benefit of this court's newly expanded formulation of the framework set forth in *Teague* v. *Lane* (489 U.S. 288) for evaluating whether a new constitutional rule applies retroactively on collateral review, should not have upheld the habeas court's dismissal of the petitioner's due process and actual innocence claims on the ground that *Dickson* did not apply retroactively to those claims on collateral review:

Under the *Teague* framework, a new rule, such as the new rules articulated in *Guilbert* and *Dickson*, will not apply retroactively to cases on collateral review under the federal constitution unless the rule is either substantive or a watershed rule of criminal procedure that implicates the fundamental fairness and accuracy of a criminal proceeding.

In the present case, the petitioner acknowledged that the new rules articulated in *Guilbert* and *Dickson* were not substantive but claimed that they were watershed rules of criminal procedure.

In light of the United States Supreme Court's recent decision to abolish the watershed rule in *Edwards* v. *Vannoy* (593 U.S. 255), this court recognized that new procedural rules no longer applied retroactively on collateral review in federal courts but nevertheless clarified that *Teague*'s watershed rule had continued vitality in Connecticut.

Moreover, in view of *Edwards* and the narrow applicability of the watershed exception, this court adopted a third exception to the *Teague* rule of nonretroactivity, concluding that a new constitutional rule of criminal procedure must be applied retroactively on collateral review if the rule was a result of developments in science that persuaded this court to reevaluate fundamental principles underlying judicial procedures, the rule significantly improves the accuracy of a conviction, and the petitioner advocated for the rule in his or her criminal proceedings or in an earlier habeas petition.

This court preliminarily observed that its recent holding in *State* v. *Harris* (330 Conn. 91) that the Connecticut constitution affords greater protec-

tion than the United States constitution with respect to the admissibility of eyewitness identification testimony militated in favor of the retroactive application of *Guilbert* and *Dickson* on collateral review, and also noted that recent case law has recognized that mistaken eyewitness identifications are the leading cause of wrongful convictions and that the risk of mistake is particularly acute when an identification has been tainted by an unduly suggestive procedure.

With respect to the retroactive application of *Guilbert* to the petitioner's due process and actual innocence claims, this court concluded that, under either *Teague*'s watershed exception or the third exception to nonretroactivity the court recognized in this case, a new rule must be of constitutional dimension in order to be applied retroactively, and the principles articulated in *Guilbert* could not be applied retroactively because that case articulated an evidentiary rather than a constitutional rule.

With respect to the retroactive application of *Dickson*, there was no question that *Dickson* announced a constitutional rule of criminal procedure when the court concluded that any first-time, in-court identification by a witness who would have been unable to reliably identify the defendant during a nonsuggestive, out-of-court procedure constitutes a procedural due process violation.

Furthermore, although the court in *Dickson* indicated in a footnote that that case should not be applied retroactively on collateral review, that statement was dictum, and this court disagreed with the earlier assertion in the same footnote in *Dickson* that the rule requiring prescreening of a first-time, in-court identification was merely an incremental change in identification procedures, as the rule articulated in *Dickson* was central to an accurate determination of innocence or guilt, such that the rule's absence would create an impermissibly high risk that innocent persons will be wrongfully convicted.

This court ultimately determined that the rule set forth in *Dickson* must apply retroactively on collateral review because the rule was a result of developments in science that persuaded this court to reevaluate the fundamental principles underlying eyewitness identification evidence, the application of the rule significantly improved the accuracy of the petitioner's conviction, and the petitioner raised eyewitness identification claims in his direct appeal from his criminal conviction.

More specifically, there was a heightened risk of a wrongful conviction in the petitioner's case because the state's case against the petitioner was largely based on two cross-racial eyewitness identifications of the petitioner, the two eyewitnesses had previously identified the same person as the shooter, who was someone other than the petitioner, and more than one year after the shooting, at a probable cause hearing, both

eyewitnesses identified the petitioner, who was the only Black man seated at defense counsel's table.

In addition, because *Dickson* was decided well after the petitioner's conviction, the petitioner did not have the opportunity in his criminal case to raise the specific claim that, in light of this court's decision in *Dickson*, the identification procedure used to secure his conviction violated his right to due process.

Argued October 20, 2023—officially released July 16, 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.*, granted in part the respondent's motion to dismiss; thereafter, the case was tried to the court, *Newson*, *J.*; judgment dismissing in part and denying in part the petition, from which the petitioner, on the granting of certification, appealed to the Appellate Court, *Alexander*, *Clark* and *Lavine*, *Js.*, which affirmed the habeas court's judgment, and the petitioner, on the granting of certification, appealed to this court. *Reversed in part*; *new trial.*

Kara E. Moreau, assigned counsel, with whom was *Emily C. Kaas-Mansfield*, assigned counsel, for the appellant (petitioner).

James A. Killen, senior assistant state's attorney, for the appellee (respondent).

Lisa J. Steele filed a brief for the Connecticut Criminal Defense Lawyers Association as amicus curiae.

Robert J. Meredith filed a brief for the Innocence Project, Inc., et al. as amici curiae.

Opinion

McDONALD, J. "[M]istaken eyewitness identification testimony is by far the leading cause of wrongful convic-

* July 16, 2024, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

tions." *State* v. *Guilbert*, 306 Conn. 218, 249–50, 49 A.3d 705 (2012). Recognizing the developments in the cognitive science of eyewitness identification, this court has recently established new rules for cases in which eyewitness identification evidence is proffered. Specifically, in *Guilbert*, we determined that "expert testimony on eyewitness identification is admissible upon a determination by the trial court that the expert is qualified and the proffered testimony is relevant and will aid the jury." Id., 226. In doing so, we overruled earlier decisions from this court, which held that the factors affecting eyewitness identification were within the knowledge of an average juror. See id., 226, 229, 251–53. We reasoned that our prior case law was "out of step with the widespread judicial recognition that eyewitness identifications are potentially unreliable in a variety of ways unknown to the average juror. This [broad-based] judicial recognition tracks a near perfect scientific consensus. The extensive and comprehensive scientific research, as reflected in hundreds of peer reviewed studies and meta-analyses, convincingly demonstrates the fallibility of eyewitness identification testimony and pinpoints an array of variables that are most likely to lead to a mistaken identification." (Footnotes omitted.) Id., 234–36. We also noted that a trial court retains discretion to provide "focused and informative" jury instructions on the fallibility of eyewitness identification evidence. Id., 257–58. Four years later, in *State* v. *Dickson*, 322 Conn. 410, 141 A.3d 810 (2016), cert. denied, 582 U.S. 922, 137 S. Ct. 2263, 198 L. Ed. 2d 713 (2017), we further developed protections against inherently suggestive identifications. In doing so, we overruled this court's 1991 holding in *this petitioner's* direct appeal related to a first-time, in-court cross-racial eyewitness identification. See id., 434–36 (overruling in part *State* v. *Tatum*, 219 Conn. 721, 595 A.2d 322 (1991)). We concluded that "*any* [first-time] in-court identification by

a witness who would have been unable to reliably identify the [petitioner] in a nonsuggestive out-of-court procedure constitutes a procedural due process violation." (Emphasis in original.) *State* v. *Dickson*, supra, 426 n.11. The sole issue in this certified appeal is whether the principles this court set forth in *Guilbert* and *Dickson* apply retroactively to the petitioner's case on collateral review. We conclude that the principles articulated in *Dickson* do. Accordingly, we reverse in part the judgment of the Appellate Court.

In 1990, following a jury trial, the petitioner, Edgar Tatum, was convicted of murder in connection with the shooting death of the victim and sentenced to sixty years of incarceration. The state's case against the petitioner was largely based on two cross-racial eyewitness identifications of the petitioner. Both eyewitnesses had previously identified the same person as the shooter, someone other than the petitioner. The eyewitnesses, who were both white, recanted these earlier identifications and, more than one year after the shooting, at the petitioner's probable cause hearing, identified the petitioner, who was the only Black man seated at defense counsel's table, as the shooter. Significantly, both eyewitnesses were heavy drug users, one admitting to using narcotics every day and the other admitting to "freebasing cocaine" on the evening of the shooting. The petitioner appealed his conviction to this court, challenging, among other things, the trial court's admission of an unduly suggestive in-court identification and the eyewitness identification instructions given to the jury. See *State* v. *Tatum*, supra, 219 Conn. 723. This court rejected his claims and upheld the judgment of conviction. Id., 723, 742.

The petitioner has since filed four petitions for a writ of habeas corpus that are not relevant to this appeal. His fifth habeas petition, which is the subject of this appeal, was filed in 2016. In count six of the operative,

amended petition, the petitioner alleged that the admission of unduly suggestive and unreliable eyewitness identification evidence in his underlying criminal case violated his due process rights under the fourteenth amendment to the federal constitution and article first, §§ 8 and 9, of the state constitution. He also argued that the jury instructions provided by the criminal trial court were insufficient to educate jurors about certain factors that could adversely impact eyewitness identification. Finally, he argued that this court's decisions in *Guilbert* and *Dickson* should be retroactively applied to his case.

In count seven, the petitioner argued that advances in the science of eyewitness identification since his conviction highlight the unreliability of the eyewitness identifications that occurred in his criminal case and call into question the validity of his conviction. The habeas court interpreted this claim as a claim of actual innocence. In discussing the claim, the court explained that, "even giving the petitioner the benefit of the doubt the law requires, he is not actually claiming that there is 'new' evidence, as in a previously undiscovered witness, an unknown video of the incident, or bodily fluids not previously subject to DNA testing." The court stated: "What the claim really amounts to is that subsequent developments in the science of eyewitness identification have changed the information and instructions a jury can be given in a criminal trial, and, if the jurors in the petitioner's trial were allowed to apply the 'new' science and instructions to the same 'old' evidence presented at the petitioner's trial, they may have viewed the testimony of the eyewitnesses who identified the petitioner differently and come to a different conclusion."

The respondent, the Commissioner of Correction, moved to dismiss the operative petition in 2018. The habeas court granted the respondent's motion to dis-

miss as to counts one (ineffective assistance of trial counsel), two (ineffective assistance of appellate counsel), three (ineffective assistance of first habeas counsel), six (due process), and seven (newly discovered evidence). As to counts six and seven, the habeas court construed count seven in conjunction with count six and explained that the petitioner already had litigated the identification procedures in his direct appeal and that the doctrine of res judicata prohibited "the petitioner from being able to relitigate this issue by changing the facts to focus on the identification procedures used in connection with witness [Tracy] LeVasseur because neither the grounds nor the requested relief is any different [from] the issue raised on appeal." The court emphasized that "the petitioner has not alleged a single new 'fact' related to his case." The court then went on to conclude that nothing in the *Guilbert* or *Dickson* decisions indicates that they were to be retroactively applied or intended to provide an avenue for collateral relief.

The habeas court denied the respondent's motion to dismiss as to counts four (ineffective assistance of second habeas counsel) and five (ineffective assistance of third habeas counsel). The court held a hearing on those two claims, after which the parties filed posttrial briefs. The habeas court ultimately dismissed count four and denied count five of the habeas petition. The petitioner thereafter filed a petition for certification to appeal, which was granted by the habeas court. On appeal to the Appellate Court, the petitioner claimed, among other things, that the habeas court incorrectly determined that this court's decisions in *Guilbert* and *Dickson* could not be applied retroactively to the identification claims raised in counts six and seven of the habeas petition. See *Tatum* v. *Commissioner of Correction*, 211 Conn. App. 42, 44, 272 A.3d 218 (2022). The

Appellate Court disagreed and affirmed the judgment of the habeas court. Id., 44, 76.

We granted the petitioner's petition for certification to appeal, limited to the following issue: "Did the Appellate Court incorrectly conclude that the habeas court had properly dismissed counts six and seven of the petitioner's operative, amended habeas petition on the ground that *State* v. *Dickson*, [supra, 322 Conn. 410], and *State* v. *Guilbert*, [supra, 306 Conn. 218], both of which overruled this court's rationale and holding regarding in-court identifications in the petitioner's direct appeal; see *State* v. *Tatum*, [supra, 219 Conn. 721]; did not apply retroactively to the petitioner's case on collateral review?" *Tatum* v. *Commissioner of Correction*, 343 Conn. 932, 276 A.3d 975 (2022).

On appeal to this court, the petitioner claims that the Appellate Court should not have upheld the habeas court's dismissal of counts six and seven of his petition on the basis that *Guilbert* and *Dickson* do not apply retroactively. He contends that both *Guilbert* and *Dickson* announced watershed rules of criminal procedure and, as such, should apply retroactively. Alternatively, even if this court were to conclude that *Guilbert* and *Dickson* do not apply retroactively to all criminal defendants and petitioners, the petitioner contends that justice requires that *Guilbert* and *Dickson* apply retroactively to his case because each case overruled the specific holdings in his direct appeal. The respondent contends that neither *Guilbert* nor *Dickson* applies retroactively. The respondent points to footnote 34 of *Dickson*, which he claims stated that the new constitutional rule announced in that case did not apply retroactively on collateral review. See *State* v. *Dickson*, supra, 322 Conn. 451 n.34.

We begin with a discussion of this court's recent eyewitness identification cases. First, in *Guilbert*, this

court held, for the first time, that, because certain factors that bear on the reliability of eyewitness identifications are not within the knowledge of the average juror, expert testimony on those factors does not invade the province of the jury and is admissible. *State* v. *Guilbert*, supra, 306 Conn. 226, 234–37, 251–52. We emphasized that "eyewitness identifications are potentially unreliable in a variety of ways unknown to the average juror," and this "recognition tracks a near perfect scientific consensus." Id., 234–35. As a result, we recognized that the methods typically used to alert juries to the fallibility of eyewitness identifications—cross-examination, closing argument, and generalized jury instructions—often are not sufficient to alert the jury to the factors affecting the reliability of eyewitness identifications. Id., 243. We also stated that a trial court retains the discretion to provide "focused and informative jury instructions on the fallibility of eyewitness identification evidence" that "reflect the findings and conclusions of the relevant scientific literature pertaining to the particular variable or variables at issue in the case . . . ." (Citations omitted; footnote omitted.) Id., 257–58. Significantly, we noted that "broad, generalized instructions on eyewitness identifications, such as those previously approved by this court in [the petitioner's direct appeal] . . . do not suffice." (Citations omitted.) Id., 258.

We next had occasion to consider eyewitness identification evidence in *Dickson*. We held that, contrary to our prior case law on the topic, "in cases in which identity is an issue, in-court identifications that are not preceded by a successful identification in a nonsuggestive identification procedure implicate due process principles and, therefore, must be prescreened by the trial court." (Footnote omitted.) *State* v. *Dickson*, supra, 322 Conn. 415. We reasoned that "we are hard-pressed to imagine how there could be a *more* suggestive identification procedure than placing a witness on the stand in open court,

confronting the witness with the person whom the state has accused of committing the crime, and then asking the witness if he can identify the person who committed the crime." (Emphasis in original.) Id., 423. We again revisited the petitioner's direct appeal and concluded that our holding in that appeal that "it was 'necessary' for the state to present a [first-time] in-court identification of the [petitioner] at the probable cause hearing must be overruled." Id., 435–36. We explained that "[w]e simply can perceive no reason why the state cannot attempt to obtain an identification using a lineup or photographic array before asking an eyewitness to identify the [petitioner] in court. Although the state is not constitutionally required to do so, it would be absurd to conclude that the state can simply decline to conduct a nonsuggestive procedure and then claim that its own conduct rendered a [first-time] in-court identification necessary, thereby curing it of any constitutional infirmity." (Emphasis omitted.) Id., 436. In short, "[t]he state is not entitled to conduct an unfair procedure merely because a fair procedure failed to produce the desired result." Id.

Finally, in *State* v. *Harris*, 330 Conn. 91, 191 A.3d 119 (2018), we explained that the due process provision of article first, § 8, of our state constitution affords greater protection than the federal constitution with respect to the admissibility of eyewitness identification testimony. See id., 114–15, 131. In *Harris*, the defendant challenged the admission of an identification that was made while he was being arraigned in court on an unrelated case. See id., 98–99. Although we concluded that the identification procedure was "overly suggestive by any measure" because "none of [the other Black, male] custodial arraignees was sufficiently similar to the defendant in height, weight and age," we also concluded that the identification was reliable in light of the circumstances of the case. Id., 107–108.

We now turn to the present case. The question of whether the principles this court set forth in *Guilbert* and *Dickson* apply retroactively to the petitioner's case on collateral review is a question of law over which our review is plenary. See, e.g., *Duperry* v. *Solnit*, 261 Conn. 309, 318, 803 A.2d 287 (2002). In *Teague* v. *Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989), the United States Supreme Court set forth the framework for evaluating whether a new rule applies retroactively on collateral review under the federal constitution. See id., 299–314 (plurality opinion); see also *Thiersaint* v. *Commissioner of Correction*, 316 Conn. 89, 112–13, 111 A.3d 829 (2015) (adopting *Teague* framework). Under *Teague*, a court "must [first] ascertain the legal landscape as it" existed at the time the petitioner's conviction became final and "ask whether the [United States] [c]onstitution, as interpreted by the precedent then existing, compels the rule . . . . That is, the court must decide whether the rule is actually new." (Citation omitted; internal quotation marks omitted.) *Beard* v. *Banks*, 542 U.S. 406, 411, 124 S. Ct. 2504, 159 L. Ed. 2d 494 (2004). A constitutional rule is "new" for purposes of *Teague* "if the result was not dictated by precedent existing at the time the [petitioner's] conviction became final." (Internal quotation marks omitted.) *Thiersaint* v. *Commissioner of Correction*, supra, 103.

The respondent concedes that *Guilbert* and *Dickson* created "new" rules, within the meaning of *Teague*. As a result, we must decide whether these "new" rules apply retroactively. "With two exceptions, a new rule will not apply retroactively to cases on collateral review. . . . First, if the new rule is substantive, that is, if the rule places certain kinds of primary, private conduct beyond the power of the criminal lawmaking authority to proscribe . . . it must apply retroactively. Such rules apply retroactively because they necessarily carry a significant risk that a [petitioner] stands con-

victed of an act that the law does not make criminal or faces a punishment that the law cannot impose [on] him." (Citations omitted; internal quotation marks omitted.) *Casiano* v. *Commissioner of Correction*, 317 Conn. 52, 62–63, 115 A.3d 1031 (2015), cert. denied sub nom. *Semple* v. *Casiano*, 577 U.S. 1202, 136 S. Ct. 1364, 194 L. Ed. 2d 376 (2016).

"Second, if the new rule is procedural, it applies retroactively if it is a watershed [rule] of criminal procedure . . . implicit in the concept of ordered liberty . . . meaning that it implicat[es] the fundamental fairness and accuracy of [a] criminal proceeding. . . . Watershed rules of criminal procedure include those that raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise. . . . The United States Supreme Court has narrowly construed [the] second exception and, in the [more than thirty-five] years since *Teague* was decided, has [never] conclude[d] that a new rule qualifie[d] as watershed." (Citations omitted; internal quotation marks omitted.) Id., 63. Indeed, the United States Supreme Court has recently abolished the watershed rule. See *Edwards* v. *Vannoy*, 593 U.S. 255, 272, 141 S. Ct. 1547, 209 L. Ed. 2d 651 (2021).[1] The court reasoned that "[c]ontinuing to articulate a theoretical exception that never actually applies in practice offers false hope to defendants, distorts the law, misleads judges, and wastes the

[1] Since *Edwards*, many scholars have advocated for the reimagining of how courts approach the retroactivity issue. See, e.g., J. Ho, Note, "Finality, Comity, and Retroactivity in Criminal Procedure: Reimagining the *Teague* Doctrine After *Edwards v. Vannoy*," 73 Stan. L. Rev. 1551, 1600 (2021) ("[i]n light of the weighty remedial interests—not just in accuracy but in human dignity and judicial integrity—a revised retroactivity framework should be more generous about granting retroactivity remedies for violations of constitutional rights"); T. Simkovic, Note, "*Ramos* Retroactivity and the False Promise of *Teague v. Lane*," 76 U. Miami L. Rev. 825, 830 (2022) ("[g]iven that *Teague*'s exception for watershed rules is now extinct, the [United States Supreme] Court should rethink its entire retroactivity framework for new rules of criminal law on habeas review").

resources of defense counsel, prosecutors, and courts. Moreover, no one can reasonably rely on an exception that is [nonexistent] in practice, so no reliance interests can be affected by forthrightly acknowledging reality. It is time—probably long past time—to make explicit what has become increasingly apparent to bench and bar over the last [thirty-five] years: New procedural rules do not apply retroactively on federal collateral review. The watershed exception is moribund. It must be regarded as retaining no vitality." (Internal quotation marks omitted.) Id.

In the present case, the petitioner does not contend that the new rules articulated in *Guilbert* and *Dickson* are substantive. Rather, the petitioner argues that these new procedural rules are watershed ones. As we discussed, new procedural rules no longer apply retroactively on federal collateral review. See id. Nevertheless, we have explained that, although "federal decisions applying *Teague* may be instructive, this court will not be bound by those decisions in any particular case . . . but will conduct an independent analysis and application of *Teague*." *Thiersaint* v. *Commissioner of Correction*, supra, 316 Conn. 113. We take this opportunity to clarify the viability of the watershed exception in Connecticut in light of the United States Supreme Court's decision to abolish the watershed rule in *Edwards*.

We have applied the *Teague* framework "more liberally than the United States Supreme Court [might] otherwise apply it . . . ." (Internal quotation marks omitted.) *Casiano* v. *Commissioner of Correction*, supra, 317 Conn. 64; see also, e.g., *Rhoades* v. *State*, 149 Idaho 130, 139, 233 P.3d 61 (2010) (because comity concerns do not apply to state court's review of state convictions, Idaho courts are "not required to blindly follow [the United States Supreme Court's] view of . . . whether a new rule is a watershed rule"), cert. denied, 562 U.S. 1258, 131 S. Ct. 1571, 179 L. Ed. 2d 477 (2011);

State v. *Mares*, 335 P.3d 487, 504 (Wyo. 2014) (applying *Teague* more broadly than United States Supreme Court when "a particular state interest is better served by a broader retroactivity ruling").

For example, we have applied the *Teague* analysis and concluded that the United States Supreme Court's decision in *Miller* v. *Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), applied retroactively on collateral review. *Casiano* v. *Commissioner of Correction*, supra, 317 Conn. 62, 69, 71. *Miller* forbade mandatory life without parole sentences for juvenile offenders. *Miller* v. *Alabama*, supra, 465. In *Casiano*, we reasoned that *Miller* created a new watershed rule of criminal procedure; *Casiano* v. *Commissioner of Correction*, supra, 62, 69; because, among other things, "the individualized sentencing prescribed by *Miller* is central to an accurate determination . . . that the sentence imposed is a proportionate one." (Citation omitted; internal quotation marks omitted.) Id., 70. Several months later, the United States Supreme Court similarly deemed *Miller*'s ruling retroactive in *Montgomery* v. *Louisiana*, 577 U.S. 190, 206, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016). The Supreme Court, however, based its decision on a different premise, namely, that *Miller* had created a new substantive rule, thus bypassing *Teague*'s watershed analysis. See id., 206, 208–209. Given that we are not bound by the United States Supreme Court's application of *Teague*, our conclusion in *Casiano* remains binding in Connecticut. See K. Kurland, "With Unanimity and Justice for All: The Case for Retroactive Application of the Unanimous Jury Verdict Requirement," 17 Nw. J.L. & Soc. Policy 49, 75 (2021).

Although *Teague*'s watershed rule may be "moribund" in the federal courts; *Edwards* v. *Vannoy*, supra, 593 U.S. 272; we conclude that it has continued vitality in Connecticut. The United States Supreme Court has explained that "the *Teague* rule of nonretroactivity was

fashioned to achieve the goals of federal habeas while minimizing federal intrusion into state criminal proceedings. It was intended to limit the authority of federal courts to overturn state convictions—not to limit a state court's authority to grant relief for violations of new rules of constitutional law when reviewing its own [s]tate's convictions." *Danforth* v. *Minnesota*, 552 U.S. 264, 280–81, 128 S. Ct. 1029, 169 L. Ed. 2d 859 (2008). In other words, the particular concerns that serve to limit habeas relief "are unique to *federal* habeas review of state convictions." (Emphasis in original.) Id., 279. Whereas federal habeas review for state prisoners risks "render[ing] the actions of state courts a serious disrespect"; *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 263, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973) (Powell, J., concurring); state postconviction proceedings "merely [reflect] and [confirm] the [state] courts' own inherent and discretionary power, firmly established in English practice long before the foundation of our [r]epublic, to set aside a judgment whose enforcement would work inequity." (Internal quotation marks omitted.) *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 233–34, 115 S. Ct. 1447, 131 L. Ed. 2d 328 (1995). Accordingly, the federalism rationales for *Teague* "simply do not apply" to state postconviction proceedings. *State* v. *Preciose*, 129 N.J. 451, 475, 609 A.2d 1280 (1992). Whereas concerns about the relationship between state and federal courts warrant caution in the federal habeas context, these same concerns suggest that states should be particularly willing to provide fulsome postconviction procedures. See, e.g., *Case* v. *Nebraska*, 381 U.S. 336, 338–40, 85 S. Ct. 1486, 14 L. Ed. 2d 422 (1965) (Clark, J., concurring); id., 344–47 (Brennan, J., concurring).

Considerations of finality are certainly very important in state habeas proceedings, but they are somewhat less important in state postconviction proceedings as compared to federal habeas proceedings, as the federal

proceedings typically occur last and, therefore, must take into account the finality of the state proceedings. See, e.g., C. Lasch, "The Future of *Teague* Retroactivity, or 'Redressability,' After Danforth v. Minnesota: Why Lower Courts Should Give Retroactive Effect to New Constitutional Rules of Criminal Procedure in Postconviction Proceedings," 46 Am. Crim. L. Rev. 1, 4–5, 57 (2009). Moreover, there is good reason to conclude that the benefits of retroactivity on collateral review in appropriate cases outweigh finality concerns. The United States Supreme Court has observed that "[t]he finality interest is more at risk" in postconviction proceedings than on direct review and that "the costs and uncertainties of a new trial are greater because more time will have elapsed in most cases." *Weaver* v. *Massachusetts*, 582 U.S. 286, 302, 137 S. Ct. 1899, 198 L. Ed. 2d 420 (2017). "For the same reasons, those 'costs and uncertainties' are lower in state [postconviction] proceedings than in federal habeas, and place less of a thumb on the scale in favor of nonretroactivity. Furthermore, to the extent finality concerns refer to the finality of a state court decision (as opposed to a state court conviction), they are reduced in state [postconviction] proceedings, which are often the state courts' first look at a constitutional claim." (Emphasis omitted.) J. Rutledge, "With Great (Writ) Power Comes Great (Writ) Responsibility: A Modified *Teague* Framework for State Courts," 59 Crim. L. Bull. 480, 494 (2023).

Again, we do not discount the importance of finality; we simply acknowledge that this court's opportunity to review certain constitutional claims may arise for the first time in the habeas context, and the interest in finality plainly does not automatically outweigh interests in fairness and justice in every circumstance. We do not believe that we should follow the Supreme Court's lead in *Edwards* by foreclosing the possibility of the retroactive application of new procedural rules

in all cases. Cf. *State* v. *Reddick*, 351 So. 3d 273, 297 (La. 2022) (Griffin, J., dissenting) ("[t]he imperative to correct past injustices manifest in the deprivation of a constitutionally guaranteed right should not cede to reliance interests and administrative concerns," and courts should "not perpetuate something [they] all know to be wrong only because [they] fear the consequences—and costs—of being right"). As we have explained in a similar context, "in criminal matters, judicial economy must give way to the demand for the truth." *State* v. *McDowell*, 242 Conn. 648, 657, 699 A.2d 987 (1997); see, e.g., *State* v. *Ellis*, 197 Conn. 436, 471, 497 A.2d 974 (1985) ("the essentially public objectives of the criminal law advise against the uncritical adoption of [res judicata] concepts"). In short, finality "is less relevant in criminal cases [in which] the [preeminent] concern is to reach a correct result and [in which] other considerations peculiar to criminal prosecutions may outweigh the need to avoid repetitive litigation . . . ." (Internal quotation marks omitted.) *State* v. *Ellis*, supra, 470.

Accordingly, we continue to see vitality in *Teague*'s watershed exception. Rather than "blindly follow" the United States Supreme Court's application of *Teague*, this court will continue to "independently review cases when applying the *Teague* standard," including when determining whether a new procedural rule is watershed, notwithstanding the United States Supreme Court's holding in *Edwards* v. *Vannoy*, supra, 593 U.S. 272.[2]

[2] State courts have regularly applied the *Teague* watershed exception, despite the United States Supreme Court's aversion to doing so. They have done so for a variety of rules: rules protecting the right to counsel; see, e.g., *Talley* v. *State*, 371 S.C. 535, 544, 640 S.E.2d 878 (2007) (holding that *Alabama* v. *Shelton*, 535 U.S. 654, 122 S. Ct. 1764, 152 L. Ed. 2d 888 (2002), announced watershed rule); see also *Alford* v. *State*, 287 Ga. 105, 106–108, 695 S.E.2d 1 (2010) (same); rules protecting the right to trial by jury and the right not to be convicted without proof beyond a reasonable doubt; see, e.g., *Powell* v. *Delaware*, 153 A.3d 69, 70, 74, 76 (Del. 2016) (holding that *Rauf* v. *State*, 145 A.3d 430 (Del. 2016), announced watershed rule); *People* v. *Beachem*, 336 Ill. App. 3d 688, 693–700, 784 N.E.2d 285 (2002) (holding that *Apprendi* v. *New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), announced watershed rule), appeal denied, 203 Ill. 2d 552, 788 N.E.2d 730,

Rhoades v. *State*, supra, 149 Idaho 139; see also, e.g., *Danforth* v. *State*, 761 N.W.2d 493, 500 (Minn. 2009); *State* v. *Mares*, supra, 335 P.3d 504.

Despite our disagreement with the conclusion reached in *Edwards*, the case did highlight the overly rigid strictures of the *Teague* watershed exception. As the United States Supreme Court has explained, "no new rules of criminal procedure can satisfy the watershed exception." *Edwards* v. *Vannoy*, supra, 593 U.S. 271. One scholar has even described the watershed exception as being so restrictive because "nothing is as important as *Gideon* [v. *Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963)], so nothing is retroactive." J. Marceau, "*Gideon*'s Shadow," 122 Yale L.J. 2482, 2488 (2013); cf. *Howard* v. *United States*, 374 F.3d 1068, 1081 (11th Cir. 2004) ("[a]t the risk of oversimplification, for purposes of the second *Teague* exception there are new rules, and then there are new *Gideon*-extension rules"). In light of the "confused and confusing" history of the retroactivity doctrine; *Danforth* v. *Minnesota*, supra, 552 U.S. 271; we think it prudent to continue to develop our application of *Teague* to ensure that its application is not so rigid that it "never actually applies in practice [and] offers [only] false hope to defendants, distorts the law, misleads judges, and wastes the resources of

cert. denied, 540 U.S. 897, 124 S. Ct. 243, 157 L. Ed. 2d 177 (2003); rules regarding sentencing in capital cases; see, e.g., *State* v. *Zuniga*, 336 N.C. 508, 512, 514, 444 S.E.2d 443 (1994) (recognizing that *Mills* v. *Maryland*, 486 U.S. 367, 108 S. Ct. 1860, 100 L. Ed. 2d 384 (1988), and *McKoy* v. *North Carolina*, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), announced watershed rules); rules announced by the United States Supreme Court; see, e.g., *Alford* v. *State*, supra, 106–108; *People* v. *Beachem*, supra, 693–700; *State* v. *Zuniga*, supra, 512, 514; *Talley* v. *State*, supra, 544; and rules announced by state high courts. *Powell* v. *Delaware*, supra, 70, 74, 76. They have also done so even when the United States Supreme Court has reached the opposite conclusion. Compare *State* v. *Zuniga*, supra, 512, 514 (recognizing that *Mills* and *McKoy* announced watershed rule under state version of *Teague*), with *Beard* v. *Banks*, supra, 542 U.S. 408, 410, 419–20 (recognizing that *Mills* and *McKoy* did not announce watershed rule under federal *Teague* standard).

defense counsel, prosecutors, and courts." *Edwards* v. *Vannoy*, supra, 272. We take this opportunity to provide greater clarity regarding the independent review this court undertakes when determining whether a rule applies retroactively on collateral review.

Specifically, in light of *Edwards* and the admittedly narrow applicability of the watershed exception, we think it necessary to adopt a third exception to the *Teague* rule of nonretroactivity. See *Casiano* v. *Commissioner of Correction*, supra, 317 Conn. 64 ("[w]e . . . remain free to apply the *Teague* analysis more liberally than the United States Supreme Court would otherwise apply it [when] a particular state interest is better served by a broader retroactivity ruling" (internal quotation marks omitted)); *Thiersaint* v. *Commissioner of Correction*, supra, 316 Conn. 108 ("the United States Supreme Court . . . held in *Danforth* v. *Minnesota*, [supra, 552 U.S. 282], that the restrictions *Teague* imposes on the fully retroactive application of new procedural rules are not binding on the states" (internal quotation marks omitted)).[3] We conclude that a new constitutional rule of criminal procedure must be applied

[3] State courts have adopted a variety of caveats to the *Teague* standard. See, e.g., J. Rutledge, supra, 59 Crim. L. Bull. 486–87; see also, e.g., id., 486–87 n.55, 487 nn.56–59 (citing cases).

Since *Edwards* was decided, only four states, namely, Colorado, Louisiana, Mississippi and Oklahoma, have explicitly addressed the future of the watershed exception. See *People* v. *Melendez*, 549 P.3d 1028, 1031 (Colo. App. 2024) (acknowledging that, in absence of ruling from Colorado Supreme Court, "the watershed rule remain[ed] embedded in Colorado jurisprudence" (internal quotation marks omitted)); *State* v. *Reddick*, supra, 351 So. 3d 281 (explicitly rejecting *Teague*'s watershed rule); *Wess* v. *State*, 348 So. 3d 333, 344 (Miss. App. 2022) (same); *State ex rel. Matloff* v. *Wallace*, 497 P.3d 686, 688–89 (Okla. Crim. App. 2021) (court did not explicitly decide whether it would continue to apply watershed exception but spoke of exception in past tense and predicted that "such a rule is unlikely ever to be announced"), cert. denied sub nom. *Parish* v. *Oklahoma*, U.S. , 142 S. Ct. 757, 211 L. Ed. 2d 474 (2022); see also, e.g., *Aili* v. *State*, 963 N.W.2d 442, 448 n.4 (Minn. 2021) (declining to decide whether watershed exception continues to exist under state law because it would not apply to case at hand).

retroactively on collateral review if the rule was a result of developments in science that persuaded us to reevaluate fundamental principles underlying judicial procedures, the rule significantly improves the accuracy of a conviction, and the petitioner advocated for the rule in the direct proceedings or in an earlier habeas petition.

As one scholar has explained, "for state [postconviction] proceedings to fulfill the traditional role of habeas corpus as the instrument by which due process [can] be insisted [on], they must allow prisoners to litigate the constitutional claims [the prisoners] were prevented from raising before their convictions became final." (Footnote omitted; internal quotation marks omitted.) J. Rutledge, supra, 59 Crim. L. Bull. 497. Courts have also reasoned that the possibility of overruling erroneous precedent may be a component of a meaningful opportunity to present a defense. See, e.g., *McCarthan* v. *Director of Goodwill Industries-Suncoast, Inc.*, 851 F.3d 1076, 1087 (11th Cir.) (concluding that petitioner "had a meaningful opportunity to present his claim" because he had "the chance to have precedent overruled en banc or by the [United States] Supreme Court"), cert. denied sub nom. *McCarthan* v. *Collins*, 583 U.S. 1012, 138 S. Ct. 502, 199 L. Ed. 2d 385 (2017). Because retroactivity under *Teague* is a threshold question, petitioners advocating for a new constitutional rule of criminal procedure do not enjoy that possibility. "Even if the court wholeheartedly agreed that the [c]onstitution required overruling precedent, [a petitioner] could not receive the benefit of that overruling." J. Rutledge, supra, 498. As a result, scholars have encouraged state courts to "treat [a] petitioner's first opportunity to raise a constitutional claim as a form of direct review for purposes of that claim." Id., 499. It strikes us as eminently reasonable, then, that a new constitutional rule of criminal procedure be applied retroactively on collateral review when the petitioner had previously raised

that claim on direct appeal or in an earlier habeas proceeding. Just because a petitioner was ahead of scientific advancements that now call into question the fundamental principles underlying judicial procedures and the accuracy of a criminal conviction does not mean that the petitioner should be precluded from the application of that new rule.

A case from Louisiana highlights the injustice that occurs when a criminal defendant or petitioner is unable to obtain the benefit of a new constitutional rule for which he or she had previously argued. At his second jury trial, the defendant, Corey Miller, was found guilty by a jury vote of ten to two. *State* v. *Miller*, 83 So. 3d 178, 182 and nn.1–2 (La. App. 2011), writ denied, 89 So. 3d 1191 (La. 2012), cert. denied, 568 U.S. 1157, 133 S. Ct. 1238, 185 L. Ed. 2d 177 (2013). At the time, the Louisiana constitution permitted a nonunanimous guilty verdict so long as at least ten out of twelve jurors vote in favor of conviction. Id., 204 and n.10; see also La. Const., art. I, § 17 (A) (2018) ("[a] case for an offense committed prior to January 1, 2019, in which the punishment is necessarily confinement at hard labor shall be tried before a jury of twelve persons, ten of whom must concur to render a verdict"). Miller was sentenced to life in prison without the possibility of parole. *State* v. *Miller*, supra, 83 So. 3d 182. Miller claimed, both at the trial and appellate levels, that the nonunanimous verdict violated the federal constitution. See id., 204. Both the trial court and the Louisiana Court of Appeal rejected this contention. See id., 205. Miller thereafter sought review from the Louisiana Supreme Court and the United States Supreme Court on the unanimity issue, but both courts denied review. See *Miller* v. *Louisiana*, supra, 568 U.S. 1157; *State* v. *Miller*, supra, 89 So. 3d 1191; see also, e.g., Petition for Writ of Certiorari, *Miller* v. *Louisiana*, 568 U.S. 1157 (No. 12-162) pp. 2, 6.

Seven years after Miller's conviction became final, the United States Supreme Court in *Ramos* v. *Louisiana*, 590 U.S. 83, 140 S. Ct. 1390, 206 L. Ed. 2d 583 (2020), determined that the conviction of a criminal defendant in state court following a nonunanimous jury verdict violates the federal constitution. See id., 89–93. The Supreme Court reasoned that the provision of the Louisiana constitution allowing for nonunanimous jury verdicts in criminal cases was adopted at a constitutional convention that had as its "avowed purpose . . . the supremacy of the white race"; (internal quotation marks omitted) id., 87; and that the provision was adopted "to ensure that [African American] juror service would be meaningless." (Internal quotation marks omitted.) Id., 88. Despite being "a Black man who did not match the witness description of the killer" and who was "convicted over the dissent of two Black jurors" in his criminal trial, Miller "remains imprisoned for life and cannot claim the retroactive benefit of the rule for which he advocated at every opportunity." J. Rutledge, supra, 59 Crim. L. Bull. 501; see also *State* v. *Miller*, supra, 83 So. 3d 193. "The idea that like cases should be decided alike is a basic principle of justice. But that principle is sacrificed when those like . . . Miller receive no relief while others raising the same argument receive new trials simply because of the accident of when the [United States] Supreme Court chose to consider the question. The same is true with equal force when the court that eventually decides the issue is a state's own high court." (Footnote omitted; internal quotation marks omitted.) J. Rutledge, supra, 502. Accordingly, when a petitioner has previously advocated for a rule in his direct proceedings or in an earlier habeas petition, and scientific advances subsequently persuade this court to reevaluate fundamental principles underlying judicial procedures that calls into question the accuracy of a conviction, we will apply that new constitutional rule retroactively on collateral review.

This third exception to *Teague* is similar to the unavailability by exhaustion doctrine Texas courts apply in deciding whether to consider the merits of a petitioner's habeas petition when the petitioner has previously filed one or more petitions. See *Ex parte Hood*, 211 S.W.3d 767, 776–77 (Tex. Crim. App.), cert. denied sub nom. *Hood* v. *Texas*, 552 U.S. 829, 128 S. Ct. 48, 169 L. Ed. 2d 43 (2007). The unavailability by exhaustion doctrine allows a court to consider a petition if it "is based on binding and directly relevant" precedent "decided after [the petitioner] had exhausted" the claim in a previous proceeding. *Ex parte Martinez*, 233 S.W.3d 319, 322 (Tex. Crim. App. 2007); see also *Ex parte Hood*, supra, 776 ("[i]f we [had] decide[d] an issue adversely to a [petitioner] in a way that contradicts a later legal development, that later legal development constitutes a legal basis that was not presented and could not have been presented at the time [the petitioner's prior habeas petition was filed]"). The *Teague* exception we adopt today balances the need to expand the circumstances in which retroactivity will work to prevent injustice with the importance of finality because it does not open the floodgates in a way that would seriously undermine finality. The limiting principles of unavailability by exhaustion applied by Texas courts would also apply to this exception. Namely, the petitioner must actually have raised the claim himself; see *Ex parte Hood*, supra, 776; and must have done so in the court that eventually announces the rule. The intervening decision must come from the United States Supreme Court or this court. Cf. id. ("a change in the law under the exhaustion doctrine . . . must come from a binding authority, i.e. cases from [a state's high court] and the United States Supreme Court" (internal quotation marks omitted)).

Having adopted this third exception to *Teague*, we turn to the issue of whether our decisions in *Guilbert*

and *Dickson* apply retroactively on collateral review. We first note the unique requirements and history of the due process provisions under our state constitution. We have explained that the due process provision of article first, § 8, of our state constitution affords greater protection than the federal constitution with respect to the admissibility of eyewitness identification testimony. See *State* v. *Harris*, supra, 330 Conn. 114–15, 131. In *Harris*, this court disagreed with its earlier decision holding that the state constitution did not afford greater protection than the federal constitution in this area. See id., 116–21, 131. We explained that our prior decision was "premised in part on our reservations about scientific studies that we now find persuasive." (Internal quotation marks omitted.) Id., 119. After conducting our analysis under *State* v. *Geisler*, 222 Conn. 672, 684–85, 610 A.2d 1225 (1992); see *State* v. *Harris*, supra, 116–30; we concluded that "[Connecticut's] precedent, persuasive federal and sister state precedent, and contemporary understandings of economic and sociological norms favor[ed] the defendant's claim . . . [that] the state constitution [affords greater protection than the federal constitution with respect to eyewitness identification testimony]." Id., 130. This militates in favor of retroactivity.

Our case law regarding eyewitness identification evidence has also progressed, steadily following scientific developments in the field. We now know that the accuracy of a criminal conviction based solely on eyewitness identification is not as strong as courts once believed. "Nationally, [approximately] 69 [percent] of DNA exonerations—252 out of 367 cases—have involved eyewitness misidentification, making it the leading contributing cause of these wrongful convictions. Further, the National Registry of Exonerations has identified at least 450 [non-DNA based] exonerations involving eyewitness misidentification." Innocence Project,How Eyewitness

Misidentification Can Send Innocent People to Prison (April 15, 2020), available at https://innocenceproject.org/how-eyewitness-misidentification-can-send-innocent-people-to-prison/#:~:text=Eyewitness%20misidentification%20is%20a,cause%20of%20these%20wrongful%20convictions (last visited July 15, 2024). It is no wonder, then, that mistaken eyewitness identification testimony is "by far the leading cause of wrongful convictions." *State* v. *Guilbert*, supra, 306 Conn. 249–50.

In recent years, we have "recognized that mistaken eyewitness identifications are a significant cause of erroneous convictions; [id.] ('mistaken eyewitness identification testimony is by far the leading cause of wrongful convictions'); and the risk of mistake is particularly acute when the identification has been tainted by an unduly suggestive procedure. [See] *United States* v. *Wade*, 388 U.S. 218, 229, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967) ('[t]he influence of improper suggestion [on] identifying witnesses probably accounts for more miscarriages of justice than any other single factor—perhaps it is responsible for more such errors than all other factors combined' . . .)." (Footnote omitted.) *State* v. *Dickson*, supra, 322 Conn. 425–26. Accordingly, this court has established new rules aimed at bringing our case law in line with our advanced understanding of eyewitness identifications. These rules strive to ensure that there is an accurate determination as to innocence or guilt.

As to the retroactive application of *Guilbert*, we conclude that the principles articulated in *Guilbert* may not be applied retroactively because that case articulated an *evidentiary* rule, not a *constitutional* one. See *State* v. *Guilbert*, supra, 306 Conn. 265 and n.45. Under either *Teague*'s watershed exception or the third exception we adopt today, in order to have retroactive application, the new rule must be of constitutional dimension. In *Guilbert*, we concluded that trial courts have the discre-

tion to admit expert testimony on the reliability of eyewitness identifications. Id., 257. Because this new rule is evidentiary, it cannot be applied retroactively to the petitioner's case on collateral review.

There is no question, however, that *Dickson* announced a constitutional rule of criminal procedure. We reasoned that placing a witness on the stand, confronting the witness with the person whom the state has accused of committing the crime, and asking that witness to identify the person who committed the crime is likely the most suggestive identification procedure. *State* v. *Dickson*, supra, 322 Conn. 423. In addition to the suggestive nature of an in-court identification, "[t]he pressure of being asked to make an identification in the formal courtroom setting and the lack of anonymity . . . create conditions under which a witness is most likely to conform his or her recollection to expectations . . . ." E. Mandery, "Due Process Considerations of In-Court Identifications," 60 Alb. L. Rev. 389, 417 (1997). Among other reasons, this is why eyewitness identification is among the least reliable forms of evidence. See, e.g., D. Medwed, "Anatomy of a Wrongful Conviction: Theoretical Implications and Practical Solutions," 51 Vill. L. Rev. 337, 358 (2006) ("[v]irtually all . . . pertinent studies . . . have pinpointed eyewitness misidentification as the single most pervasive factor in the conviction of the innocent"). There is no doubt that, in cases in which the identity of the person who committed the crime is at issue, first-time, in-court identifications are unnecessarily suggestive and, therefore, raise concerns regarding an accurate conviction, and "the fundamental fairness of [a] trial . . . is seriously diminished" in such a situation. (Citations omitted.) *Teague* v. *Lane*, supra, 489 U.S. 312–13 (plurality opinion). As a result, in *Dickson*, we concluded that "any [first-time] in-court identification by a witness who would have been unable to reliably identify the [petitioner] in a nonsuggestive

out-of-court procedure constitutes a procedural due process violation." (Emphasis omitted.) *State* v. *Dickson*, supra, 426 n.11. Thus, we conclude that it is necessary to apply *Dickson* retroactively to the petitioner's case on collateral review to ensure the reliability of his criminal trial.

The respondent, however, claims that, in footnote 34 of *Dickson*, this court concluded that *Dickson* should not be applied retroactively on collateral review. See id., 451 n.34. Although we agree that there is language in footnote 34 to that effect, we conclude that this comment was dictum. See, e.g., *Cruz* v. *Montanez*, 294 Conn. 357, 376–77, 984 A.2d 705 (2009) ("[d]ictum includes those discussions that are merely passing commentary . . . those that go beyond the facts at issue . . . and those that are unnecessary to the holding in the case" (internal quotation marks omitted)). First, we note that the parties in *Dickson* did not significantly discuss retroactivity concerns in their briefing.[4] The issue of retroactivity was not necessary to determine the outcome in *Dickson*, which was a direct appeal. Moreover, we disagree with this court's assertion in *Dickson* that "the rule [requiring prescreening of a first-time, in-court identification] is merely an incremental change in identification procedures." *State* v. *Dickson*, supra, 322 Conn. 451 n.34. As we have explained, "[t]he influence of improper suggestion [on] identifying witnesses probably accounts for more miscarriages of justice than any other single factor—perhaps it is responsible for more such errors than all other factors

[4] In passing, the state addressed retroactivity in the context of this court's using its supervisory authority rather than announcing a constitutional prophylactic rule. See *State* v. *Dickson*, Conn. Supreme Court Records & Briefs, December Term, 2015, State's Brief p. 50; see also id., State's Supplemental Brief p. 5; id., State's Supplemental Reply Brief pp. 1–2, 5. The defendant did not address retroactivity in his primary brief but briefly discussed the issue in his supplemental reply brief. See id., Defendant's Supplemental Reply Brief p. 5.

combined . . . .” (Internal quotation marks omitted.) Id., 426. We cannot conclude that prescreening an eyewitness prior to a first-time, in-court identification is merely an “incremental change” that serves only to remove “some remote possibility” of a wrongful conviction. (Internal quotation marks omitted.) Id., 451 n.34. Thus, we disagree with the respondent’s contention that footnote 34 in *Dickson* is dispositive of the retroactivity issue.

In sum, the rule articulated in *Dickson* is “central to an accurate determination of innocence or guilt”; *Teague* v. *Lane*, supra, 489 U.S. 313 (plurality opinion); such that the rule’s absence would create an impermissibly large risk that innocent persons will be convicted. We agree with the brief of the amici curiae, the Innocence Project, Inc., and the Connecticut Innocence Project, that “[t]he issue of inaccurate eyewitness identification testimony . . . strikes at the heart of whether a criminal proceeding is fair and accurate.” We therefore conclude that the rule set forth in *Dickson* must apply retroactively on collateral review because the rule was a result of developments in science that persuaded us to reevaluate the fundamental principles underlying eyewitness identification evidence, the application of the rule significantly improves the accuracy of the petitioner’s conviction, and the petitioner advocated for the rule in his direct appeal.

In the petitioner’s criminal trial, there were two eyewitnesses. LeVasseur, a white female, initially identified someone other than the Black petitioner from a photographic array as the shooter. *State* v. *Tatum*, supra, 219 Conn. 724. It was not until almost three months after the shooting, during a subsequent array, that she identified the petitioner. See id. The second witness also identified someone other than the petitioner as the shooter—the same individual the first witness had identified—but later declined to identify anyone until he

could see the suspect in person. Id. More than one year after the shooting, at the probable cause hearing, both witnesses identified the petitioner, who was the only Black man seated at defense counsel's table.[5] See id., 724–25. Notwithstanding the prior identifications of another individual, both eyewitnesses later testified that they had no doubt about their identifications of the petitioner.

One additional fact weighs heavily in favor of applying *Dickson* retroactively in this particular case. More than thirty years ago, in his direct appeal, the petitioner challenged the procedures related to an eyewitness identification used in his criminal case. See id., 723, 725, 728. At that time, this court concluded that the first-time, in-court identification of the petitioner at the probable cause hearing was not unnecessarily suggestive because it was "necessary for the prosecution to present evidence at the preliminary hearing to establish probable cause to believe that [the petitioner] had committed the crimes charged." (Emphasis omitted.) Id., 728. Twenty-five years later, recognizing the inherent suggestiveness of a first-time, in-court identification, this court overruled the holding in the petitioner's direct appeal regarding the procedure that was used to identify the petitioner, calling the first time, in-court identification of the petitioner "unfair . . . ." *State* v. *Dickson*, supra, 322 Conn. 435–36.[6] Despite this conclusion in

[5] On appeal, the petitioner contends that, because he was arrested approximately two months prior to the probable cause hearing and remained incarcerated through the hearing, it is "highly likely that he was wearing prison clothes, rather than street clothes, at the time of [the witness'] identification." We note, however, that the record indicates that the petitioner was wearing a "green, plaid shirt" at the probable cause hearing.

[6] During his direct appeal, the petitioner also raised a challenge to the eyewitness identification jury instructions given in his criminal case. See *State* v. *Tatum*, supra, 219 Conn. 732. This court concluded that the instructions were "adequate to alert the jury to the dangers inherent in eyewitness identification." Id., 734. Of course, more than two decades later, on the basis of developed science on the reliability of eyewitness identifications, we recognized that eyewitness identifications are potentially unreliable in

Dickson, which explicitly rejected the eyewitness identification procedures used in his criminal case, the petitioner has not yet had the opportunity to raise the claim that, in light of our decision in *Dickson*, the identification procedures used in his criminal case violated his right to due process.

The central purpose of a criminal trial is "to ascertain the truth which is the sine qua non of a fair trial." *Estes* v. *Texas*, 381 U.S. 532, 540, 85 S. Ct. 1628, 14 L. Ed. 2d 543 (1965). Mistaken eyewitness identifications are the leading cause of wrongful convictions. See, e.g., *State* v. *Guilbert*, supra, 306 Conn. 249–50. The risk of mistaken eyewitness identifications is particularly acute when the identification has been tainted by an unduly suggestive procedure. See, e.g., *United States* v. *Wade*, supra, 388 U.S. 229. As a result, unduly suggestive and unreliable eyewitness identifications undermine the truth seeking function of the criminal justice system. Given the developments in the science of eyewitness identification, the heightened risk of a wrongful conviction, and the fact that the petitioner raised eyewitness identification claims in his direct appeal, we conclude that the

a number of ways unknown to the average juror; *State* v. *Guilbert*, supra, 306 Conn. 234; and, as such, the jury instructions used in the petitioner's criminal trial were not sufficient to alert the jury to factors affecting the reliability of the eyewitness identifications. See id., 258; see also id., 247 n.27. Many of the factors that could adversely impact eyewitness identifications and that are unknown to the average juror were present in the petitioner's criminal case. For example, both eyewitnesses in the petitioner's criminal case testified that they had no doubt regarding their identification of the petitioner, notwithstanding their earlier identification of another individual as the shooter. Cf. id., 253–54. Both eyewitnesses also had only a limited opportunity during the high stress situation to view the individual they later identified; we now understand that high stress situations involving weapons can impact the reliability of an identification. See id., 253. Moreover, both eyewitness identifications were cross-racial, which we know are "considerably less accurate than identifications involving the same race . . . ." Id. Nevertheless, given our conclusion that *Guilbert* announced an evidentiary rule, not a constitutional one, *Guilbert* does not apply retroactively on collateral review.

rule articulated in *Dickson* must be applied retroactively on collateral review in the petitioner's case. See, e.g., *Colwell* v. *State*, 118 Nev. 807, 820, 59 P.3d 463 (2002), cert. denied, 540 U.S. 981, 124 S. Ct. 462, 157 L. Ed. 2d 370 (2003). Accordingly, we conclude that the Appellate Court, which lacked the benefit of our newly expanded formulation of the *Teague* rule, should not have upheld the habeas court's dismissal of counts six and seven of the petitioner's operative petition on the ground that *Dickson* does not apply retroactively to the petitioner's case on collateral review.

CONCLUSION

Thirty-three years ago, the petitioner argued before this court that the trial court had improperly admitted an in-court eyewitness identification of him at his criminal trial that was tainted by an unnecessarily suggestive pretrial identification procedure. See *State* v. *Tatum*, supra, 219 Conn. 723, 725. At that time, this court rejected that claim; see id., 723; and the petitioner has served decades in prison as a result. In recent years, however, this court's jurisprudence has benefitted from significant developments related to the cognitive science associated with eyewitness identifications. In light of those scientific developments, in *Dickson*, we recognized that this court was clearly wrong when it rejected the petitioner's original claim in his direct appeal regarding the unnecessarily suggestive in-court, pretrial identification, and we overruled the holding in the petitioner's direct appeal. See *State* v. *Dickson*, supra, 322 Conn. 434–36. We do not lightly overrule holdings in prior cases. It is only "[w]hen a prior decision is seen so clearly as error that its enforcement [is] for that very reason doomed" that we will overrule it. (Emphasis omitted; internal quotation marks omitted.) *Conway* v. *Wilton*, 238 Conn. 653, 659, 680 A.2d 242 (1996); see, e.g., *Kluttz* v. *Howard*, 228 Conn. 401, 406, 636 A.2d 816 (1994) ("a court should not overrule its earlier decisions

unless the most cogent reasons and inescapable logic require it" (internal quotation marks omitted)). Had the petitioner made the same claim today that he raised in his direct appeal more than thirty years ago, he would prevail. It is long past time that the petitioner be afforded the opportunity to challenge the procedures related to the eyewitness identification used in his criminal case in light of the principles we articulated in *Dickson*.

The judgment of the Appellate Court is reversed insofar as it upheld the habeas court's dismissal of counts six and seven of the petitioner's operative habeas petition and the case is remanded to the Appellate Court with direction to reverse the judgment of the habeas court with respect to those counts and to remand the case to that court for a trial on counts six and seven and with direction to apply the holding of *Dickson* retroactively to the petitioner's case.

In this opinion the other justices concurred.

CENTRIX MANAGEMENT CO., LLC *v.* DONALD W. FOSBERG (SC 20927)

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

Syllabus

Pursuant to statute (§ 42-150bb), when a consumer contract or lease includes a unilateral attorney's fees provision benefiting the commercial party, a prevailing consumer is entitled to an award of attorney's fees, the size of which "shall be based as far as practicable upon the terms governing the size of the fee for the commercial party."

The plaintiff landlord brought this summary process action, seeking to gain possession of an apartment occupied by the defendant tenant. After the trial court rendered judgment for the defendant, the defendant filed a motion for attorney's fees pursuant to § 42-150bb, relying on the unilateral provision in the party's lease agreement providing that, if the plaintiff prevailed in an action on the lease agreement, the defendant would be responsible for reasonable attorney's fees up to $750. The trial court

granted the defendant's motion and awarded him $3500 in attorney's fees. In doing so, the court relied on the equitable purpose of § 42-150bb, that is, to achieve parity between the parties, and reasoned that limiting the defendant's recovery to the maximum amount allowed by the lease agreement would not result in true parity between the parties. On appeal, the plaintiff challenged the trial court's award of attorney's fees, claiming that, under § 42-150bb, the court had the discretion to award the defendant only up to $750, which was the maximum amount of attorney's fees that the plaintiff could have recovered pursuant to the terms of the lease agreement.

Held that, although trial courts, pursuant to § 42-150bb, have discretion to award a prevailing consumer reasonable attorney's fees in excess of the maximum amount that a prevailing commercial party could recover under the terms of the consumer contract or lease when the court determines that it is not practicable to base the award of attorney's fees on those contractual or lease terms, in the present case, the trial court did not make that threshold determination, and, accordingly, this court vacated the award of attorney's fees and remanded the case for a new hearing on the defendant's motion for attorney's fees:

This court's examination of the phrase "based . . . upon," as used in § 42-150bb, led it to conclude that, when a contract or lease caps a commercial party's recovery of attorney's fees at a specific dollar amount, the trial court's discretion to award a prevailing consumer attorney's fees pursuant to § 42-150bb is subject to the same limit, as long as applying that limit is practicable.

This court also determined that the term "practicable," as used in § 42-150bb, had to be construed with reference to the statute's equitable purpose, and both the statutory language and this court's prior decisions supported the conclusion that the term "practicable" means feasible under the circumstances, which are circumstances that achieve equity or fairness.

Accordingly, when a unilateral attorney's fees provision that triggers the application of § 42-150bb caps a commercial party's recovery of attorney's fees at a specific dollar amount, the court must base a prevailing consumer's award of attorney's fees on the terms governing the amount of the commercial party's fee, unless the consumer demonstrates that doing so would be impracticable under the circumstances, specifically, that such an award would not achieve the equitable purpose of 42-150bb.

In cases in which the consumer demonstrates impracticability, the court should exercise its discretion, consistently with established law, to award the prevailing consumer reasonable attorney's fees.

In making the threshold practicability determination, a court should consider all relevant circumstances, including the complexity and length

of the litigation, the size of the cap and its proportion in relation to the prevailing consumer's reasonable attorney's fees, and the commercial party's fee arrangement.

Although the trial court relied on the equitable purpose of § 42-150bb in awarding the defendant reasonable attorney's fees, it did not consider whether it was practicable to base the award of attorney's fees on the contractual terms governing the amount of the plaintiff's fees, and, accordingly, this court directed the trial court to do so on remand in accordance with this court's opinion.

Argued February 6—officially released July 18, 2024*

Procedural History

Summary process action, brought to the Superior Court in the judicial district of New Britain, Housing Session, and tried to the court, *Baio*, *J.*; judgment for the defendant; thereafter, the court, *Baio*, *J.*, granted the defendant's motion for attorney's fees, and the plaintiff appealed; subsequently, Henry C. Winiarski was substituted as the defendant. *Vacated*; *further proceedings.*

Robert Shluger, for the appellant (plaintiff).

Chad Borgman, law student intern, with whom were *Will Krueger*, law student intern, *Jeffrey Gentes* and, on the brief, *Anika Singh Lemar*, and *Miriam Pierson* and *Erica Henry*, law student interns, for the appellee (substitute defendant).

Opinion

DANNEHY, J. When a consumer contract or lease includes a unilateral attorney's fees provision benefiting the commercial party, a consumer who successfully prosecutes or defends an action based on the contract is entitled as a matter of law to attorney's fees, and "the size of the attorney's fee awarded to the consumer shall be based as far as practicable upon the terms governing the size of the fee for the commercial party."

* July 18, 2024, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

General Statutes § 42-150bb.[1] In this appeal, the plaintiff landlord, Centrix Management Co., LLC, challenges the trial court's award of reasonable attorney's fees in the amount of $3500, following the judgment rendered in favor of the defendant tenant, Donald W. Fosberg.[2] The plaintiff contends that, because doing so would be "practicable" pursuant to § 42-150bb, the court had discretion to award the defendant only up to $750, which was the maximum amount of attorney's fees that the plaintiff could have recovered pursuant to the terms of the lease agreement. The defendant responds that the plaintiff's claim rests on an overly narrow construction of two key statutory terms in § 42-150bb, "based . . . upon" and "practicable." Consistent with the equitable purpose of the statute, the defendant contends, the trial court had discretion to award him reasonable attorney's fees in excess of $750. Although we conclude that trial courts have discretion to award a prevailing consumer reasonable attorney's fees pursuant to § 42-150bb when the court determines that it is not practicable to base the award upon the contractual terms governing the commercial party's recovery, in the present case, the trial court did not make this threshold determination. Accordingly, we vacate the trial court's award of attorney's fees and remand the case with direction to conduct a new hearing on the defendant's motion for attorney's fees consistent with this opinion.

The record reveals the following relevant undisputed facts and procedural background. In September, 2021, the plaintiff served the defendant, who had rented an

[1] Section 42-150bb defines "commercial party" to include lessors and "consumer" to include lessees. Accordingly, for the sake of simplicity, we use the terms "commercial party" and "consumer" to include landlords and tenants, respectively.

[2] During the pendency of this appeal, Henry C. Winiarski, in his capacity as the conservator of the estate and person of Fosberg, was substituted as the defendant. For ease of reference, we refer in this opinion to both Fosberg and Winiarski as the defendant.

apartment in a building owned by the plaintiff, with notice to quit possession of the premises, alleging that the defendant had violated his responsibilities pursuant to General Statutes § 47a-11 (c) and (g).[3] The defendant remained in possession of the apartment, and the plaintiff subsequently commenced this summary process action. After a two day bench trial, the court rendered judgment in favor of the defendant, who was represented by a nonprofit group, the Connecticut Veterans Legal Center. The defendant subsequently moved, pursuant to § 42-150bb, to recover attorney's fees in the amount of $6622.15. The defendant relied on language in the lease agreement providing that, if the plaintiff prevailed in an action on the lease, the defendant would be responsible for "reasonable attorney's fees . . . but only up to a maximum amount of $750, and costs."[4] The defendant claimed that the plaintiff's unilateral right to attorney's fees under the lease triggered the application of § 42-150bb. The plaintiff conceded that the defendant was entitled to attorney's fees pursuant to § 42-150bb but argued that the trial court's discretion was limited to awarding fees in the maximum amount of $750.

Following oral argument on the motion, the court awarded the defendant $3500 in attorney's fees. The

[3] General Statutes § 47a-11 (c) and (g) provides in relevant part: "A tenant shall . . . (c) remove from his dwelling unit all ashes, garbage, rubbish and other waste in a clean and safe manner to the place provided by the landlord pursuant to subdivision (5) of subsection (a) of section 47a-7 . . . [and] (g) conduct himself and require other persons on the premises with his consent to conduct themselves in a manner that will not disturb his neighbors' peaceful enjoyment of the premises or constitute a nuisance, as defined in section 47a-32, or a serious nuisance, as defined in section 47a-15 . . . ."

[4] Section 11 of the lease agreement provides: "Upon violation of any term of this [l]ease, [y]ou are responsible for reasonable attorney's fees, but only up to a maximum amount of $750, and costs incurred by [u]s. If [w]e incur legal fees to defend a suit as to [o]ur obligations under this [l]ease, including security deposit disputes, and if [w]e are the prevailing party, [y]ou will be responsible for payment of legal fees, but only up to a maximum amount of $750, and costs."

trial court grounded its decision to award the defendant attorney's fees in excess of the lease agreement's cap of $750 on the equitable purpose of § 42-150bb, namely, to achieve parity between the parties. The court explained that, although limiting the defendant's recovery to the maximum amount allowed to the plaintiff by § 11 of the lease agreement would render the unilateral provision reciprocal, doing so would not result in "true 'parity' " between the parties, as intended by the legislature. In light of the equitable purpose of the statute, the court concluded that the defendant was entitled to reasonable attorney's fees. The plaintiff appealed from the trial court's decision granting the defendant's motion for attorney's fees to the Appellate Court, and this court transferred the appeal to itself pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

The question of whether the trial court abused its discretion in awarding the defendant reasonable attorney's fees in the amount of $3500 turns on the construction of two statutory terms in § 42-150bb. First, we must resolve whether, when a contract or lease includes a unilateral attorney's fees provision capping the commercial party's recovery at a specific dollar amount, the trial court is obligated to apply an identical cap on fees to a prevailing consumer's award, because § 42-150bb provides in relevant part that, as far as practicable, the award should be "based . . . upon" the terms governing the size of the attorney's fees of the commercial party. Second, we must determine under what circumstances it would not be "practicable" for the trial court to base a prevailing consumer's award of attorney's fees upon the terms of the contract or lease.

Both issues present questions of statutory construction: the first question turns on the meaning of the phrase "based . . . upon" in § 42-150bb, and the second turns on the meaning of the term "practicable." Accordingly, our review is plenary. See *Wind Colebrook*

South, LLC v. *Colebrook*, 344 Conn. 150, 161, 278 A.3d 442 (2022). In construing statutes, we follow the plain meaning rule set forth in General Statutes § 1-2z. Id.

I

We first consider whether, when a contract or lease caps a commercial party's recovery of attorney's fees at a specific dollar amount, the trial court's discretion to award attorney's fees to a prevailing consumer pursuant to § 42-150bb is limited to awarding only up to the maximum amount that the commercial party could recover under the contract or lease.

We begin with the language of the statute. Section 42-150bb provides in relevant part: "Whenever any contract or lease . . . to which a consumer is a party, provides for the attorney's fee of the commercial party to be paid by the consumer, an attorney's fee shall be awarded as a matter of law to the consumer who successfully prosecutes or defends an action or a counterclaim based upon the contract or lease. Except as hereinafter provided, the size of the attorney's fee awarded to the consumer shall be based as far as practicable upon the terms governing the size of the fee for the commercial party. No attorney's fee shall be awarded to a commercial party who is represented by its salaried employee. In any action in which the consumer is entitled to an attorney's fee under this section and in which the commercial party is represented by its salaried employee, the attorney's fee awarded to the consumer shall be in a reasonable amount regardless of the size of the fee provided in the contract or lease for either party. . . ."[5]

[5] Section 42-150bb is an example of an exception to the American rule, pursuant to which "attorney's fees and ordinary expenses and burdens of litigation are not allowed to the successful party absent a contractual or statutory exception. See *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 247, 95 S. Ct. 1612, 44 L. Ed. 2d 141 (1975); *Fleischmann Distilling* [*Corp.*] v. *Maier Brewing Co.*, 386 U.S. 714, 717, 87 S. Ct. 1404, 18 L. Ed. 2d 475 (1967)." (Internal quotation marks omitted.) *Rizzo Pool Co.* v. *Del Grosso*, 240 Conn. 58, 72, 689 A.2d 1097 (1997).

The question of whether the trial court's discretion in awarding attorney's fees to a prevailing consumer is confined to awarding an amount equal to that which the commercial party would be entitled to recover under the contract turns first on the meaning of the phrase "based . . . upon" in § 42-150bb. Because that phrase is not defined in § 42-150bb or in related statutes, we examine its ordinary meaning. See 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"). Dictionaries in print around the time that the statute was enacted in 1979; see Public Acts 1979, No. 79-453; define the verb "to base" to mean "to make or form a base or foundation for . . . to put or rest (on) as a base or basis . . . ." Webster's New World College Dictionary (2d Ed. 1972) p. 116. A "base," in turn, is defined as "the thing or part on which something rests . . . the fundamental or main part . . . the principal or essential ingredient . . . anything from which a start is made"; id.; and "the bottom of something considered as its support: foundation . . . ." Webster's New Collegiate Dictionary (1981) p. 91. Interpreting a different statute, this court recently looked to Black's Law Dictionary to define " 'based on' as '[d]erived from, and therefore similar to . . . .' " *Costanzo* v. *Plainfield*, 344 Conn. 86, 103, 277 A.3d 772 (2022), quoting Black's Law Dictionary (10th Ed. 2014) p. 180. These different meanings of the term "base" all share a core principle: to base something on another thing means to use the base as the foundation. Section 42-150bb provides that the trial court "shall" base a prevailing consumer's award upon the "terms governing the size of the fee for the commercial party," as far as practicable. Accordingly, trial courts are required to look to the contractual terms governing the size of the commercial party's fee

to determine the prevailing consumer's award of attorney's fees.[6] When, as in the present case, the contract specifies a maximum dollar amount that the commercial party may recover, the prevailing consumer's recovery is subject to the same limit, as long as applying that limit is practicable.[7]

II

Although the trial court's task in awarding a prevailing consumer attorney's fees pursuant to § 42-150bb begins with the terms governing the size of the fee of the commercial party, it does not necessarily end there. Section 42-150bb provides that, "as far as practicable," the court "shall" base a prevailing consumer's fees upon the terms governing the size of the commercial party's fees. In other words, when it is practicable to base the prevailing consumer's award of attorney's fees upon the contractual terms, § 42-150bb cabins the trial court's discretion by requiring the court to use the contractual terms to determine the consumer's award of attorney's fees. If doing so is not practicable, however, the terms governing the size of the attorney's fees of the commer-

[6] The defendant does not claim that, in awarding him reasonable attorney's fees, the trial court "based" its award "upon" the terms of the lease agreement pursuant to § 42-150bb, and the court's memorandum of decision does not indicate that it did so.

[7] Depending on the contractual terms, "basing" the prevailing consumer's award of attorney's fees "upon" the contractual terms governing the size of the attorney's fees of the commercial party may, as in the present case, where the contract sets a ceiling of a specific dollar amount, yield an equal recovery, or at least an equal maximum recovery. We recognize, however, that different contractual terms will not necessarily entitle a prevailing consumer to an equal *dollar amount*, such as when a contract expressly entitles the commercial party to reasonable attorney's fees. See *Centrix Management Co., LLC* v. *Valencia*, 145 Conn. App. 682, 693, 76 A.3d 694 (2013) (when consumer contract unilaterally entitles commercial party to recover reasonable attorney's fees, prevailing consumer is also entitled to reasonable attorney's fees pursuant to § 42-150bb). Under those circumstances, the award of a prevailing consumer will naturally depend on, among other things, the extent and complexity of the litigation.

cial party no longer serve as the foundation for the prevailing consumer's fees. We must determine, therefore, the meaning of the term "practicable," as it is used in § 42-150bb.

Like the phrase "based . . . upon," the term "practicable" is not defined in § 42-150bb. Contemporary to the passage of that statute, dictionaries generally defined the term "practicable" to mean "feasible" or "possible." See, e.g., Webster's New Collegiate Dictionary, supra, p. 895 ("possible to practice or perform: feasible"); Webster's New World College Dictionary, supra, p. 1117 ("that can be done or put into practice; feasible"). Legal dictionaries recognize that the term also may mean "feasible under the circumstances." See, e.g., Black's Law Dictionary (5th Ed. 1979) p. 1055 (citing, as one meaning of "[p]racticable," "feasible in the circumstances").

The plaintiff, which advocates that any award greater than nothing would be practicable, essentially argues that, as long as an award is "possible," it is practicable. Construing the term "practicable" in § 42-150bb to mean "possible," however, would render that term meaningless.[8] Specifically, if "practicable" means "possible,"

[8] Indeed, some courts have questioned the aptness of equating practicability with possibility, noting that impossibility presents a significantly greater hurdle than impracticability. See, e.g., *Outfitter Properties, LLC* v. *Wildlife Conservation Board*, 207 Cal. App. 4th 237, 247, 143 Cal. Rptr. 3d 312 (2012) ("[s]ome courts have said that 'practicable' in a government context means that an entity is vested with discretion to consider the 'advisability' of an action, and have explained that 'practicable' does not mean 'possible' "); *James H. Q. Davis Trust* v. *JHD Properties, LLC*, Docket No. 22 CVS 8617, 2022 WL 17573944, *5 (N.C. Super. December 9, 2022) (In interpreting statute providing that limited liability company may be dissolved if it is not practicable to conduct business in conformance with operating agreement, court concluded that " 'practicable' is synonymous with 'feasible' and does not mean simply 'possible.' Indeed, the [c]ourt notes that something may be possible yet not *feasible* without extra time or resources in a particular circumstance. Following this same logic, the [c]ourt also concludes that 'not practicable' is likewise synonymous with 'unfeasible' and does not mean 'impossible.' " (Emphasis in original.)).

there is no meaningful distinction between a requirement that an award be based upon the terms governing the size of the fee for the commercial party and a requirement that an award be based upon the size of the fee for the commercial party "as far as practicable . . . ." General Statutes § 42-150bb. An award of *any* amount, no matter how small, is practicable in the sense that it is possible.[9] If we were to construe the term "practicable" to mean possible, therefore, in every instance the trial court would be required to base a prevailing consumer's award of attorney's fees upon the contractual terms governing the size of the attorney's fees for the commercial party. Under that construction, the term "practicable" would be rendered superfluous. See, e.g., *American Promotional Events, Inc.* v. *Blumenthal*, 285 Conn. 192, 203, 937 A.2d 1184 (2008) ("[i]nterpreting a statute to render some of its language superfluous violates cardinal principles of statutory interpretation").

[9] We find unpersuasive the plaintiff's reliance on dictum in this court's decision in *Rizzo Pool Co.* v. *Del Grosso*, 240 Conn. 58, 78 n.19, 689 A.2d 1097 (1997) (*Rizzo Pool*). As we explain herein, in that case, the issue presented was whether the phrase "the terms governing the size of the fee for the commercial party" in § 42-150bb implicitly referenced General Statutes § 42-150aa (b). *Rizzo Pool Co.* v. *Del Grosso*, supra, 73, 76. In a footnote, we observed that, "in some instances, the parties' contract may provide for attorney's fees based upon 15 percent of the recovery. In these circumstances, should the consumer prevail in defending an action brought by the commercial party, the consumer would receive pursuant to the contractual terms 15 percent of nothing—which would, of course, be nothing. Accordingly, an award of attorney's fees based upon the terms of the contract would not be practicable." Id., 78 n.19.

The plaintiff seizes on this dictum to argue that only an award that renders § 42-150bb absurd, in particular, an award of zero dollars, would be impracticable. As we noted previously in this opinion, the quoted language in footnote 19 of *Rizzo Pool* is dictum. The court in *Rizzo Pool* did not have before it the question of the meaning of the term "practicable." Moreover, even if we agreed with the plaintiff that the language is not dictum, nothing in footnote 19 of *Rizzo Pool* suggests that the example used by this court was intended to define every instance in which it would be impracticable to base a prevailing consumer's award upon the contractual terms.

The language of § 42-150bb offers some insight into the nature of the circumstances that serve as the limiting principle for the meaning of the term "practicable." The statute identifies one instance in which the trial court will have no discretion to look to the contractual terms in determining the amount of a prevailing consumer's award of attorney's fees, namely, when the commercial party is represented by a salaried employee. Section 42-150bb dictates two consequences that flow from these circumstances. First, the statute provides in relevant part that "[n]o attorney's fee shall be awarded to a commercial party who is represented by its salaried employee . . . ." General Statutes § 42-150bb. This bar to recovery indicates that the legislature did not intend that litigation costs should always be irrelevant for purposes of applying § 42-150bb. Implicit in the bar is that it would be inequitable to allow a commercial party to recover attorney's fees when the commercial party incurred no additional costs in bringing the action.[10] This language, therefore, suggests that the concept of fairness is embedded in § 42-150bb.

Second, if a consumer contract includes a unilateral attorney's fees clause in favor of a commercial party represented by its salaried employee—a clause that is rendered invalid by § 42-150bb—a prevailing consumer is entitled to attorney's fees "in a reasonable amount

[10] Our interpretation, that the bar to recovery when a commercial party is represented by a salaried employee is grounded in principles of fairness, finds support in the legislative history of § 42-150bb. See Conn. Joint Standing Committee Hearings, Judiciary, Pt. 3, 1979 Sess., p. 802, testimony of Attorney Raphael Podolsky of Connecticut Legal Services' Legislative Office (Podolsky explained that there "seems to be a consensus . . . that, where you use an in-house employee, you should not be claiming attorney's fees at all. For example, the Retail Installment Sales Financing Act [General Statutes § 36a-770 et seq.], which has a 15 percent limit [on attorney's fees] specifically says that, to get the 15 percent, you have to farm it out to someone who is not a salaried employee. In other words, you have to have extra incurred cost[s], not merely using one of your regular salaried people to bring the lawsuit.").

regardless of the size of the fee provided in the contract or lease for either party." General Statutes § 42-150bb. In the present case, for example, if the plaintiff had been represented by a salaried employee, in determining the defendant's award of attorney's fees, the trial court would have lacked discretion to rely on the contractual terms limiting the plaintiff's recovery of attorney's fees to a maximum of $750, and, instead, the defendant would have been entitled to recover reasonable fees without reference to the contractual cap of $750. Accordingly, the statute suggests that, when it would be unfair to base a prevailing consumer's award upon the contractual terms, the consumer is entitled to reasonable attorney's fees. We therefore conclude that, as used in § 42-150bb, "practicable" means "feasible under the circumstances," which are circumstances that achieve equity or fairness.[11]

Our prior decisions interpreting § 42-150bb, which consistently have looked to its equitable purpose in interpreting the statute, provide support that the meaning of the term "practicable" must be understood in light of that purpose. In *Rizzo Pool Co.* v. *Del Grosso*, 240 Conn. 58, 689 A.2d 1097 (1997) (*Rizzo Pool*), this court rejected the claim that the phrase "the terms

[11] We emphasize that, notwithstanding dictum in *Rizzo Pool Co.* v. *Del Grosso*, 240 Conn. 58, 76–77 n.18, 689 A.2d 1097 (1997) (*Rizzo Pool*) to the contrary, we do not read the term "practicable" in § 42-150bb to mean "reasonable." Specifically, in *Rizzo Pool*, we stated in dictum that " 'reasonable' will be the operative term controlling attorney's fees generated in connection with the defense to [a commercial party's] action." Id. As we explained previously in this opinion; see footnote 9 of this opinion; in *Rizzo Pool*, this court did not have before it the question of the meaning of the term "practicable," as used in § 42-150bb. In an action based on a contract that includes a unilateral provision capping the commercial party's recovery of attorney's fees at a specific dollar amount, a prevailing consumer is entitled to recover reasonable fees pursuant to § 42-150bb only upon a showing that awarding the consumer attorney's fees based upon the contractual terms governing the commercial party's recovery would be impracticable in light of the equitable purpose of the statute.

governing the size of the fee for the commercial party" in § 42-150bb implicitly referenced General Statutes § 42-150aa (b), which limits the attorney's fees of a "holder of a contract or lease" who is subject to § 42-150aa to "fifteen per cent of the amount of any judgment which is entered."[12] *Rizzo Pool Co.* v. *Del Grosso*, supra, 73. Although our review of the plain language of § 42-150bb persuaded us that the 15 percent limit did not apply, we also looked to the legislative history of § 42-150bb, which clarified that the statutory phrase "the terms governing the size of the fee for the commercial party" referred to the phrase "the contract or lease" in § 42-150bb, not to the language of § 42-150aa.[13] *Rizzo Pool Co.* v. *Del Grosso*, supra, 74. In arriving at that conclusion, we relied heavily on the purpose of § 42-150bb, which is to convert unilateral attorney's fees clauses benefiting commercial parties to reciprocal clauses that also benefit consumers. Id., 74–75. In support of our statutory interpretation, we specifically cited the remarks of Representative Richard D. Tulisano, who explained: "[T]he legislation before us today provides [for] the first time the ability for consumers in this state to obtain attorney's fees, of [a] reasonable amount, as a result of defending or prosecuting any action in which the commercial party has provided for attorney's fees

[12] General Statutes § 42-150aa (b) provides: "If a lawsuit in which money damages are claimed is commenced by an attorney who is not a salaried employee of the holder of a contract or lease subject to the provisions of this section, such holder may receive or collect attorney's fees, if not otherwise prohibited by law, of not more than fifteen per cent of the amount of any judgment which is entered."

[13] We recognize that *Rizzo Pool* was decided prior to the enactment of § 1-2z and that this court looked to the legislative history and purpose of § 42-150bb, notwithstanding our conclusion that the language was plain and unambiguous. We are not, however, barred from relying on this court's construction of § 42-150bb in that decision, which remains good law and has precedential authority unless it is overturned. See, e.g., *Hummel* v. *Marten Transport, Ltd.*, 282 Conn. 477, 498–99, 923 A.2d 657 (2007) (rejecting proposition that § 1-2z overruled prior decisions construing statutes in manner inconsistent with requirements of § 1-2z).

for their own behalf. What this does is give some equity to the situation. At the present time, many form contracts include attorney's fees provisions for the commercial party, and even though . . . that party may be wrong and a consumer successfully defends an action against him, or her, they would not be entitled to receive attorney's fees in defending that action. This will put some equity in the situation to the same extent that any commercial party will receive. [22 H.R. Proc., Pt. 22, 1979 Sess.], pp. 7487, 7489–90." (Internal quotation marks omitted.) *Rizzo Pool Co.* v. *Del Grosso*, supra, 75–76.

This court and the Appellate Court have subsequently relied on the equitable purpose of § 42-150bb in construing the statute broadly for the benefit of consumers. This court, for instance, has relied on the statute's equitable purpose in holding that a decedent's daughter could be considered a "personal representative" for purposes of § 42-150bb, notwithstanding the fact that she was not a legal representative of the decedent, who was a party to the contract at issue in the case. *Aaron Manor, Inc.* v. *Irving*, 307 Conn. 608, 611, 617, 57 A.3d 342 (2013). In so concluding, we cited to the equitable purpose of the statute, reasoning that "[i]t would be wholly incongruous with this design to conclude that the plaintiff would be entitled to fees for successfully prosecuting the present action but that the defendant would not be entitled to fees for mounting a successful defense." Id., 618. Then, in *Connecticut Housing Finance Authority* v. *Alfaro*, 328 Conn. 134, 176 A.3d 1146 (2018), this court declined to construe § 42-150bb narrowly to require a consumer, in order to be entitled to attorney's fees, to prevail on the merits. Id., 147–48. This court reasoned that such a narrow construction would be inconsistent with the remedial purpose of the statute. Id. Instead, this court held that, when a commercial plaintiff withdraws an action as a matter of right, for

purposes of determining whether the consumer is entitled to attorney's fees pursuant to § 42-150bb, the commercial party bears the burden of proving that "the withdrawal was unrelated to the defense mounted by the consumer." Id., 148. Similarly, in *Meadowbrook Center, Inc.* v. *Buchman*, 169 Conn. App. 527, 151 A.3d 404 (2016), aff'd, 328 Conn. 586, 181 A.3d 550 (2018), the Appellate Court relied on the equitable purpose of § 42-150bb to hold that trial courts have discretion to excuse late filings that do not comply with the timing provision set forth in Practice Book § 11-21. Id., 532–33 n.4, 538.

In light of the significance that this court and the Appellate Court have given to the equitable purpose of § 42-150bb in construing the statute, we conclude that the term "practicable," like other statutory terms in § 42-150bb, must be understood with reference to that purpose. The statute was intended to rectify, at least in this one aspect, the inequities resulting from the unequal bargaining power between the parties to consumer contracts. "It is common knowledge that parties with superior bargaining power, especially in 'adhesion' type contracts, customarily include [attorney's] fee[s] clauses for their own benefit. This places the other contracting party at a distinct disadvantage. Should he lose in litigation, he must pay legal expenses of both sides and even if he wins, he must bear his own attorney's fees. One-sided attorney's fees clauses can thus be used as instruments of oppression to force settlements of dubious or unmeritorious claims." *Coast Bank* v. *Holmes*, 19 Cal. App. 3d 581, 596–97, 97 Cal. Rptr. 30 (1971).

Accordingly, in cases such as the present one, where the unilateral attorney's fees provision that triggers the application of § 42-150bb caps the commercial party's recovery of attorney's fees at a specific dollar amount, the court shall base a prevailing consumer's award of attorney's fees upon the terms governing the size of the

commercial party's fee, unless the consumer demonstrates that doing so would be impracticable under the circumstances, that is, that doing so would not achieve the equitable purpose of § 42-150bb.[14] In making this threshold determination, the trial court should consider all relevant circumstances, including, but not limited to, the complexity and length of the litigation, the size of the cap and its proportion in relation to the prevailing consumer's reasonable attorney's fees, and the commercial party's fee arrangement.[15]

If the trial court concludes that basing the prevailing consumer's award of attorney's fees upon the terms governing the size of the commercial party's recovery would be inconsistent with the equitable purpose of § 42-150bb, the court should exercise its discretion to award the prevailing consumer reasonable attorney's fees consistent with this court's decision in *Smith* v. *Snyder*, 267 Conn. 456, 477, 839 A.2d 589 (2004). Id., 477 ("to support an award of attorney's fees, there must be a clearly stated and described factual predicate for

[14] Placing the burden on the prevailing consumer to show that basing his attorney's fees award upon the contractual terms governing the commercial party's recovery of fees is consistent with our case law requiring the party seeking attorney's fees to show that the requested amount is reasonable. See, e.g., *Commission on Human Rights & Opportunities* v. *Sullivan*, 285 Conn. 208, 238, 939 A.2d 541 (2008) ("[t]he burden of showing reasonableness rests on the party requesting the fees, and there is an undisputed requirement that the reasonableness of attorney's fees and costs must be proven by an appropriate evidentiary showing" (internal quotation marks omitted)).

[15] Before this court, the defendant asserts that, in summary process actions, the average amount of attorney's fees incurred by prevailing tenants is higher than that incurred by prevailing landlords. The defendant contends that landlords frequently obtain default judgments, which involve a minimal expenditure of time and resources, and which allow attorneys to represent landlords in a high volume of cases, while charging a flat rate. The defendant does not claim, however, that the plaintiff was charged a flat rate in the present case, and the defendant did not present any evidence to that effect before the trial court. This court is not a fact-finding body. See, e.g., *State* v. *Lawrence*, 282 Conn. 141, 156–57, 920 A.2d 236 (2007) (appellate tribunal's function is to review proceedings before trial court, not to find or retry facts).

the fees sought, apart from the trial court's general knowledge"). Setting reasonable fees as the alternative, when it is not practicable to base the prevailing consumer's award upon the contractual terms, is consistent both with § 42-150bb, which entitles a prevailing consumer to reasonable attorney's fees when the commercial party is represented by a salaried employee, and also with the general rule that, when a prevailing party is entitled to attorney's fees, those fees must be reasonable. See, e.g., General Statutes § 10-153m (authorizing award of reasonable attorney's fees, under specified circumstances, "[i]n any action brought pursuant to section 52-418 to vacate an arbitration award rendered in a controversy between a board of education and a teacher or the organization which is the exclusive representative of a group of teachers, or to confirm, pursuant to section 52-417, such an arbitration award"); General Statutes § 35-54 (in action brought pursuant to Connecticut Uniform Trade Secrets Act, General Statutes § 35-50 et seq., authorizing award of reasonable attorney's fees to prevailing party "[i]f a claim of misappropriation is made in bad faith or a motion to terminate an injunction is made or resisted in bad faith"); General Statutes § 42-180 (authorizing reasonable attorney's fees, under specified circumstances, in consumer actions against motor vehicle manufacturers); *Lederle* v. *Spivey*, 332 Conn. 837, 844, 213 A.3d 481 (2019) (courts have "inherent authority" to award reasonable attorney's fees when losing party has acted in bad faith (internal quotation marks omitted)).

In the present case, although the trial court relied on the equitable purpose of § 42-150bb in awarding the defendant reasonable attorney's fees, the court did not first consider whether it was practicable to base the defendant's award of attorney's fees upon the contractual terms governing the size of the plaintiff's fees. Accordingly, we direct the trial court to hold a hearing

on remand to determine whether it is practicable, that is, consistent with the equitable purpose of § 42-150bb, to award the defendant attorney's fees in an amount based upon the terms in the lease agreement governing the plaintiff's recovery of attorney's fees. If the trial court determines that it is not practicable to do so, the court should award the defendant reasonable attorney's fees, consistent with this court's decision in *Smith* v. *Snyder*, supra, 267 Conn. 477.

The award of attorney's fees is vacated and the case is remanded with direction to conduct a new hearing on the defendant's motion for attorney's fees in accordance with this opinion.

In this opinion the other justices concurred.

ORDERS

CONNECTICUT REPORTS

Vol. 349

HAROLD T. BANKS, JR. *v.* COMMISSIONER OF CORRECTION

The petitioner Harold T. Banks, Jr.'s petition for certification to appeal from the Appellate Court, 225 Conn. App. 234 (AC 43187), is denied.

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

Deren Manasevit, assigned counsel, in support of the petition.

James A. Killen, senior assistant state's attorney, in opposition.

Decided September 17, 2024

BENJAMIN BOSQUE *v.* COMMISSIONER OF CORRECTION

The petitioner Benjamin Bosque's petition for certification to appeal from the Appellate Court, 225 Conn. App. 255 (AC 43188), is denied.

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

Deren Manasevit, assigned counsel, in support of the petition.

James A. Killen, senior assistant state's attorney, in opposition.

Decided September 17, 2024

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

The plaintiff's petition for certification to appeal from the Appellate Court, 226 Conn. App. 547 (AC 45572), is denied.

Brandon B. Fontaine, in support of the petition.

Decided September 17, 2024

JAMES DEMARCO *v.* CHARTER OAK TEMPLE RESTORATION ASSOCIATION, INC.

The plaintiff's petition for certification to appeal from the Appellate Court, 226 Conn. App. 335 (AC 46099), is denied.

James V. Sabatini, in support of the petition.

Bernard E. Jacques and *Lauren T. Graham*, in opposition.

Decided September 17, 2024

HYACINTH DOLOR *v.* MATTHEW J. KWONG

The defendant's petition for certification to appeal from the Appellate Court (AC 47056) is denied.

Matthew J. Kwong, self-represented, in support of the petition.

Decided September 24, 2024

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

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Tax appeal; applications for charitable and hospital tax exemptions pursuant to statute (§ 12-81 (7) and (16)) for certain personal property that plaintiff hospital used to provide outpatient rehabilitation services at rehabilitation facility located in defendant town; whether plaintiff's personal property, even if exempt from taxation under § 12-81 (7) or (16), was nevertheless taxable under statute (§ 12-66a) that permits municipalities to tax any personal property incident to the rendering of health care services if such personal property is located at real property that was "acquired by a health system"; whether suite in which rehabili-

tation facility was located was "acquired" for purposes of § 12-66a when it was leased, rather than purchased, by plaintiff; whether plaintiff hospital was "health system," as defined by statute ((Supp. 2024) § 19a-508c (a) (5)).

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

Williams *v.* Mansfield (Order) 908

Woodbridge Newton Neighborhood Environmental Trust *v.* Connecticut Siting Council . 619

Application for certificate of environmental compatibility and public need pursuant to Public Utility Environmental Standards Act (§ 16-50g et seq.); whether trial court properly dismissed plaintiff's appeal from decision of defendant siting council approving application of defendant telecommunications company to construct cell phone tower in certain location; claim that plaintiff nonprofit association of real property owners lacked standing, as intervenor pursuant to statute (§ 22a-19), to raise issue of property values; claim that council had improperly declined to consider impact of proposed tower on private property values; whether private property values are among enumerated or unenumerated statutory (§ 16-50p (a) (3) (B)) criteria that siting council is required to consider in acting on application; claim that council's decision was unsupported by substantial evidence.

CONNECTICUT APPELLATE REPORTS

Vol. 228

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

IN RE JADIEL B.*
(AC 47325)

Elgo, Clark and Westbrook, Js.

Syllabus

The respondent father appealed from the judgment of the trial court terminating his parental rights with respect to his minor child, J, who had previously been adjudicated neglected and committed to the care and custody of the petitioner, the Commissioner of Children and Families. The father claimed, inter alia, that the trial court erred in determining, pursuant to statute (§ 17a-112 (j)), that he was unable or unwilling to benefit from the efforts of the Department of Children and Families to reunify him with J. *Held*:

The trial court's determination, pursuant to § 17a-112 (j) (1), that the father was unable or unwilling to benefit from the department's reunification efforts was not clearly erroneous.

The record was inadequate to review the father's unpreserved claim that the department's failure to provide him with services during his period of incarceration violated his right to equal protection guaranteed under the federal and state constitutions.

Argued May 16—officially released September 25, 2024**

Procedural History

Petition by the Commissioner of Children and Families to terminate the respondents' parental rights with respect to their minor child, brought to the Superior Court in the judicial district of Fairfield, Juvenile Matters at Bridgeport, and tried to the court, *McLaughlin*, *J.*; judgment terminating the respondents' parent rights, from which the respondent father appealed to this court. *Affirmed*.

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

** September 25, 2024, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

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

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

Opinion

ELGO, J. The respondent father, Joel B.-R., appeals from the judgment of the trial court, rendered in favor of the petitioner, the Commissioner of Children and Families, terminating his parental rights with respect to his minor child, Jadiel B. (Jadiel).[1] On appeal, the respondent claims that the trial court erred in determining that (1) the Department of Children and Families (department) had made reasonable efforts to reunify the respondent with Jadiel and (2) the respondent was unable or unwilling to benefit from services. The respondent also contends that General Statutes § 17a-112, as applied, violates the equal protection clauses of the federal and state constitutions. We affirm the judgment of the court.

The following undisputed relevant facts, which the court found by clear and convincing evidence, and procedural history are relevant to this appeal.[2] Jadiel was

[1] The court also terminated the parental rights of Heather M., the respondent mother of Jadiel. She has not appealed from the termination of her parental rights. All references in this opinion to the respondent are to Joel B.-R. only.

[2] In addition to setting forth its findings of fact in its memorandum of decision, the court stated that it took judicial notice of the trial court file, specifically, "[the] prior court's ruling in this case including the neglect adjudication, any orders relating to an [order of temporary custody], and then, the [permanency] plan, and, certainly, the petition in this case." Additionally, the court admitted nineteen exhibits into evidence. With the exception of exhibit R, the respondent's criminal conviction certification record, all exhibits were entered as full exhibits upon the agreement of the parties. The court overruled the respondent's objection to the admission of exhibit R, and it was also admitted as a full exhibit.

born in August, 2020. On August 7, 2020, the petitioner filed a neglect petition and a petition for an ex parte order of temporary custody on behalf of Jadiel. The court granted the ex parte order of temporary custody and, on August 17, 2020, sustained the order of temporary custody, vesting temporary custody of Jadiel with the petitioner. On May 20, 2021, the court adjudicated Jadiel neglected and committed him to the care and custody of the petitioner. The court ordered final specific steps for the respondent at the time of the neglect adjudication. On October 5, 2021, the court approved the permanency plan of termination of parental rights and adoption for Jadiel.[3]

On January 24, 2022, the petitioner filed a petition to terminate the respondent's parental rights, which was predicated on the respondent's failure to achieve a sufficient degree of personal rehabilitation pursuant to § 17a-112 (j) (3) (B). In the petition, the petitioner alleged, inter alia, that the department had made reasonable efforts at reunification, that the respondent was unable or unwilling to benefit from reunification efforts, and that reasonable efforts were not required because the trial court already had approved a plan other than reunification. On February 8, 2022, the court adjudicated the respondent to be the biological father of Jadiel. A trial on the petition to terminate the respondent's parental rights commenced on October 19, 2023, and concluded on October 26, 2023.

In its memorandum of decision dated December 4, 2023, the court set forth the following facts that are relevant to the disposition of this appeal. "At birth, [Jadiel] tested positive for cocaine. The mother also tested positive for cocaine. When [Jadiel] was born, he had difficulty breathing and was placed on a [Continuous Positive Airway Pressure (CPAP) machine]. The

[3] On August 9, 2022, and June 6, 2023, the court also approved a permanency plan of termination of parental rights and adoption for Jadiel.

hospital transferred [Jadiel] to the Neonatal Intensive Care Unit (NICU) for observation and for possible treatment for withdrawal. Due to [Jadiel] and the mother testing positive for cocaine, the hospital social worker contacted the department. In response, the [petitioner] filed the [petition for an ex parte order of temporary custody].

The court found that Jadiel has been in the care and custody of the petitioner since the granting of the order of temporary custody in August, 2020, and has resided with the same foster family since that time. The court further found that "[t]he foster family consists of a foster mother and foster sister. The foster mother also has three adult children. The family provides [Jadiel] with a loving and supportive home. [Jadiel] calls the foster mother 'mommy' and the foster sister 'sissy.' " The foster mother ensures that [Jadiel] is well cared for medically and educationally. [Jadiel] attends prekindergarten. His school social worker reports that he is doing 'phenomenal' and is 'super social and outgoing.' [Jadiel] is happy and developmentally on target."

The court found that "[t]he [respondent] is thirty-six years old. He has a long history of substance abuse and mental health issues and criminal activity. The [respondent's] substance abuse issues include the use and abuse of cocaine, alcohol, and marijuana.

"When [Jadiel] was a month old, the [respondent] was incarcerated on charges of robbery in the second degree and assault in the second degree. He was released from prison on February 9, 2023. While incarcerated, the department could not provide the [respondent] with any services. Only the [Department of Correction] can provide programs to incarcerated individuals. During his incarceration, the [respondent] did not complete any programs or treatment for substance abuse or mental health issues. He also did not complete any parenting programs."

The court further found that, upon the respondent's release from prison, he failed to obtain consistent employment or housing, only sporadically attended substance abuse and mental health treatment programs, and continued to test positive for cocaine, marijuana, opiates, and alcohol. The court noted that, on September 6, 2023, the respondent was arrested again as a result of an incident that occurred on June 16, 2023. As of the date of the termination of parental rights trial, the respondent was incarcerated on pending charges of assault in the second degree, robbery in the third degree, larceny in the second degree, breach of the peace in the second degree, interfering with an officer, violation of probation, and attempt to commit robbery in the second degree.

The court thereafter found, by clear and convincing evidence, that (1) the department had made reasonable efforts to reunify the respondent and Jadiel,[4] and that the respondent was unable or unwilling to benefit from those efforts, (2) the respondent had failed to rehabilitate, and (3) termination of parental rights was in Jadiel's best interest. Accordingly, the court granted the petitioner's petition for termination of the respondent's parental rights. The respondent then filed the present appeal.[5]

Before addressing the respondent's claims on appeal, we briefly set forth the legal principles that govern our review. "Proceedings to terminate parental rights are governed by . . . § 17a-112. . . . Under [that provision], a hearing on a petition to terminate parental rights consists of two phases: the adjudicatory phase and the

[4] The court noted that the respondent's location was never an issue and that he appeared with appointed counsel at trial.

[5] Pursuant to Practice Book §§ 67-13 and 79a-6 (c), the attorney for the minor child filed a statement adopting the brief of the petitioner and supporting the affirmation of the judgment terminating the respondent's parental rights.

dispositional phase. During the adjudicatory phase, the trial court must determine whether one or more of the . . . grounds for termination of parental rights set forth in § 17a-112 [(j) (3)] exists by clear and convincing evidence. The [petitioner] . . . in petitioning to terminate those rights, must allege and prove one or more of the statutory grounds. . . . Also, as part of the adjudicatory phase, the department is required to prove, by clear and convincing evidence, that it has made reasonable efforts . . . to reunify the child with the parent, unless the court finds . . . that the parent is unable or unwilling to benefit from reunification . . . .'' (Citation omitted; internal quotation marks omitted.) *In re Malachi E.*, 188 Conn. App. 426, 434, 204 A.3d 810 (2019).

''If the trial court determines that a statutory ground for termination exists, then it proceeds to the dispositional phase. . . . In the dispositional phase of a termination of parental rights hearing, the trial court must determine whether it is established by clear and convincing evidence that the continuation of the respondent's parental rights is not in the best interest of the child.'' (Citation omitted; internal quotation marks omitted.) Id.

I

The respondent first challenges the court's findings, made pursuant to § 17a-112 (j) (1), that the department had made reasonable efforts to reunify him with Jadiel and that he was unable or unwilling to benefit from such efforts.[6] Specifically, he contends that the department did not provide the respondent with any rehabilitative services prior to the filing of the petition for termination of parental rights on January 24, 2022, because

[6] The respondent also challenges the constitutionality of General Statutes §§ 17a-111b (a) (2) and 17a-112 (j). Specifically, he contends that the statutory interplay between these sections ''allows for an impermissible end run around the clear and convincing evidentiary standard required, as a matter of due process, in all termination hearings.'' According to the respondent,

he was incarcerated. He further contends that the court improperly considered efforts made by the department after the filing of the termination petition within its reasonable efforts determination. We conclude that the court properly determined that the respondent was unable or unwilling to benefit from reunification services and, therefore, need not address the respondent's claim that the department failed to make reasonable efforts to reunify the respondent and Jadiel.

The following legal principles and standard of review are relevant to our resolution of this issue. "[Section] 17a-112 (j) (1) requires that before terminating parental rights, the court must find by clear and convincing evidence that the department has made reasonable efforts to locate the parent and to reunify the child with the parent, unless the court finds in this proceeding that the parent is unable or unwilling to benefit from reunification efforts provided such finding is not required if the court has determined at a hearing . . . that such efforts are not appropriate . . . . Thus, the department may meet its burden concerning reunification in

"the statutory scheme requires the department to prove it made reasonable efforts to reunify the respondent with his child by clear and convincing evidence unless the court has approved a permanency plan other than reunification. But at the permanency plan hearing, the department is merely required to satisfy its burden, including that it has made reasonable efforts to reunify the parent with the child . . . by a mere preponderance of the evidence."

In the present case, because the court expressly found, on the basis of clear and convincing evidence, that the respondent was unwilling and unable to benefit from reunification efforts, and we affirm those findings, we need not address the respondent's constitutional claims. See *In re Kyreese L.*, 220 Conn. App. 705, 714–15 n.6, 299 A.3d 296 (declining to review constitutional challenge to statutory scheme because court found, on basis of clear and convincing evidence, that department made reasonable efforts to reunify parent and child), cert. denied, 348 Conn. 901, 300 A.3d 1166 (2023); *In re Timothy B.*, 219 Conn. App. 823, 828 n.5, 296 A.3d 342 ("[a]s a jurisprudential matter, Connecticut courts follow the recognized policy of self-restraint and the basic judicial duty to eschew unnecessary determinations of constitutional questions" (internal quotation marks omitted)), cert. denied, 349 Conn. 919, 318 A.3d 439 (2023).

one of three ways: (1) by showing that it made such efforts, (2) by showing that the parent was unable or unwilling to benefit from reunification efforts or (3) by a previous judicial determination that such efforts were not appropriate." (Internal quotation marks omitted.) *In re Timothy B.*, 219 Conn. App. 823, 827–28, 296 A.3d 342, cert. denied, 349 Conn. 919, 318 A.3d 439 (2023).

"[I]n evaluating a trial court's ultimate finding that the respondent was unable or unwilling to benefit from rehabilitation efforts for evidentiary sufficiency, we ask whether the trial court could have reasonably concluded, upon the facts established and the reasonable inferences drawn therefrom, that the cumulative effect of the evidence was sufficient to justify its [ultimate conclusion]. . . . When applying this standard, we construe the evidence in the light most favorable to sustaining the judgment of the trial court. . . . [An appellate court does] not examine the record to determine whether the trier of fact could have reached a conclusion other than the one reached. . . . [Rather] every reasonable presumption is made in favor of the trial court's ruling." (Internal quotation marks omitted.) *In re Cameron W.*, 194 Conn. App. 633, 667–68, 221 A.3d 885 (2019), cert. denied, 334 Conn. 918, 222 A.3d 103 (2020). Furthermore, in reviewing this claim we note that "an opinion must be read as a whole, without particular portions read in isolation, to discern the parameters of its holding. . . . Furthermore, [w]e read an ambiguous trial court record so as to support, rather than contradict, its judgment." (Citation omitted; internal quotation marks omitted.) *In re Jason R.*, 306 Conn. 438, 453, 51 A.3d 334 (2012).

The crux of the respondent's claim is that, because incarceration alone cannot be the basis to terminate his parental rights, and because the department failed to facilitate his reunification with Jadiel based entirely on his incarceration, the court erred in terminating his

parental rights. In considering this claim, we note "the reality . . . that incarceration imposes limitations on what the department and its social workers can do and what services it can provide for an incarcerated parent facing termination of his or her parental rights. . . . The reasonableness of the department's efforts must be viewed in the context of these limitations." (Citation omitted; internal quotation marks omitted.) *In re Karter F.*, 207 Conn. App. 1, 15–16, 262 A.3d 195, cert. denied, 339 Conn. 912, 261 A.3d 745 (2021); see also *In re Katia M.*, 124 Conn. App. 650, 661, 6 A.3d 86 ("[a]lthough we agree that incarceration alone is not a sufficient basis to terminate parental rights . . . incarceration nonetheless may prove an obstacle to reunification due to the parent's unavailability" (citation omitted)), cert. denied, 299 Conn. 920, 10 A.3d 1051 (2010); *In re Emily S.*, 210 Conn. App. 581, 610, 270 A.3d 797 ("[T]he fact of incarceration, in and of itself, cannot be the basis for a termination of parental rights. . . . At the same time, a court properly may take into consideration the inevitable effects of incarceration on an individual's ability to assume his or her role as a parent. . . . Extended incarceration severely hinders the department's ability to offer services and the parent's ability to make and demonstrate the changes that would enable reunification of the family." (Internal quotation marks omitted.)), cert. denied, 342 Conn. 911, 271 A.3d 1039 (2022).

In *In re Karter F.*, supra, 207 Conn. App. 17–18, the respondent argued that the trial court improperly had found that he was unable or unwilling to benefit from reunification services because he was incarcerated. Reading the trial court's decision as a whole, however, this court determined that the respondent's incarceration was not the sole basis for the court's finding that he was unable to benefit from the department's reunification efforts. Id., 18–19. The court's memorandum of decision and the record, rather, "[revealed] that the

court made ample relevant factual findings concerning the respondent's unresolved mental and emotional issues and his failure to take advantage of the opportunities that the department offered him to treat those issues or to bond with the child during his incarceration." Id., 19. Similarly, in the present case, our review of the court's memorandum of decision and the record reveals that the court did not base its conclusion that the respondent was unable or unwilling to benefit from reunification services solely on the fact that the respondent was incarcerated. Rather, the court found, with ample support in the record, that the respondent was unable or unwilling to benefit from the department's reunification efforts that were offered both prior to the respondent's incarceration as well as during his incarceration.[7]

As set forth previously in this opinion, on August 17, 2020, the court sustained the order of temporary custody, vesting temporary custody of the child with the petitioner. The court noted in its memorandum of decision that it ordered preliminary specific steps in August, 2020, when it sustained the order of temporary custody, and that these same specific steps were ordered as final specific steps at the time of the adjudication of neglect on May 20, 2021.[8] The specific steps required, inter alia, that the respondent (1) "[k]eep all appointments set by or with [the department]," (2) "[s]ubmit to a substance abuse evaluation and follow the recommendations about treatment, including, inpatient treatment if necessary, aftercare and relapse prevention," (3) "[n]ot use illegal drugs or abuse alcohol or medicine," (4) "[n]ot get involved with the criminal

[7] In light of this conclusion, we need not address the petitioner's contention that the trial court was entitled to base its "unable or unwilling" determination solely on the respondent's incarceration.

[8] The respondent signed the specific steps on April 16, 2021, while he was incarcerated.

justice system [and] [c]ooperate with the Office of Adult Probation" (5) "[v]isit [Jadiel] as often as [the department] permits" and (6) "[t]ell [the department] the names and addresses of the grandparents of [Jadiel]."

Significantly, on September 7, 2020, approximately one month after the birth of the child, and following the issuance of the specific steps, including the step that he "[n]ot get involved with the criminal justice system," the respondent was arrested and incarcerated on criminal charges, including assault in the second degree and robbery in the second degree. The record further reflects that reunification services were provided to the respondent in the brief period between when the petitioner gained custody of Jadiel in August, 2020, and September 7, 2020, when the respondent was incarcerated. Specifically, the record reflects the undisputed fact that, prior to the respondent's incarceration on September 7, 2020, the respondent was offered fourteen virtual supervised visits with Jadiel but attended only one visit. At the time of this visit, the respondent was "observed to be in bed and had difficulty keeping his eyes open."

The evidence in the record also supports the court's finding that "[w]hen [Jadiel] first came into the care of the [petitioner] in 2020 via [the order of temporary custody], the department met with the . . . [respondent] to discuss services." Specifically, the summary of facts dated August 5, 2020, states that "[t]he [d]epartment held a considered removal meeting on [August 5, 2020] and encouraged . . . [the respondent] to bring family supports for [Jadiel]." The summary of facts further indicates that the department provided case management to the family and offered the respondent substance abuse services through its referrals. Finally, the summary indicates that the department had attempted to establish in person and telephone contact with the

respondent and had encouraged the respondent's sobriety "through face-to-face interactions."

The social study admitted into evidence during the termination of parental rights trial indicates that "[the respondent] admitted to cocaine use in [August, 2020] and did not take the necessary steps to remain sober. In [August, 2020], [the respondent] agreed to [complete] a drug screen and a substance abuse evaluation while also agreeing to participate in any other recommendations. A referral was made to Travisano [Network] on [August 5, 2020] but the [respondent] never followed through on this referral." According to the social study, "[the respondent] has not kept [appointments] set by [the department] and has not participated in [a]dministrative case hearings." Specifically, the evidence reflects that from August, 2020, through January 21, 2022, the department held and invited the respondent to two administrative case reviews, but the respondent did not participate in either meeting.

Until his incarceration in September, 2020, the respondent did not inform the department, his attorney, or the attorney for Jadiel of his whereabouts. The social study attributed this to the respondent's struggles with "homelessness, substance abuse, and legal troubles resulting in incarcerations." See *In re Katia M.*, supra, 124 Conn. App. 665 (respondent's failure to keep department personnel apprised of his whereabouts and failure to communicate through relatives, counselors or telephone supports court's finding that respondent was unwilling or unable to benefit from reunification services). Although the respondent was required, pursuant to the specific steps ordered in August, 2020, to provide the department with the names and addresses of Jadiel's grandparents, he failed to do so until November 8, 2021, more than one year after Jadiel came into contact with the department. After receiving this information, the

department reached out to the grandparents, but they did not respond to the department.

Following the respondent's incarceration on September 7, 2020, and continuing through the filing of the petition for termination of the respondent's parental rights on January 24, 2022, the department's ability to offer services to the defendant was limited by several factors. First, as the court found, only the Department of Correction has the authority to provide services such as mental health and substance abuse counseling for incarcerated individuals.[9] The services that were potentially available to the respondent were further limited due to the restrictions in place due to the COVID-19 pandemic. Finally, the record reveals that the respondent did not remain in any facility long enough to complete treatment.[10]

The record reflects, however, that the department continued to make efforts to reunify the respondent and Jadiel during this time, but the respondent did not make use of the services that were provided. "[T]he inevitable restraints imposed by incarceration do not

[9] According to the respondent, "the state's responsibility to make reasonable efforts to reunify the respondent with his child should not be wiped away simply because one agency oversees the reunification efforts while another has custody of the respondent." To the extent the respondent asserts that this constitutes a violation of due process, we note that this claim was not raised in the trial court. Further, the respondent has not requested review of this claim pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 7881, 120 A.3d 1188 (2015), the requirements of which are discussed in part II of this opinion. "[T]he [respondent's] brief neither includes a *Golding* analysis nor requests extraordinary review of her claim under any other exception to the preservation rule. For this reason alone, the [respondent] has failed to adequately brief [this] constitutional claim and the claim is deemed abandoned." *Guiliano* v. *Jefferson Radiology, P.C.*, 206 Conn. App. 603, 624, 261 A.3d 140 (2021).

[10] The respondent was asked at trial whether he had tried to obtain services while incarcerated. In response, the respondent testified that he "wrote to [his] counselor two or three times, and the only reply [he] ever received was that they didn't have services available at that location . . . ."

in themselves excuse a failure to make use of available though limited resources for contact with a distant child." (Emphasis omitted; internal quotation marks omitted.) *In re Katia M.*, supra, 124 Conn. App. 664–65. In this regard, the department offered monthly visitation between the respondent and Jadiel; the respondent, however, only visited with Jadiel three times. Further, the court specifically found that while the respondent was incarcerated, the department followed up with him every month regarding Jadiel and this case. See *In re Katia M.*, supra, 124 Conn. App 668–69 (while respondent was incarcerated, department facilitated visits between him and child, communicated with respondent's family monthly, and attempted to contact respondent by calling correctional institution and sending him letters). The respondent was placed on a waiting list after being assessed for services in September, 2020. The record reflects, however, that he had the opportunity to participate voluntarily in fellowships and to connect with correctional counselors at any point during his incarceration but did not do so. The social study indicates that the respondent "failed to demonstrate insight into how his substance use has impacted his ability to parent his child."

Reading the court's memorandum of decision as a whole; see *In re Jason R.*, supra, 306 Conn. 453; and construing the evidence in the light most favorable to sustaining the judgment of the trial court; see *In re Cameron W.*, supra, 194 Conn. App. 667; we conclude that the court's determination that the respondent was unable or unwilling to benefit from the department's reunification efforts was not clearly erroneous.[11]

[11] Pursuant to § 17a-112 (j) (1), "[t]he [petitioner] must prove [by clear and convincing evidence] *either* that [the department] has made reasonable efforts to reunify or *alternatively*, that the parent is unwilling or unable to benefit from reunification efforts. Section 17a-112 (j) clearly provides that the [petitioner] is not required to prove both circumstances. Rather, either showing is sufficient to satisfy this statutory element." (Emphasis in original; internal quotation marks omitted.) *In re Caiden B.*, 220 Conn. 326, 361 n.22,

II

The respondent next claims that the department's failure to provide him with services during his incarceration violated his right to equal protection guaranteed under the federal and state constitutions. The respondent concedes that this claim was not preserved at trial and seeks review pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). We conclude that the record is inadequate to review the respondent's unpreserved claim.

"The [e]qual [p]rotection [c]lause of the [f]ourteenth [a]mendment to the United States [c]onstitution is essentially a direction that all persons similarly situated should be treated alike. . . . Conversely, the equal protection clause places no restrictions on the state's authority to treat dissimilar persons in a dissimilar manner. . . . Thus, [t]o implicate the equal protection [clause] . . . it is necessary that the state statute [or statutory scheme] in question, either on its face or in practice, treat persons standing in the same relation to it differently. . . . [Consequently], the analytical predicate [of consideration of an equal protection claim] is a determination of who are the persons [purporting to be] similarly situated. . . . The similarly situated inquiry focuses on whether the [respondent is] similarly situated to another group for purposes of the challenged government action. . . . Thus, [t]his initial inquiry is not whether persons are similarly situated for all purposes, but whether they are similarly situated for purposes of the law challenged." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Stuart*

297 A.3d 1025, cert. denied, 348 Conn. 904, 301 A.3d 527 (2023). Because we conclude that the court properly found that the respondent was unable or unwilling to benefit from reunification efforts, a finding that is sufficient to satisfy § 17a-112 (j), we need not address the merits of the respondent's additional claim that the court erred in finding that the department's efforts to reunify the respondent with Jadiel were reasonable.

v. *Commissioner of Correction*, 266 Conn. 596, 601–602, 834 A.2d 52 (2003).

"After this initial inquiry, the court must . . . determine the standard by which the challenged statute's constitutional validity will be determined. If, in distinguishing between classes, the statute either intrudes on the exercise of a fundamental right or burdens a suspect class of persons, the court will apply a strict scrutiny standard [under which] the state must demonstrate that the challenged statute is necessary to the achievement of a compelling state interest. . . . If the statute does not touch upon either a fundamental right or a suspect class, its classification need only be rationally related to some legitimate government purpose in order to withstand an equal protection challenge." (Internal quotation marks omitted.) *Taylor* v. *Commissioner of Correction*, 216 Conn. App. 570, 586–87, 286 A.3d 449 (2022). "A party challenging a law under rational basis review bears the burden of proving that the law's class-based distinctions are wholly irrational." *State* v. *Dyous*, 307 Conn. 299, 317, 53 A.3d 153 (2012).

The respondent argues that the right to family integrity is fundamental and that § 17a-112, in practice, "infringes upon that fundamental right by treating similarly situated persons differently based upon their ability to make bond and secure their individual liberty while awaiting disposition of their criminal charges." The respondent, therefore, argues that the strict scrutiny standard of review applies to this claim. The petitioner counters that the reasonable efforts requirement is a statutory requirement rather than a constitutionally mandated prerequisite to termination of parental rights and, thus, the respondent has failed to demonstrate the violation of a fundamental right. The petitioner, therefore, argues that the rational basis standard of review applies to the respondent's claim. We need not decide whether the strict scrutiny standard of review

or the rational basis standard of review applies to this claim because, regardless of which standard applies, the record is inadequate to review this claim.

Pursuant to *State* v. *Golding*, supra, 213 Conn. 239–40, as modified by *In re Yasiel*, supra, 317 Conn. 781, "a [respondent] can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the [respondent] of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness beyond a reasonable doubt. . . . [T]he inability to meet any one prong requires a determination that the [respondent's] claim must fail. . . . The appellate tribunal is free, therefore, to respond to the [respondent's] claim by focusing on whichever condition is most relevant in the particular circumstances." (Citations omitted; emphasis in original; internal quotation marks omitted.) *In re Skylar B.*, 204 Conn. App. 729, 738–39, 254 A.3d 928 (2021).

"In assessing whether the first prong of *Golding* has been satisfied, it is well recognized that [t]he [respondent] bears the responsibility for providing a record that is adequate for review of [his] claim of constitutional error. If the facts revealed by the record are insufficient, unclear or ambiguous as to whether a constitutional violation has occurred, we will not attempt to supplement or reconstruct the record, or to make factual determinations, in order to decide the [respondent's] claim. . . . The reason for this requirement demands no great elaboration: in the absence of a sufficient record, there is no way to know whether a violation of constitutional magnitude in fact has occurred." (Internal quotation marks omitted.) *In re Riley B.*, 203

Conn. App. 627, 637–38, 248 A.3d 756, cert. denied, 336 Conn. 943, 250 A.3d 40 (2021).

The crux of the respondent's claim is that the statutory scheme as applied to this case creates two distinct classes of people—those who remain incarcerated while awaiting adjudication of their criminal charges (i.e., indigent individuals) and those who have the means and ability to ensure their release while awaiting criminal trial. According to the respondent, individuals in the first category are denied access to the reunification services necessary to achieve rehabilitation under § 17a-112, while those in the second category have access to reunification services. The respondent contends that this claim is reviewable under *Golding* because the record establishes that he was incarcerated, but not convicted, during the relevant portion of the child protection case and that "[t]he necessary factual predicate that exists outside the record—that some people accused of crimes can post bond and remain free while awaiting trial and [others] cannot—is knowledge so common that it need not be established on the record." We disagree.

If, as argued by the respondent, this claim is subject to the strict scrutiny standard of review, the state was required to demonstrate that the challenged statute is necessary to the achievement of a compelling state interest. See *Taylor* v. *Commissioner*, supra, 216 Conn. App. 586. Because this claim was not raised in the trial court, however, the record is devoid of any evidence regarding the reasons that the department may be unable to provide the same level of services to incarcerated individuals.[12] Similarly, if, as argued by the petitioner, this claim is subject to the rational basis standard

[12] As the petitioner aptly points out in her appellate brief, "because neither the department nor [the Department of Correction] knew that [the respondent] intended to raise an equal protection argument, they did not submit their own evidence about the nondiscriminatory reasons they could not provide services. They had no opportunity to provide details about, for

of review, the respondent was required to prove "that the law's class-based distinctions are wholly irrational." *State* v. *Dyous*, supra, 307 Conn. 317. In this regard, the respondent simply argues that "there can be no rational basis for treating people arrested for the same criminal conduct differently with regard to reunification efforts based solely on the parent's ability to secure pretrial release." The respondent, however, presented no evidence regarding why the department may be unable to provide the same level of services to incarcerated individuals and how the department's actions in this regard were "wholly irrational." In the absence of the basic factual predicate underlying the respondent's equal protection claim, we conclude that the record is insufficient to permit us to review this claim. See *State* v. *Anonymous*, 179 Conn. 155, 167–68, 425 A.2d 939 (1979) (rejecting claim of "class bias against indigent persons" in termination of parental rights proceeding when defendant presented court "with nothing but suppositions and allegations to support this claim").

"Our role is not to guess at possibilities, but to review claims based on a complete factual record developed by the trial court. . . . Without the necessary factual and legal conclusions furnished by the trial court . . . any decision made by us respecting [the respondent's claim] would be entirely speculative." (Internal quotation marks omitted.) *In re Riley B.*, supra, 203 Conn. App. 639. On the basis of the foregoing, we decline

instance, the protocols governing [the Department of Correction's] authority over presentence inmates, which types of services [the Department of Correction] does typically make available and which it does not, the department's ability to work with [the Department of Correction] to provide services, how different services might present different challenges (e.g., visitation, mental health, substance abuse, parenting), how different inmates present different concerns (e.g., the inmate's risk assessment, the gravity of the underlying issues), how different institutions might have different logistical limitations (e.g., program's capacity, staffing, security), and how [the COVID-19 pandemic] affected all these issues."

to review the respondent's unpreserved constitutional claim because it fails the first prong of *State* v. *Golding*, supra, 213 Conn. 239–40.

The judgment is affirmed.

In this opinion the other judges concurred.

RANDALL BROWN *v.* COMMISSIONER OF CORRECTION
(AC 46407)

Alvord, Elgo and Suarez, Js.

Syllabus

The petitioner appealed, on the granting of certification, from the habeas court's denial of his petition for a writ of habeas corpus. The petitioner claimed, inter alia, that the habeas court erred in finding that no agreement existed between the state and certain witnesses, H and J, in exchange for their testimony at the petitioner's criminal trial. *Held*:

The habeas court's conclusion that the petitioner had failed to establish that an implied or express agreement existed between the state and H and J regarding their testimony at the petitioner's criminal trial was not clearly erroneous.

The habeas court's finding that H's bond modification was not a benefit given to H in exchange for his testimony was not clearly erroneous.

The petitioner's claim that his due process rights were violated by the state's failure to correct misleading testimony was untenable because the testimony of H and J in question was not misleading.

Argued April 10—officially released October 1, 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.*

Samantha Conway, assigned counsel, for the appellant (petitioner).

Danielle Koch, assistant state's attorney, with whom, on the brief, were *Sharmese Walcott*, state's attorney, and *Angela Macchiarulo*, supervisory assistant state's attorney, for the appellee (respondent).

Opinion

ELGO, J. The petitioner, Randall Brown, appeals from the judgment of the habeas court denying his amended petition for a writ of habeas corpus. In this certified appeal, the petitioner claims that the court (1) erroneously found that no agreement existed between the state and certain witnesses in exchange for their testimony, (2) erroneously found that a bond modification for a witness who testified at the petitioner's criminal trial did not constitute a benefit to that witness, and (3) improperly concluded that his due process rights were not violated by the state's failure to correct misleading testimony. We affirm the judgment of the habeas court.

The following facts underlying the petitioner's conviction, as set forth by our Supreme Court in his direct appeal, are relevant to our resolution of this appeal. On May 23, 2005, the petitioner, along with Eddy Hall, Jr., Chijoke Jackson and Idris France, devised a plan to rob the victim, Demarco Mitchell. *State* v. *Brown*, 299 Conn. 640, 644, 11 A.3d 663 (2011). Jackson contacted the victim, who agreed to meet him on Colebrook Street in Hartford that evening. Id. When the victim arrived, he got into the backseat of a vehicle with Hall and Jackson; the petitioner stood in the street behind the vehicle. Id., 645. France then entered the backseat and pointed a gun at the victim, and a struggle ensued. Id. The victim jumped out of the vehicle and ran down Colebrook Street chased by the petitioner. Id. When the victim tripped and fell near a curb, the petitioner shot him in the head. Id., 646.

The petitioner thereafter was arrested and charged with felony murder in violation of General Statutes § 53a-54c, murder in violation of General Statutes § 53a-54a (a), robbery in the first degree in violation of General Statutes §§ 53a-8 and 53a-134 (a) (4), attempt to commit robbery in the first degree in violation of General Statutes §§ 53a-49 (a) (2) and 53a-134 (a) (4), conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-48 (a) and 53a-134 (a) (4), carrying a pistol or revolver without a permit in violation of General Statutes § 29-35 (a), and criminal possession of a firearm in violation of General Statutes (Rev. to 2005) § 53a-217 (a) (1). Following a trial, at which Hall and Jackson testified on behalf of the state, the jury found the petitioner guilty on all counts. Id., 646. The trial court rendered judgment in accordance with that verdict and sentenced the petitioner to a total effective term of fifty-five years of incarceration. Id. Our Supreme Court affirmed that judgment of conviction on direct appeal. Id., 662.

On August 16, 2013, the petitioner filed an amended petition for a writ of habeas corpus predicated on the alleged ineffective assistance of his criminal trial counsel. See *Brown* v. *Commissioner of Correction*, 161 Conn. App. 770, 772, 129 A.3d 172 (2015), cert. denied, 320 Conn. 916, 131 A.3d 751 (2016). A trial followed, at the conclusion of which the habeas court denied the petition. On appeal, this court affirmed that judgment. Id., 771–72.

On April 24, 2017, the petitioner commenced the present habeas corpus action. In count one of his second amended petition for a writ of habeas corpus, the petitioner alleged a due process violation stemming from the state's "knowing use of false or misleading testimony" by Hall and Jackson as to whether they received any benefit from the state in exchange for their testimony at the petitioner's criminal trial. In count two, he

alleged a further due process violation due to the state's "failure to disclose material exculpatory evidence relating to cooperation agreements" between the state and both Hall and Jackson. In counts three and four, the petitioner alleged ineffective assistance on the part of counsel in his first habeas action.[1]

A habeas trial was held on November 22, 2021, and May 9, 2022. The petitioner called Jackson, Attorney Herbert E. Carlson, Jr.,[2] Attorney Christopher Parker,[3] Attorney Jeremy N. Weingast,[4] and Attorney Grayson Colt Holmes[5] as witnesses. The parties also submitted several exhibits, including transcripts from the petitioner's criminal trial and court proceedings involving Jackson and Hall. In a thorough memorandum of decision dated February 14, 2023, the court concluded that the petitioner had not established any of his due process or ineffective assistance of habeas counsel claims.[6] Accordingly, the court denied the petition for a writ of habeas corpus, and this certified appeal followed.

As a preliminary matter, we note certain principles relevant to this appeal. "The law governing the state's

[1] The petitioner also alleged two claims of ineffective assistance on the part of his criminal trial counsel. The petitioner withdrew those claims prior to the habeas trial.

[2] Attorney Carlson represented the state of Connecticut at the petitioner's criminal trial.

[3] Attorney Parker represented Jackson at the time of the petitioner's criminal trial.

[4] Attorney Weingast represented Hall at the time of the petitioner's criminal trial.

[5] Attorney Holmes represented the petitioner during his first habeas corpus action.

[6] In its memorandum of decision, the court found that the petitioner had abandoned his claim that Attorney Holmes had rendered ineffective assistance of habeas counsel by failing to adequately investigate and present testimony regarding the ineffective assistance of the petitioner's criminal trial counsel, as alleged in count four of the petition. The court further found that the petitioner had failed to prove deficient performance on the part of Attorney Holmes for failing to raise due process claims in the petitioner's first habeas corpus action and prejudice resulting therefrom, as alleged in count three of the petition. The petitioner does not challenge the propriety of those determinations in this appeal.

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).

I

In rejecting the petitioner's due process claim, the court found that the petitioner had not met his burden of establishing that an implied or express agreement existed between the state and Hall and Jackson regarding their testimony at the petitioner's criminal trial. On appeal, the petitioner claims that finding is clearly erroneous. We disagree.

"[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. That is the standard and scope of this court's judicial review of decisions of the trial court. Beyond that, we will not go. . . . A finding of fact is clearly

erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) Id., 737–38.

The petitioner's claim concerns Hall and Jackson, two accomplices in the May 23, 2005 homicide who testified on behalf of the state at his criminal trial. Following the petitioner's conviction, Hall pleaded guilty to conspiracy to commit robbery in the first degree in violation of §§ 53a-48 (a) and 53a-134 (a) (4), and received a suspended sentence of ten years of incarceration with five years of probation. Jackson testified at the habeas trial that he also pleaded guilty and received a sentence of twelve years of incarceration, execution suspended after thirty months, with five years of probation. The petitioner claims that the leniency of those sentences was the result of an agreement with the state in exchange for Hall's and Jackson's testimony.

In its memorandum of decision, the court detailed the following relevant facts, all of which find support in the transcripts and exhibits before us. "Both Hall and Jackson testified in the petitioner's criminal trial. Both testified on cross-examination that they did not expect a benefit from their testimony. The petitioner's [criminal] trial attorney, Attorney [Robert] Meredith, cross-examined both Hall and Jackson about the benefits they would receive for their testimony in the petitioner's criminal case. Attorney Meredith also questioned Hall on the bond modification that the prosecutor, Attorney Carlson, did not object to. Hall denied that the bond modification was part of a deal for his testimony at the petitioner's criminal trial.

"At the petitioner's criminal trial and at the habeas trial, Jackson testified and denied any agreement with

the state for a more lenient sentence in exchange for his testimony at the petitioner's criminal trial. . . . Attorney Carlson testified credibly at the habeas trial, and he denied he offered any type of agreement, either explicit or implicit, to Attorney Parker or Attorney Weingast for their respective clients' testimony in the petitioner's criminal case. . . . Attorney Carlson testified that Attorney Parker approached him and said his client, Jackson, was willing to plead guilty to his charges and was willing to testify. . . . Attorney Carlson found that Attorney Parker's offer on his client's behalf was uncommon. . . . Attorney Carlson's testimony denied the occurrence of 'wink and nod type of deals' between a prosecutor and a defendant, whereby the state would agree to speak with the judge at sentencing and to help a cooperating defendant without disclosing such agreement on the record. . . .

"Both Hall['s] and Jackson's attorneys testified at the habeas trial. Attorney Parker credibly denied any deals with the state for Jackson's testimony. Hall's attorney, Attorney Weingast, testified that Hall's involvement in the robbery and murder was minor, but Hall had significant exposure after being charged as a coconspirator. Attorney Weingast testified inconsistently that there was a promise that was either explicit or implicit for Hall's cooperation. Basically, the [promise] testified to by Attorney Weingast, was that Hall's sentencing judge would be made aware that Hall had cooperated in the petitioner's criminal trial. . . . However, on redirect, Attorney Weingast testified that 'the [agreement with the state] wasn't an explicit promise but based on my experience . . . and that [Hall's] cooperation would be brought to the attention [of] the sentencing judge.' . . . Attorney Weingast testified that, '[b]ased on my experience and what I'd seen in other cases, I was confident that my client would get very beneficial treatment as a result of his cooperation.' . . . On further questioning,

Attorney Weingast was unable to describe the agreement between his client and the prosecutor. The court finds that it was Attorney Weingast's hope and expectation that his client would benefit from testifying in the petitioner's criminal case, but that does not suffice to show that an agreement existed. Attorney Carlson testified that, as the coconspirators' case unfolded, he believed that Hall and Jackson were less culpable actors in the robbery and murder of [the victim], but Attorney Carlson did not consider Hall's and Jackson's sentencings until well after the petitioner and France were convicted." (Citations omitted.)

It is axiomatic that, as an appellate tribunal, "[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 the present case, the court credited the habeas trial testimony of Jackson, Attorney Parker, and Attorney Carlson that there was no agreement, inducement, or promise offered by the state in exchange for Hall's and Jackson's testimony at the petitioner's criminal trial.

The court further declined to credit Attorney Weingast's testimony that "there was a promise that was either explicit or implicit for Hall's cooperation" therein. In so doing, the court specifically found that Attorney Weingast had testified "inconsistently" on that issue. The transcripts before us substantiate that finding. At the habeas trial, Attorney Weingast testified that it was his expectation that Hall would receive a benefit

for his testimony at the petitioner's trial, stating: "Based on my experience and what I'd seen in other cases, I was confident that [Hall] would get very beneficial treatment as a result of his cooperation." In addition, Attorney Weingast testified that there was never an explicit promise or assurance of beneficial treatment from the state. Given that inconsistent testimony, the court found that "it was Attorney Weingast's hope and expectation that his client would benefit from testifying in the petitioner's criminal case, but that does not suffice to show that an agreement existed."[7]

In light of the foregoing, the court concluded that the petitioner had failed to establish that an implied or express agreement existed between the state and Hall and Jackson regarding their testimony at the petitioner's criminal trial. Because that determination finds support in the record before us, we conclude that it is not clearly erroneous.

II

The petitioner also claims that the court erroneously found that a modification to Hall's bond did not constitute a benefit given to that witness in exchange for his testimony. We do not agree.

[7] As our Supreme Court has observed, "[i]t is well established that a prosecutor's intention to recommend a specific sentence for a cooperating witness is not subject to *Brady* if the intention has not been disclosed to the witness. See, e.g., *Shabazz* v. *Artuz*, 336 F.3d 154, 165 (2d Cir. 2003) ('[t]he government is free to reward witnesses for their cooperation with favorable treatment in pending criminal cases without disclosing to the defendant its intention to do so, *provided* that it does not promise anything to the witnesses prior to their testimony' . . .); *Diaz* v. *Commissioner of Correction*, [supra, 174 Conn. App. 798] ('Any . . . understanding or agreement between any state's witness and the state police or the state's attorney clearly falls within the ambit of *Brady* principles. . . . An unexpressed intention by the state not to prosecute a witness does not.' . . .)." (Emphasis in original.) *Greene* v. *Commissioner of Correction*, 330 Conn. 1, 29–30, 190 A.3d 851 (2018), cert. denied sub nom. *Greene* v. *Semple*, U.S. , 139 S. Ct. 1219, 203 L. Ed. 2d 238 (2019).

The following additional facts are relevant to that claim. Following his arrest related to the May 23, 2005 homicide, Hall was placed on a $750,000 cash or surety bond. While the petitioner's case was pending, Attorney Weingast filed a motion for a bond modification on behalf of Hall. The state did not object to that request, and Hall's bond was reduced to $100,000 cash. Hall's parents then posted the bond, and Hall was released from custody.

At the habeas trial, the petitioner argued that the modification of Hall's bond constituted a benefit from the state in exchange for his testimony at the petitioner's criminal trial. The petitioner, however, presented little evidence on that issue. Hall did not testify at the habeas trial, and Attorney Weingast was not questioned on that issue. The only evidence presented to the court on the issue of Hall's bond modification was Hall's testimony from the petitioner's criminal trial and Attorney Carlson's testimony at the habeas trial. During the petitioner's criminal trial, Hall was cross-examined by defense counsel and asked if the modification of his bond constituted a benefit to him. In response, Hall testified that he would have been released on bond "regardless" of whether his bond was modified.

Attorney Carlson similarly testified at the habeas trial that Hall had indicated, at the time of the petitioner's criminal trial, that his father was "going to be able to [post his bond] whether it's cash or a surety." Attorney Carlson also explained that he did not object to Attorney Weingast's motion for a bond modification because, in his view, there was not "much difference between [a] $750,000 surety and $100,000 cash, so it didn't make a lot of difference because [Attorney] Weingast said either way my client's father can and will make that bond." The court credited that testimony, as was its exclusive prerogative as the arbiter of credibility, and found that "Hall's family was going to pay the surety

or put up the cash themselves to have Hall released pending resolution of the charges against him."

We conclude that the record before us contains evidence to support the court's finding that Hall's bond modification was not a benefit given to Hall in exchange for his testimony at the petitioner's trial. That finding, therefore, is not clearly erroneous.[8]

III

The petitioner's remaining claim is that the court improperly concluded that his due process rights were not violated by the state's failure to correct misleading testimony. Because an essential predicate to such a claim is lacking, we disagree.

During the petitioner's criminal trial, Hall and Jackson testified that they did not expect to receive a benefit from the state in exchange for their testimony. The petitioner contends that this testimony was misleading, arguing that Hall and Jackson had an agreement with the state for leniency in sentencing. The petitioner also contends that Hall received an additional benefit when the state did not object to the modification of his bond. He thus maintains that the state's failure to correct Hall and Jackson's testimony at his criminal trial constitutes a due process violation under the *Brady*, *Napue* and *Giglio* line of cases. See *Diaz* v. *Commissioner of Correction*, supra, 174 Conn. App. 795–96.

His claim requires little discussion. In parts I and II of this opinion, we concluded that the court's findings

[8] Even if we were to conclude otherwise, the petitioner could not prevail. As the transcripts of the petitioner's criminal trial reflect, defense counsel was aware that a modification of Hall's bond had occurred, and he cross-examined Hall thereon. For that reason, the petitioner cannot establish a *Brady* violation. See, e.g., *Young* v. *Commissioner of Correction*, 219 Conn. App. 171, 189, 294 A.3d 29 ("[i]t is axiomatic that [e]vidence known to the defendant or his counsel, or that is disclosed, even if during trial, is not considered suppressed as that term is used in *Brady*" (internal quotation marks omitted)), cert. denied, 347 Conn. 905, 297 A.3d 567 (2023).

that no agreement existed between the state and Hall and Jackson for leniency in sentencing and that Hall's bond reduction did not constitute a benefit given in exchange for his testimony were not clearly erroneous. Because the testimony of Hall and Jackson in question was not misleading, the petitioner's due process claim is untenable.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* PATRICIA DANIELS (AC 46053)

Cradle, Suarez and Clark, Js.

Syllabus

The defendant appealed from the judgment of the trial court following her conviction of, inter alia, manslaughter in the first degree. She claimed that the evidence was insufficient to support the conviction of intentional manslaughter and that the trial court committed error in its jury instruction concerning the element of intent. *Held*:

The state presented evidence from which the jury reasonably could have found beyond a reasonable doubt that the defendant collided with the victim's vehicle intending to cause serious physical injury to another person.

The defendant, having implicitly waived any objection to the trial court's instruction to the jury on the element of intent, was unable to demonstrate that a constitutional violation occurred that deprived her of a fair trial, and she failed to demonstrate that she was entitled to relief under the plain error doctrine.

Argued May 23—officially released October 1, 2024

Procedural History

Substitute information charging the defendant with two counts of the crime of manslaughter in the first degree, and with one count each of the crimes of misconduct with a motor vehicle, risk of injury to a child, and evasion of responsibility in the operation of a motor vehicle, brought to the Superior Court in the judicial

district of Fairfield and tried to the jury before *Kavanewsky*, *J.*; verdict of guilty; thereafter, the court vacated the conviction as to one count of manslaughter in the first degree, and rendered judgment of guilty of manslaughter in the first degree, misconduct with a motor vehicle, risk of injury to a child, and evasion of responsibility in the operation of a motor vehicle, from which the defendant appealed to this court, *Lavine*, *Bright* and *Bear*, *Js.*, which reversed in part the trial court's judgment; subsequently, the state, on the granting of certification, appealed to the Supreme Court, which reversed in part the judgment of this court and remanded the case to this court with direction to remand the case to the trial court with direction to reinstate the defendant's intentional manslaughter conviction, to sentence the defendant on that count, and to resentence the defendant on the remaining counts of conviction; thereafter, the defendant appealed to this court. *Affirmed.*

Laila M.G. Haswell, senior assistant public defender, with whom, on the brief, was *Ruth Burke*, certified legal intern, for the appellant (defendant).

Denise B. Smoker, senior assistant state's attorney, with whom, on the brief, were *Joseph T. Corradino*, state's attorney, and *Marc R. Durso*, senior assistant state's attorney, for the appellee (state).

Opinion

SUAREZ, J. The defendant, Patricia Daniels, appeals from the judgment of conviction, following a jury trial, of manslaughter in the first degree in violation of General Statutes § 53a-55 (a) (1) (intentional manslaughter). The defendant claims that (1) the evidence was insufficient to support the conviction and (2) the court committed instructional error in its jury instruction concerning the essential element of intent. We affirm the judgment of the trial court.

In connection with a prior appeal, this court previously summarized the facts, as reasonably could have been found by the jury, as follows: "The victim, Evelyn Agyei, left her Bridgeport home at approximately 6 a.m. on December 4, 2014. Her eleven year old son accompanied her. Agyei and her son got into her Subaru Outback (Subaru), Agyei driving and her son in the back seat on the passenger's side. After traversing some back roads, they took Bond Street and arrived at the intersection of Bond Street and Boston Avenue. Agyei stopped at the red light and then proceeded to make a right turn onto Boston Avenue, staying in the right lane. As she was making the right turn, her son looked to the left and saw a white BMW sport utility vehicle (BMW) approximately two streets down, traveling at a high rate of speed in the left lane.

"After Agyei [turned] onto Boston Avenue, the driver of the BMW pulled alongside Agyei's vehicle. Agyei's son saw the BMW logo on the hood; however, he could not see the driver or the license plate. The driver of the BMW then moved into the right lane, hitting Agyei's Subaru once on the driver's side and causing her to begin to lose control of the vehicle. The driver of the BMW then moved behind the Subaru and ran into it from behind, causing the vehicle to cross the median, proceed under a fence, and hit a tree. Tragically, Agyei died from her injuries, and her son, who also was injured, continues to have vision problems as a result of the injuries he sustained. After an investigation . . . the police, having concluded that the defendant was the driver of the BMW that hit the Subaru [and] caus[ed] Agyei's death and the injuries to Agyei's son, arrested the defendant." *State* v. *Daniels*, 191 Conn. App. 33, 36–37, 213 A.3d 517 (2019), rev'd in part, 342 Conn. 538, 271 A.3d 617 (2022).

In a long form information, the defendant was charged with intentional manslaughter, manslaughter in

the first degree in violation of § 53a-55 (a) (3) (reckless manslaughter), misconduct with a motor vehicle in violation of General Statutes § 53a-57 (a) (criminally negligent operation), risk of injury to a child in violation of General Statutes § 53-21 (a) (1), and evasion of responsibility in the operation of a motor vehicle in violation of General Statutes § 14-224 (a). The jury found the defendant guilty of all of these charged offenses, and the court accepted the jury's verdict. At the time of the defendant's sentencing, the trial court vacated the intentional manslaughter conviction at the state's request so as to avoid double jeopardy implications pursuant to *State* v. *Polanco*, 308 Conn. 242, 61 A.3d 1084 (2013). See id., 245 ("when a defendant has been convicted of greater and lesser included offenses, the trial court must vacate the conviction for the lesser offense rather than merging the convictions"). With respect to the remaining charged offenses, the court imposed a total effective sentence of twenty years of incarceration, execution suspended after sixteen years, followed by five years of probation.

In a prior appeal to this court, the defendant claimed, in part, that the trial court had erred in accepting the jury's guilty verdicts on the intentional manslaughter, reckless manslaughter, and criminally negligent operation charges because they were legally inconsistent insofar as each offense required a mutually exclusive mental state. See *State* v. *Daniels*, supra, 191 Conn. App. 36. This court concluded that the convictions of reckless manslaughter and criminally negligent operation were legally inconsistent but that neither conviction was legally inconsistent with the conviction of intentional manslaughter. Id., 49, 51, 53. This court reversed the judgment of conviction with respect to the counts of reckless manslaughter and criminally negligent operation and remanded the case to the trial court

for a new trial as to those charges as well as the charge of intentional manslaughter. Id., 62–63.

Thereafter, our Supreme Court granted the state's petition for certification to appeal with respect to the following issue: "Did the Appellate Court improperly order a new trial rather than reinstate the defendant's conviction of intentional manslaughter in the first degree, which was vacated for sentencing purposes under *State* v. *Polanco*, [supra, 308 Conn. 242]?" *State* v. *Daniels*, 333 Conn. 918, 216 A.3d 651 (2019). In *State* v. *Daniels*, 342 Conn. 538, 271 A.3d 617 (2022), our Supreme Court agreed with the state that this court had improperly ordered a new trial on the charges of intentional manslaughter, reckless manslaughter, and criminally negligent operation, rather than reinstating the intentional manslaughter conviction. Id., 547. Relying on *State* v. *Wright*, 320 Conn. 781, 135 A.3d 1 (2016), *State* v. *Miranda*, 317 Conn. 741, 120 A.3d 490 (2015), and *State* v. *Polanco*, supra, 308 Conn. 242, our Supreme Court concluded that the legal inconsistency in the verdict as to the reckless manslaughter and criminally negligent operation charges did not taint the intentional manslaughter conviction and that the reinstatement of the latter conviction was the proper remedy. See *State* v. *Daniels*, supra, 342 Conn. 554. Accordingly, our Supreme Court reversed the judgment of this court solely with respect to the remedy afforded the defendant in her direct appeal to this court. See id., 562–63. The Supreme Court remanded the case to this court "with direction to remand the case to the trial court with direction to reinstate the defendant's intentional manslaughter conviction, to sentence the defendant on that count, and to resentence the defendant on the remaining counts of conviction . . . ." Id. Following our remand to the trial court, the trial court imposed a total effective sentence of seventeen years of incarceration, execution suspended after thirteen years, followed by five years of probation for the crimes of which

the defendant presently stands convicted, namely, intentional manslaughter, risk of injury to a child, and evasion of responsibility in the operation of a motor vehicle. This appeal followed.[1] In light of the claims raised on appeal, the defendant asks this court to reverse the intentional manslaughter conviction and order either a directed verdict of not guilty on that charge or a new trial on that charge. Additional facts will be set forth as necessary.

I

First, the defendant claims that the evidence was insufficient to support the conviction of intentional manslaughter. Specifically, the defendant argues that the jury could not reasonably have found that she acted with the requisite mental state necessary for the commission of intentional manslaughter, the specific intent to cause serious physical injury. The defendant argues that, on the basis of the evidence before the jury, "it is impossible to ascertain whether [she] changed lanes to hit [Agyei's] car or whether she simply did not see [Agyei's] car. None of her actions before or after evidences any intent to run [Agyei's] car off the road. Second, even if the evidence is sufficient to show that the incident was intentional, it is not sufficient to show that [the defendant] intended to cause serious physical injury."

We begin by setting forth the principles that govern our consideration of the claim. "[A] defendant who asserts an insufficiency of the evidence claim bears an arduous burden. . . . [F]or the purposes of sufficiency review . . . we review the sufficiency of the evidence as the case was tried . . . . [A] claim of insufficiency of the evidence must be tested by reviewing no less

[1] In this appeal, the defendant does not challenge the judgment of conviction as to the crimes of risk of injury to a child or evasion of responsibility in the operation of a motor vehicle.

than, and no more than, the evidence introduced at trial. . . . In reviewing a sufficiency of the evidence claim, we apply a two part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [jury] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt . . . . This court cannot substitute its own judgment for that of the jury if there is sufficient evidence to support the jury's verdict. . . .

"[T]he jury must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense, [but] each of the basic and inferred facts underlying those conclusions need not be proved beyond a reasonable doubt. . . . If it is reasonable and logical for the jury to conclude that a basic fact or an inferred fact is true, the jury is permitted to consider the fact proven and may consider it in combination with other proven facts in determining whether the cumulative effect of all the evidence proves the defendant guilty of all the elements of the crime charged beyond a reasonable doubt. . . . Moreover, it does not diminish the probative force of the evidence that it consists, in whole or in part, of evidence that is circumstantial rather than direct. . . . It is not one fact . . . but the cumulative impact of a multitude of facts which establishes guilt in a case involving substantial circumstantial evidence. . . . In evaluating evidence, the [jury] is not required to accept as dispositive those inferences that are consistent with the defendant's innocence. . . . The [jury] may draw whatever inferences from the evidence or facts established by the evidence [that] it deems to be reasonable and logical. . . .

"[O]n appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether

there is a reasonable view of the evidence that supports the jury's verdict of guilty." (Internal quotation marks omitted.) *State* v. *Raynor*, 175 Conn. App. 409, 424–26, 167 A.3d 1076 (2017), aff'd, 334 Conn. 264, 221 A.3d 401 (2019).

"It is well established that the question of intent is purely a question of fact. . . . The state of mind of one accused of a crime is often the most significant and, at the same time, the most elusive element of the crime charged. . . . Because it is practically impossible to know what someone is thinking or intending at any given moment, absent an outright declaration of intent, a person's state of mind is usually proven by circumstantial evidence . . . . Intent may be and usually is inferred from [conduct. . . . Whether] such an inference should be drawn is properly a question for the jury to decide. . . . [I]ntent may be inferred from the events leading up to, and immediately following, the conduct in question . . . the accused's physical acts and the general surrounding circumstances." (Citation omitted; internal quotation marks omitted.) *State* v. *Thompson*, 146 Conn. App. 249, 277–78, 76 A.3d 273, cert. denied, 310 Conn. 956, 81 A.3d 1182 (2013). "[T]he determination of [intent] should stand unless the conclusion drawn by the trier is an unreasonable one. . . . [T]he [trier of fact is] not bound to accept as true the defendant's claim of lack of intent or his explanation of why he lacked intent. . . . Furthermore, it is a permissible, albeit not a necessary or mandatory, inference that a defendant intended the natural consequences of his voluntary conduct." (Internal quotation marks omitted.) *State* v. *Leuders*, 225 Conn. App. 612, 625, 317 A.3d 69 (2024).

We now turn to the essential element of the offense at issue in the present claim. Section 53a-55 (a) provides in relevant part: "A person is guilty of manslaughter in the first degree when: (1) With intent to cause serious

physical injury to another person, he causes the death of such person or of a third person . . . .'' Intentional manslaughter is a specific intent offense; the state bore the burden of proving beyond a reasonable doubt that the defendant intended to cause serious physical injury to another person. Our legislature defines ''[s]erious physical injury'' as ''physical injury which creates a substantial risk of death, or which causes serious disfigurement, serious impairment of health or serious loss or impairment of the function of any bodily organ . . . .'' General Statutes § 53a-3 (4).

The state presented evidence from which the jury reasonably could have found the following facts about the automobile collision that led to Agyei's death.[2] The collision occurred on a portion of Boston Avenue that consists of a four lane road that is divided by a landscaped median. Two lanes of travel proceed eastbound and two lanes of travel proceed westbound. The automobile operated by the defendant approached Agyei's automobile at a high rate of speed as Agyei made a right turn from Bond Street onto Boston Avenue. The defendant, who was in the left lane, pulled alongside Agyei's vehicle, which was in the right lane. At this point in time, Agyei's eleven year old son noticed the defendant approach in what he would later describe to be a white BMW SUV. As both automobiles moved in the same direction, the front of the defendant's automobile struck the rear driver's side of Agyei's automobile. Agyei

[2] This version of events is consistent with the trial testimony of Agyei's son as well as images of the collision that were recorded by surveillance cameras at a nearby school. The defendant does not dispute that the evidence permitted the jury to find these facts about how the collision occurred but argues that the jury could not reasonably have concluded that she acted with the requisite mental state for the commission of intentional manslaughter. Instead, she argues that ''[t]he video shows [her automobile] striking [Agyei's automobile], both cars losing control, and [her automobile] striking [Agyei's automobile] again. The video shows that this was a terrible accident. It does not show specific intent to harm the Agyeis.''

began to lose control of her automobile. Seconds later, the defendant moved into the right lane, behind Agyei, and the front of her automobile struck the rear of Agyei's automobile a second time. As a result of the impact, Agyei lost control of her automobile and it crossed the median, proceeded under a fence, and struck a tree.

The state also presented evidence about the defendant's conduct following the collision. There was no dispute that the operator of the automobile that collided with Agyei fled the scene on December 4, 2014. The police, relying on the description of the automobile involved in the collision provided by Agyei's son, began contacting registered owners of BMW SUVs. Ultimately, they questioned the defendant at her home in Bridgeport on December 16, 2014. The defendant permitted the police to inspect her white BMW SUV in the driveway. The police immediately noticed that the front bumper of the automobile was damaged in a manner consistent with it having been involved in the collision that led to Agyei's death. This led to the police impounding the automobile.[3]

When officers spoke with the defendant at her home on December 16, 2014, she told them that she first noticed the damage to her automobile on December 8, 2014, after she had been released from a four day stay in a hospital for psychiatric treatment.[4] With respect to

[3] The state presented evidence of the results of a forensic analysis of both the defendant's automobile and Agyei's automobile. The results of such analysis, including an analysis of paint samples taken from both automobiles, supported a conclusion that the defendant's automobile had struck Agyei's automobile.

[4] The defendant presented evidence that she had been admitted voluntarily to St. Vincent's Medical Center on December 4, 2014. Brunoi Germain, a psychiatrist employed by the hospital who treated the defendant, determined that she was not stable enough to be released until December 8, 2014, in part because she had made comments reflecting that she could have posed a danger to her granddaughter in that she had expressed thoughts of kidnapping her. Germain diagnosed the defendant as having an unspecified mood disorder and she received mood stabilizer and antipsychotic medications during her hospital stay.

her whereabouts on December 4, 2014, the date of the collision, she stated that she had been having "some psychological issues" and that she left her home "at around 6 or 6:30 that morning and drove herself to St. Vincent's Hospital and checked herself in to the psych unit." She stated that her route to the hospital included driving westbound on Boston Avenue in Bridgeport. The defendant described some of the "issues" she had been experiencing on December 4, 2014, which included her relationship with her fiancé, whom she identified as David Adkins. The defendant showed the officers wedding rings she had purchased. The defendant told the police that she was speaking with Adkins while driving herself to the hospital and that she met Adkins at the hospital before she decided "to check herself in." The defendant also told the police that she was under the belief that her granddaughter was being sexually molested and that she was so upset that she was unable to breathe and had not slept in several days.

The state presented evidence that the defendant voluntarily provided the police with sworn, recorded statements on December 17 and 18, 2014. In her statement of December 17, 2014, the defendant reiterated many of the representations that she had made to the police the day before. She also told the police that, earlier in the year, she had been involved in an automobile accident in Waterbury in which she collided with a parked automobile. She also explained that she drove to St. Vincent's Medical Center on December 4, 2014, rather than Bridgeport Hospital, which was considerably closer in distance to her residence, because she had received psychiatric treatment at St. Vincent's Medical Center in 2003, and she did not believe that Bridgeport Hospital had a psychiatric unit. In her much shorter

We note that, although the jury was presented with evidence about the defendant's mental state at the time of the events at issue, the defendant did not assert a defense of diminished capacity.

statement on December 18, 2014, the defendant expressed her displeasure with the police for having publicly identified her as a suspect in the crimes that occurred on December 4, 2014.

The state presented evidence from which the jury reasonably could have found that some of the defendant's representations to the police were false. For example, the state presented testimony from Adkins that he was the pastor of a church in New Haven that the defendant had attended over the course of many years. Adkins testified that he had never been engaged to the defendant, given the defendant an engagement ring, or been in a romantic or sexual relationship with her. Moreover, Adkins testified that he did not speak with the defendant on December 4, 2014, nor was he in Bridgeport that day. Cell phone records presented by the state corroborated portions of his testimony.

There was undisputed evidence that the defendant had, in fact, used her cell phone near 6:29 a.m., when the collision occurred. The parties stipulated that the defendant called 911 from her cell phone at 6:24 a.m. The 911 dispatcher called her back immediately thereafter. The defendant called 911 again at 6:25 a.m. The state presented evidence that the defendant sought police assistance for what she described as a violent incident involving several armed men, a woman, and a baby at the intersection of Coleman Street and Vine Street in Bridgeport. She stated that she was observing this incident from a beige Nissan Maxima. When police officers responded to the location described by the defendant, they did not find any evidence of the armed disturbance that she had described.

From the evidence presented at trial, the jury reasonably could have found beyond a reasonable doubt that the defendant collided with Agyei intending to cause serious physical injury to another person. First, there

was evidence of the defendant's mental state generally in the moments leading up to the collision. There was evidence that the defendant made the decision to check herself into a hospital for what she described as mental issues, that she was upset about her relationship with Adkins, and that she was so distraught about the situation that she perceived involving her granddaughter that she was unable to breathe and had not slept in several days. The jury, thus, reasonably could infer that the defendant was agitated, not calm, as she drove herself to the hospital seeking treatment for what was later diagnosed as a mood disorder.

Second, the jury reasonably could have drawn inferences about the defendant's mental state from the manner in which she operated her automobile, an instrumentality that is capable of causing serious physical injury. In her agitated state, she approached Agyei while traveling at a high rate of speed. She initially struck the rear driver's side of Agyei's automobile while she was steering into the right lane. Seconds later, she moved into the right lane directly behind Agyei's automobile and struck the rear of it with sufficient force to cause it to spin out of control. The fact that the defendant did not bring her automobile to a stop or otherwise take steps to avoid striking Agyei following the initial collision, but instead struck Agyei a second time, causing Agyei to lose control, cross the median, and, ultimately, strike a tree, supported a finding that the defendant intended to cause serious physical injury. The jury also was presented with photographs of Agyei's automobile following the collision as well as the surveillance footage taken of the collision. The jury reasonably could have inferred that, at the time of the collision, Agyei's automobile should have been visible to other drivers, including the defendant, and the fact that the defendant struck Agyei's automobile twice, viewed in light of the

evidence as a whole, reflected an intent to cause serious physical injury.

Third, the jury reasonably could have found that, in the aftermath of the collision, the defendant engaged in conduct that demonstrated her intent to cause serious physical injury and her consciousness of guilt.[5] "Evidence that an accused has taken some kind of evasive action to avoid detection for a crime, such as flight, concealment of evidence, or a false statement, is ordinarily the basis for a [jury] charge on the inference of consciousness of guilt." (Internal quotation marks omitted.) *State* v. *Vasquez*, 133 Conn. App. 785, 800, 36 A.3d 739, cert. denied, 304 Conn. 921, 41 A.3d 661 (2012). The evidence demonstrated that the defendant fled the scene of the collision rather than stopping to help the occupants of Agyei's automobile or summon first responders to the scene. The jury could reasonably have inferred that the defendant's failure to summon aid immediately following the collision supported a finding that she, in fact, intended to cause serious physical injury by striking Agyei's automobile. Moreover, when the police located the defendant and questioned her concerning the events of December 4, 2014, she provided false information that tended to exculpate herself from her criminal conduct. Specifically, the defendant told the police that she was engaged to Adkins, that she was speaking on her cell phone with Adkins at the time of the collision, and that Adkins met her at the hospital that morning. The jury reasonably could have found that all of these statements were false and that the defendant had made these false statements knowingly because she knew that she had intentionally caused the collision that led to Agyei's death.

The defendant urges us to conclude that the evidence of intent was insufficient because, here, "there is simply

[5] The court delivered a consciousness of guilt jury instruction in this case.

no indicia that [she] intended to hit [Agyei's automobile] or even knew it was there." She also argues that, here, "[she] did not display any sort of intent to seriously physically injure. There was no prior indication that she arbitrarily felt like running total strangers off the road to hurt them. Nor did the evidence ever show any relationship at all with the Agyei family, much less an acrimonious one." The defendant urges us to conclude that the state failed to prove the requisite intent because "the surrounding circumstances" do not suggest that she intended to harm the victims in this case and the manner in which the collision occurred reflects "that this was a terrible accident."

The defendant's arguments invite this court to construe the evidence in the light most favorable to the defense. As we explained previously, our role in evaluating the sufficiency of the evidence is to evaluate the evidence in the light most favorable to sustaining the verdict. To the extent that the defendant argues that, in contrast with other cases, the evidence was insufficient because the circumstances surrounding the collision did not readily explain her *motive* to cause serious physical injury to the particular victims of her criminal conduct, her argument puts a higher burden on the state than is required.[6] The state was not required to

[6] The defendant relies on *State* v. *Goldberger*, 118 Conn. 444, 173 A. 216 (1934) (affirming conviction of murder in second degree); *State* v. *Santiago*, 206 Conn. App. 390, 260 A.3d 585 (affirming conviction of attempt to commit assault in first degree and attempt to commit assault of peace officer), cert. denied, 339 Conn. 918, 262 A.3d 138 (2021); and *State* v. *Andrews*, 114 Conn. App. 738, 971 A.2d 63 (affirming conviction of attempt to commit assault in first degree and attempt to commit assault of peace officer), cert. denied, 293 Conn. 901, 975 A.2d 1277 (2009). First, these cases are factually distinguishable, and they do not require as a matter of law that intent be proven by means of any specific type of evidence. They reflect that the issue of intent is inherently fact bound and must be evaluated on a case-by-case basis. Second, even if we assume, arguendo, that the state's evidence of intent was stronger in these cases than in the present case, it in no way undermines the inquiry before us based on the evidence in the present case. Although these cases may be instructive, they are not dispositive. We must construe the evidence in the present case in the light most favorable to the

prove that an acrimonious relationship existed between the defendant and one or more occupants of Agyei's automobile or that the defendant stood to gain by causing one or more occupants serious physical injury. Although evidence of such facts would have been relevant to the issue of the defendant's intent, our inquiry is to evaluate the evidence that was before the jury.

Here, for the reasons we have explained, the evidence of the defendant's operation of her automobile, the evidence of her agitated state prior to the events at issue, and her conduct following the collision afforded the jury a basis upon which to find beyond a reasonable doubt that she intended to inflict serious physical injury.

II

Next, the defendant claims that the court committed instructional error in its jury instruction concerning the essential element of intent. Specifically, the defendant challenges the portion of the court's intent instruction in which it stated that an inference that there was intent to cause serious physical injury could be drawn from her use of an automobile during the events at issue. Primarily, the defendant argues that the court's instruction violated her due process right to a fair trial. Alternatively, the defendant argues that the instruction constitutes plain error. We conclude that the defendant waived her constitutional challenge at trial and that she has failed to demonstrate that she is entitled to relief under the plain error doctrine.

state and to determine whether, in light of the evidence so construed, the jury could have found beyond a reasonable doubt that the defendant acted with the requisite intent.

The defendant also relies on out of state cases, including *State* v. *Chalmers*, 100 Ariz. 70, 411 P.2d 448 (1966); *Commonwealth* v. *Comer*, 552 Pa. 527, 716 A.2d 593 (1998); and *Commonwealth* v. *O'Hanlon*, 539 Pa. 478, 653 A.2d 616 (1995). These cases, which are factually distinguishable from the present case, do not affect our evaluation of whether the evidence presented in the present case supported the jury's finding that the defendant acted with the specific intent to cause serious physical injury.

The following additional facts are relevant to this claim. On December 7, 2016, after the parties rested their cases, the court dismissed the jury for the day and the following colloquy with counsel occurred:

"The Court: [H]ow much time, if any, do the attorneys need before they see me on the charge conference?

"[Defense Counsel]: Judge, have we seen a copy of the charge yet? I've not.

"[The Prosecutor]: I haven't—

"[Defense Counsel]: I don't need any. I'm prepared to . . . attend now if there's nothing to review. I'm prepared.

"[The Prosecutor]: Yeah, we can . . . discuss it now.

"The Court: No, I don't have a written copy—

"[The Prosecutor]: Oh.

"The Court: —printed out, but I will give you one . . . once I do it, but I don't.

"[Defense Counsel]: I'm prepared now.

"The Court: Okay. State ready, too?

"[The Prosecutor]: Yes, Your Honor.

"The Court: Okay, then this [is] what we'll do. I'm going to adjourn in a moment. I'll . . . see the attorneys in back for a charge conference. We'll put the results of the charge conference on the record tomorrow, as is required before argument, and then the attorneys will be prepared to argue the case."

The next morning, the court began the proceeding, outside of the presence of the jury, by stating that it was providing "replacement pages" to the attorneys for the portion of its charge in which it discussed the

offense of evasion of responsibility. The following colloquy between the court, the prosecutor, and defense counsel followed:

"The Court: I want to summarize the charge conference we had briefly yesterday and into today.

"I did send a copy of the substantive offenses to counsel by email last night . . . 8 p.m., 8:30 thereabouts. The only change I made to that, I think, relates to the evasion of responsibility count that we just talked about. Then earlier this morning, I sent the entirety of the charge.

"In terms of the way I do intend to charge and the charge conference we had, I'm going to go over what I'll just call, very briefly, the headnotes.

"I'm going to charge on the function of the court and jury, the presumption of innocence, burden of proof, reasonable doubt, evidence, circumstantial and direct evidence, inferences, credibility of witnesses, evaluating credibility of witnesses.

"I'm also doing an instruction on evidence admitted for a limited purpose. We've gone over that, and I've given you a copy of that, relating to the use of certain evidence by way of what the defendant may have said to others, expert testimony, the testimony of police officers.

"I am giving an instruction on evidence of consciousness of guilt as requested by the state. I know there's a defense objection to that. But it will relate primarily to issues of flight, if in fact they deem she was involved in an incident and did, in fact, flee, and that was unexplained. And also relating to purported statements she made [concerning] [Adkins].

"The state put on evidence that would appear to contradict those. It's for the jury to determine whether

or not the defendant's statements that were made and were false or not. But if they choose to believe she made them and they are false, they can use that as evidence of consciousness of guilt. That's all in my instructions.

"I am giving an instruction on the defendant's election not to testify, the nature of the information and then I'm going to instruct on manslaughter first in count one, intentional manslaughter first recklessness indifference in count two.

"I am giving a lesser included offense on count two of manslaughter second. I'm going to instruct count three, misconduct with a motor vehicle, and I am going to give a lesser offense there that was requested by both sides, negligent homicide with motor vehicle. I'm going to give a count four, risk of injury to a minor, situation risk.

"Count five, evading responsibility—we've talked about that, and then the concluding remarks; notetaking, how they're to render their verdicts, the irrelevance of any punishment, the duties upon retiring and how they're to communicate with the court.

"Now, just in terms of the charge conference, is there anything the state wants to add or correct concerning that?

"[The Prosecutor]: No, I don't believe so, Your Honor.

"The Court: The defense?

"[Defense Counsel]: No, sir.

"The Court: Okay. Then will the attorneys be ready when the jury comes out to argue?

"[The Prosecutor]: Yes, Your Honor.

"[Defense Counsel]: Yes, Judge. I—I heard the court say that it noted our objection to the consciousness of

guilt charge. I just want to say the word so that it's not waived. We . . . object to giving that charge.

"The Court: Okay.

"[Defense Counsel]: I just want to make sure nobody claims waiver, you know.

"The Court: No. It's clear you're objecting, okay."

Thereafter, the prosecutor and defense counsel made closing arguments to the jury. The court then delivered its jury charge. The court provided the following instruction concerning the requisite intent for intentional manslaughter: "For you to find the defendant guilty of this charge, the state must prove the following elements beyond a reasonable doubt. The first element is that the defendant specifically intended to cause serious, physical injury to another person. Intent relates to condition of mind of the person who commits the act; her purpose in doing it. Specific intent is the intent to achieve a specific result. It is a conscious objective to cause such result. The specific intent for the crime of intentional manslaughter in the first degree is the intention to cause serious, physical injury to another person; here, [Agyei]. There is no particular length of time necessary for a defendant to have formed the specific intent to cause such injury.

"What the defendant intended is a question of fact for you to determine. You should consider all of the evidence as it pertains to the defendant's intent. What a person's intention was is usually a matter to be determined by inference. No person is able to testify that he looked into another's mind and saw therein a certain knowledge or a certain purpose or intention to do harm to another. Because direct evidence of the defendant's state of mind is rarely available, intent is generally proved by circumstantial evidence. The only way a jury can ordinarily determine what a person's intention was

at any given time, is by determining what the person's conduct was and what the circumstances were surrounding that conduct, any words spoken by the defendant and any statements she made. To draw an inference concerning someone's intent from this circumstantial evidence is the proper function of a jury, provided of course that the inference drawn complies with the standards for inferences as explained in connection with my instruction on circumstantial evidence. The inference is not a necessary one. You're not required to infer a particular intent from such evidence, but it is an inference that you may draw if you find it is reasonable and logical.

"You may also consider the nature of the injuries inflicted upon the decedent, as well as the instrumentality, the motor vehicle, as evidence [of] intent, and from such evidence an inference may be drawn that there was intent to cause serious, physical injury. Any inference that may be drawn from the nature of the instrumentality used and the manner of its use is then an inference of fact to be drawn by you upon consideration of these and other circumstances in the case in accordance with my previous instructions. Remember that the burden of proving intent beyond a reasonable doubt is on the state."

After it delivered its charge, the court, outside of the presence of the jury, separately asked the prosecutor and defense counsel whether there were any exceptions to the charge. The state raised an issue with respect to the court's instruction concerning expert testimony that did not ultimately lead to a corrected instruction. Defense counsel, renewing his earlier objection, stated that he took exception "[o]nly with respect to consciousness of guilt, sir, nothing else."

We first address the defendant's argument that the portion of the court's instruction concerning intent in

which it permitted the jury to consider her use of an automobile violated her right to due process. The defendant acknowledges before this court that she did not preserve this claim for review, but she seeks review pursuant to the bypass rule set forth in *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). "Pursuant to *Golding*, a [defendant] can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the [defendant] of a fair trial; and (4) if subject to harmless error analysis, the [state] has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. . . . The first two steps in the *Golding* analysis address the reviewability of the claim, [whereas] the last two steps involve the merits of the claim." (Emphasis in original; internal quotation marks omitted.) *In re Gabriella M.*, 221 Conn. App. 827, 836, 303 A.3d 319, cert. denied, 348 Conn. 925, 304 A.3d 443 (2023).

The state argues that the defendant implicitly waived the unpreserved claim of a constitutionally defective jury instruction under *State* v. *Kitchens*, 299 Conn. 447, 10 A.3d 942 (2011), and that she is therefore unable to prevail under *Golding*. In *Kitchens*, our Supreme Court reasoned that "when the trial court provides counsel with a copy of the proposed jury instructions, allows a meaningful opportunity for their review, solicits comments from counsel regarding changes or modifications and counsel affirmatively accepts the instructions proposed or given, the defendant may be deemed to have knowledge of any potential flaws therein and to have

waived implicitly the constitutional right to challenge the instructions on direct appeal." Id., 482–83.

In the present case, the record reflects, and the parties do not dispute, that the court provided the parties with a written copy of its proposed jury instructions by email at approximately 8:30 p.m. on December 7, 2016. The proposed instructions contained the instruction that is the subject of the present claim. We are persuaded that, because counsel had the instructions overnight, the court afforded counsel a meaningful opportunity to review the proposed instructions prior to the court proceeding on the following day. See, e.g., *State* v. *Davis*, 311 Conn. 468, 480–81, 88 A.3d 445 (2014) (opportunity to review proposed jury instructions overnight amounts to meaningful review); *State* v. *Leach*, 165 Conn. App. 28, 33–34, 138 A.3d 445 (same), cert. denied, 323 Conn. 948, 169 A.3d 792 (2016).

The defendant argues that this court should narrowly define what satisfies an opportunity to review jury instructions "overnight." Specifically, the defendant argues that " '[o]vernight' should mean that the court must provide the advanced copy by 5 p.m., and it must be delivered in person and on the record. By 8 p.m., time is getting very short. This court should consider that the attorneys may have family or other obligations in the evenings. Moreover, if the copy is delivered by email, the attorney may not see it for a few more hours, if at all. There is no guarantee that it will even show up in the attorneys' inboxes." The defendant's argument in this regard is not persuasive. As the record reflects, on December 8, 2016, when the court asked counsel about the proposed jury instructions that it had emailed to counsel the night prior, defense counsel in no way indicated that he did not have a meaningful opportunity to review the instructions. In line with his basic duty to review the instructions on behalf of the defendant, it was reasonable for the court to expect that defense

counsel had an affirmative obligation to inform the court if he was not prepared to proceed or needed more time to prepare to discuss the proposed jury charge. No such requests were made by defense counsel even though the court did not in any way suggest that it would not afford counsel more time, if requested, to review the proposed charge. Contrary to the arguments being raised presently, defense counsel did not state that other obligations prevented him from reviewing the instructions overnight, that he did not timely notice the proposed instructions in his email, or that he simply never received them in his email. Instead, all of defense counsel's responses to the court's inquiries unequivocally indicated that he was ready to address the substance of the court's draft jury charge and proceed to closing arguments.

This court does not apply the implicit waiver doctrine set forth in *Kitchens* in a rigid or mechanistic fashion. We are ever mindful that an evaluation of waiver must be made on a case-by-case basis and that, "in most instances, a combination of facts and circumstances rather than any single fact will support a finding of waiver." *State* v. *Bellamy*, 323 Conn. 400, 411, 147 A.3d 655 (2016). We decline to resolve the waiver issue in the present case on hypothetical facts that are foreign to the record before us. Neither our *Kitchens* case law nor the unique facts of the present case support the defendant's argument that defense counsel's ability to review the emailed proposed jury instructions overnight did not amount to a meaningful opportunity for review.

The following morning, when the court solicited comments from counsel regarding changes or modifications, defense counsel affirmatively accepted the instructions proposed by the court. The court specifically referred to its instruction on "manslaughter first in count one" and thereafter asked defense counsel if there was anything "to add or correct" in its proposed

charge. Defense counsel replied, "No, sir." Following the charge, defense counsel did not take an exception to the charge based on the intent instruction at issue in the present claim.

Because, under *Kitchens*, the defendant implicitly waived any objection to the court's intent instruction, she is unable to demonstrate under *Golding*'s third prong that a constitutional violation occurred that deprived her of a fair trial.

We now turn to the defendant's argument that the portion of the court's instruction concerning intent in which it permitted the jury to consider her use of an automobile constitutes plain error. See Practice Book § 60-5.[7] It is well settled that a conclusion that an implicit waiver under *Kitchens* has occurred does not necessarily preclude appellate relief under the plain error doctrine with respect to that same claim. See *State* v. *McClain*, 324 Conn. 802, 808, 155 A.3d 209 (2017).

"[I]f a claim is unpreserved . . . an appellate court may in the interests of justice notice plain error not brought to the attention of the trial court. . . . Application of the plain error doctrine is nevertheless 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. . . . [Thus, a] defendant cannot prevail under [the plain error doctrine] . . . unless he demonstrates that the claimed error is both so clear and so harmful that a failure to reverse the judgment would result in manifest injustice. . . .

"There is a two step framework for evaluating claims under the plain error doctrine. First, we must determine

[7] Practice Book § 60-5 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. . . ."

whether the trial court in fact committed an error and, if it did, whether that error was indeed plain in the sense that it is patent [or] readily discernable on the face of a factually adequate record, [and] also . . . 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 his 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." (Citation omitted; internal quotation marks omitted.) *State* v. *Waters*, 214 Conn. App. 294, 315–16, 280 A.3d 601, cert. denied, 345 Conn. 914, 284 A.3d 25 (2022).

The defendant argues: "The facts of this case do not support the deadly weapon instruction [delivered by the court].[8] First, the inference tends to arise only in a very narrow subset of cases where it is almost incontrovertible. The instruction usually applies when the weapon [used] has the sole purpose of inflicting serious physical injury on someone, such as a firearm. . . . In Connecticut, it is supposed to apply when it is used on the vital part of another. . . .

[8] The defendant describes the portion of the court's intent instruction at issue, concerning her use of an automobile, as a "deadly weapon" instruction. The court, however, did not refer to the defendant's automobile, let alone any other evidence before the jury in this case, as a deadly weapon.

We note that a "deadly weapon" "means any weapon, whether loaded or unloaded, from which a shot may be discharged, or a switchblade knife, gravity knife, billy, blackjack, bludgeon, or metal knuckles. . . ." General Statutes § 53a-3 (6). An automobile, nevertheless, may be deemed to be a "dangerous instrument," which "means any instrument, article or substance which, under the circumstances in which it is used or attempted or threatened to be used, is capable of causing death or serious physical injury, and includes a 'vehicle' as that term is defined in this section and includes a dog that has been commanded to attack, except a dog owned by a law enforcement agency of the state or any political subdivision thereof or of the federal government when such dog is in the performance of its duties under the direct supervision, care and control of an assigned law enforcement officer . . . ." General Statutes § 53a-3 (7).

"Neither of these situations exist[s] in the present case. Although a car is a deadly weapon; see General Statutes § 53a-3 (7); its existence is not premised on its ability to fatally injure someone. Context is critical when a motor vehicle is involved. Here, although the accident was fatal, the facts do not support the inevitable conclusion that [the defendant] was using the car to badly hurt someone. There was no evidence that she chased [Agyei's automobile] down, that she was waging a vendetta against [Agyei] and her son, or even that she was exhibiting road rage, as the state argued." (Citations omitted; footnote added; internal quotation marks omitted.) The defendant argues that the instruction was improper because it "gave the jury permission to find that [she] intended to cause serious physical injury based solely on the facts that [Agyei] died and that [the defendant] was driving a car."

The defendant argues that the error was clear, obvious, and indisputable and that "[e]xpanding the deadly weapon doctrine to an accident such as this one put [her] at a huge disadvantage. It will also affect public confidence in our justice system, as our citizens are all at risk [of] being convicted of manslaughter when such accidents occur."

First, we observe that the defendant focuses on isolated portions of the court's intent instructions, specifically, the portions concerning the defendant's use of an automobile in connection with Agyei's death. She fails to properly view those portions of the instruction in the context of the entire charge. See, e.g., *State* v. *Blaine*, 334 Conn. 298, 308, 221 A.3d 798 (2019) ("individual instructions are not to be judged in artificial isolation from the overall charge" (internal quotation marks omitted)). Here, as we set forth previously, the court instructed the jury to consider "*all of the evidence* as it pertains to the defendant's intent." (Emphasis

added.) It also stated that the issue of intent was generally resolved on the basis of circumstantial evidence and "by determining *what the person's conduct was and what the circumstances were surrounding that conduct*, any words spoken by the defendant, and any statements she made." (Emphasis added.) The court cautioned the jury that it "may" infer a particular intent on the part of the defendant if it finds that it is reasonable and logical. The court then stated, "[y]ou *may also consider* the nature of the injuries inflicted upon the decedent, as well as the instrumentality, the motor vehicle, as evidence of intent, and from such evidence an inference may be drawn that there was intent to cause serious, physical injury. Any inference that may be drawn from the nature of the instrumentality used and the manner of its use is then an inference of fact to be drawn by you *upon consideration of these and other circumstances in the case in accordance with my previous instructions*."

A review of the court's instructions readily reflects that the court did not instruct the jury that it was permissible for it to find that the defendant intended to cause serious physical injury to another based *solely* on the fact that Agyei died and that her death was caused by the defendant's operation of a motor vehicle. Such an interpretation of the charge is unreasonable. Instead, the court's instructions, read broadly and realistically, permitted the jury, in its evaluation of all of the evidence, to consider "the nature of the instrumentality used and the manner of its use" in its evaluation of intent.

Second, the defendant's claim is premised on her erroneous belief that the charge was inapplicable because the evidence was insufficient to support a finding that she intended to cause serious physical injury. This is reflected in her arguments that the collision that caused Agyei's death was "an accident" and that the

facts do not support a finding that she was operating her automobile "to badly hurt someone." We have rejected materially similar arguments of this nature in part I of this opinion. The defendant does not appear to cast doubt on the basic principle that, depending on the circumstances of its use, an automobile can be a dangerous instrument that is capable of causing serious physical injury. In light of the evidence presented by the state, the court properly invited the jury to consider the surrounding circumstances of her use of her automobile in the present case to determine whether she intended to cause serious physical injury.

Third, even if we were to conclude that the court's charge was improper, we nevertheless would conclude that the alleged error was neither patent nor readily discernable on the face of the record. The defendant does not argue that the instruction is legally flawed but that it was unwarranted in light of the evidence before the jury. Despite the defendant's characterization of the nature of the claimed error, she has not satisfied the high standard of demonstrating an error that was so clear, obvious and indisputable that it warrants the extraordinary remedy of reversal. In light of the foregoing, we are not persuaded that plain error exists.

The judgment is affirmed.

In this opinion the other judges concurred.

NOEMI WALENCEWICZ *v.* JEALOUS MONK, LLC
(AC 46362)

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

Syllabus

The defendant restaurant appealed from the trial court's judgment for the plaintiff awarding her damages as a result of injuries she sustained when she slipped on a loose decal and fell in the defendant's premises. The

defendant claimed, inter alia, that the trial court improperly denied its motions to overturn the jury's verdict. *Held*:

The trial court correctly denied the defendant's motions for a directed verdict and to set aside the verdict, as the evidence was sufficient for the jury to find that the defendant had constructive notice of the loose decal and that the decal in fact caused the plaintiff's injuries.

The trial court's failure to instruct the jury on the definitions of negligence and reasonable care constituted harmless error, the court's instructions having set forth the plaintiff's allegations of negligence, the relevant elements of a premises liability claim and the applicable duties that the defendant owed to the plaintiff.

Argued May 22—officially released October 1, 2024

Procedural History

Action to recover damages for the defendant's negligence, brought to the Superior Court in the judicial district of New London, where the court, *Young*, *J.*, denied the defendant's motion for summary judgment; thereafter, the case was tried to the jury before *Jacobs*, *J.*; subsequently, the court, *Jacobs*, *J.*, denied the defendant's motion for a directed verdict; verdict for the plaintiff; thereafter, the court, *Jacobs*, *J.*, denied the defendant's motions for a directed verdict and to set aside the verdict, and rendered judgment in accordance with the verdict, from which the defendant appealed to this court. *Affirmed*.

Daniel J. Krisch, with whom, on the brief, was *Julie A. Lavoie*, for the appellant (defendant).

Caitlyn S. Malcynsky, for the appellee (plaintiff).

Opinion

BRIGHT, C. J. In this premises liability action, the defendant, Jealous Monk, LLC, appeals from the judgment of the trial court, rendered after a jury trial, in favor of the plaintiff, Noemi Walencewicz. On appeal, the defendant claims that the court improperly (1) denied the defendant's motions for a directed verdict and to set aside the verdict because the plaintiff failed to

present sufficient evidence to support the jury's findings that the defendant had constructive notice of the specific defect and that the specific defect caused her injuries, and (2) refused to charge the jury on the definitions of negligence and reasonable care. We affirm the judgment of the trial court.

At trial, the jury was presented with evidence of the following relevant facts. The defendant owns and operates the Jealous Monk restaurant in Mystic, a section of the town of Stonington. On Sunday, December 29, 2019, the restaurant opened at 10:30 a.m., and the plaintiff and her friend Sarah Johnson arrived for brunch at about 10:45 a.m. As the hostess led the plaintiff and Johnson to a "low top table on [the] right-hand side as soon as you walk into the restaurant," the plaintiff, who was wearing high heel boots with "chunky heels," slipped and fell when she stepped from the tile floor in the bar area onto the wood floor in the dining area.

The hostess had seated approximately five tables before the plaintiff arrived at the restaurant, but only one of those tables was in the dining area where the plaintiff fell. Lisa Paterno, who was seated at that table with a few other people, saw the plaintiff slip on something, but she did not see what it was. After the plaintiff fell, however, Paterno saw a decal of the Batman logo (Batman decal) on the floor near the plaintiff's feet, and she assumed that the decal had caused the plaintiff to slip and fall because she did not see any other reason for the fall, such as water, salt, or sand on the floor. The Batman decal was "a laminated plastic material" that was "eight to ten inches by four to six inches" in size. Although the decal also was described as a sticker, it appears that it was still adhered to its plastic backing, and not the floor, because a patron picked it up from the floor and gave it to the hostess after the plaintiff fell. A slightly smaller version of the decal was admitted into evidence at trial by agreement of the parties, and

that sticker is adhered to a clear plastic backing. Although the plaintiff did not see the Batman decal before she fell, someone pointed it out to her immediately after she fell, and it was located near her feet. Once the plaintiff was able to stand, she exited the restaurant to seek medical treatment. As a result of the fall, the plaintiff suffered extensive injuries to her left arm and elbow, which required multiple surgeries to repair, and she also suffered less extensive injuries to her right elbow.

In September, 2020, the plaintiff initiated the underlying action against the defendant. The operative amended complaint, dated January 12, 2021, set forth a claim of negligence based on premises liability. Specifically, the plaintiff alleged that the defendant was negligent in failing "to conduct or [cause] to be conducted, reasonable and proper inspections of the floor area where the plaintiff fell"; "to remedy or correct the hazardous condition of the floor area when it could and should have done so"; "to warn the plaintiff and others of the hazardous condition of the floor area"; "to have adequate and proper maintenance and inspection procedures in place to ensure safe conditions of the floor for the plaintiff and others"; "to maintain the floor in a safe condition for the plaintiff and others when it could and should have done so"; and "to have [the foreign object] removed when it could, and should, have done so." The defendant denied any negligence and raised the special defense that the plaintiff was contributorily negligent.[1]

The defendant moved for summary judgment, arguing that "the undisputed facts establish, as a matter of law,

[1] "[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.) *Wager* v. *Moore*, 193 Conn. App. 608, 610 n.2, 220 A.3d 48 (2019).

that the plaintiff [would] be unable to prove actual or constructive notice of the alleged defective condition." The plaintiff filed an objection to the motion for summary judgment, arguing that "there is a clear issue of material fact . . . as to whether the defendant had constructive notice of a foreign object which contributed to the plaintiff's fall, namely, a 'Batman' decal on the floor of the restaurant." The court agreed with the plaintiff and denied the motion.

The case proceeded to a jury trial, and the parties filed proposed jury instructions before trial. The evidence portion of the trial spanned a single day on December 19, 2020. At trial, it was undisputed that the plaintiff was a business invitee and that, therefore, the defendant owed her a duty to keep the premises in a reasonably safe condition. The central issues were whether the Batman decal caused the plaintiff's fall and whether the defendant had notice of the Batman decal.

The plaintiff presented testimony from Johnson, Paterno, herself, and several of the defendant's former employees who were working at the restaurant on the day of the accident: Dylan Sheak, a restaurant and bar manager who arrived after the plaintiff fell; Devon Lyon, the hostess on the day of the accident; and Alicia O'Neill, the restaurant manager who was on duty when the plaintiff fell. Sheak and Lyon did not testify at trial, but transcripts from their depositions were read into the record. The plaintiff also presented various documentary evidence, including accident reports prepared by the defendant, medical reports from several different doctors, photographs of both the interior and exterior of the defendant's premises, and a replica of the Batman decal.

Sheak testified that the night before the accident the restaurant would have closed at "[a]bout midnight" and that cleaning is performed "[a]bout a half an hour after

closing, and before opening." He explained that an outside contractor cleans the floors after the restaurant closes, "and then the duties of the opening staff are also to tidy and clean." Sheak also discussed a "Customer Accident/Incident Report" that he prepared in accordance with the defendant's policies and procedures. That report indicated that the location where the plaintiff fell was clean and dry immediately after the accident and that the area had been last checked at 10:30 a.m. by the "opening staff." There also was a notation by Lyon, stating "BAT sticker on floor."

O'Neill testified that she arrived at the restaurant between 8:30 and 9 a.m., and "[c]hairs were still up when [staff] came in in the morning, and I had the host sweep the restaurant. And I had the servers, before we opened, do a spot sweep in all their sections." She further testified that the defendant's employees check their areas in the morning, and she agreed that, if a foreign object was left on the floor the night before, the defendant had two chances to identify it and remove it—"[o]ne, by the cleaning crew at night and . . . second, by the cleaning crew in the morning . . . ." Lyon likewise testified that a cleaning crew would "do a full cleaning of the entire restaurant" after it closed. As to whether the Batman decal could have been dropped on the floor by a patron after the restaurant opened, Lyon did not remember there being anyone else in the area where the plaintiff fell, aside from the five or six people at Paterno's table. Paterno testified that no one at her table had brought the Batman decal into the restaurant and that she did not know how it came to be on the floor near the plaintiff's feet.

At the close of the plaintiff's evidence, the defendant's counsel moved for a directed verdict on the ground that the evidence was insufficient to establish the defendant's liability for the plaintiff's injuries. The plaintiff's counsel objected, arguing that whether the defendant

had constructive notice of the defect is a factual question for the jury. Specifically, the plaintiff's counsel argued: "I think the facts include the proposition that she fell due to this, based on all the testimony we had, due to the Batman sticker. That they have a policy of cleaning the restaurant at night. They have a policy of sweeping or checking it in the morning, that this—no one at . . . Paterno's table, which is the only table in the area occupied, played, or had the Batman sticker with them. . . . [T]herefore, the inference is that a child the night before dropped it and they never found it. They didn't detect it in their inspection. They should have, they didn't, and that's what caused her to fall. I think that's the chain of events which occurred. I think all of that evidence is in front of the jury. So, I think it's a jury question and not a directed verdict." The court agreed with the plaintiff and denied the motion for a directed verdict.

The defendant called a single witness, Michael Corso, who was the general manager of the restaurant at the time of the accident. Corso testified that, after the restaurant closed each night, staff would put the chairs up on the tables, and a cleaning crew then would vacuum and mop the floors in the front and back of the premises. Corso explained that staff would inspect the floor of the restaurant "because, when [staff] puts chairs down there tends to be debris, or sometimes stuff on the floor. So, it's typically, just, you know, a dustpan and a broom, just for small kind of debris on the floor." During cross-examination, the following exchange occurred between the plaintiff's counsel and Corso:

"[The Plaintiff's Counsel]: Would you expect your night crew to find foreign objects and remove them as part of their duties?

"[Corso]: Yes.

"[The Plaintiff's Counsel]: Would you expect the morning crew to find foreign objects and remove them as part of their duties?

"[Corso]: I would hope so."

Following Corso's testimony, the defense rested its case.

The next day, the court held a brief charging conference and conferred with counsel regarding the proposed jury charge. The court referred to a prior discussion about the proposed instructions and noted that the plaintiff's counsel had proposed omitting a general negligence charge because such charge was subsumed by the defective premises charge. The court stated that it had concluded that it was necessary for the jury to be given the definition of negligence. The following discussion then occurred between the court and the parties' counsel.

"The Court: . . . [T]he defective premises elements are really a subset of general negligence. It [is] a particularized form of general negligence. So, without knowing what general—what negligence is, how do they make a finding one way or the other as to whether this defendant was negligent, taking into account all of the elements of a defective premises claim?

"[The Plaintiff's Counsel]: Well, I understand, but . . . I don't think I have to prove both negligence and defect in separate—as separate elements of proof. . . . That's the way it's laid out. We have to prove all the following, and two and three are separate. So, my burden is now increased. I have to prove defect, and I have to prove negligence. If I was on the jury, I'm thinking, okay, he has to prove defective premises. He has to prove a defect. He has to prove—

"The Court: But you have to prove negligence. And negligence is reasonable care under the circumstances

then and there existing. But—and reasonable care, under the circumstances, then and there existing in a defective premises [case] takes into account all of the elements of a defective premises claim.

"[The Plaintiff's Counsel]: I just think, you know, with all due respect, I think it's confusing the way it's laid out, and I think it puts a higher burden on the plaintiff than in—this is not my first defective premises case, not your first defective premises case. . . . I don't think this is the way the judicial department website has it laid out. I may be wrong on that, but I had looked at it, and I think the charge I submitted was based on the judicial department website version.

"[The Defendant's Counsel]: I think, Your Honor, it has to be this way. I think the jury needs the definition, and just put it out with a simple sentence that's on paragraph two. There's no telling if they know what you're talking about or not. I think the way you have it laid out is necessary.

"[The Plaintiff's Counsel]: What I propose—it goes status of the plaintiff, which we notice. Notice, constructive notice, duty, knowledge to principal, control, nature of claim. It talks about unsafe condition. I remember looking at the website. I just—I think the website does not have a double burden the way it's laid out on page 11. So, I just think they're going to get that and say, what—you know, really what's going on here? He has to prove this and he has to prove that?

"The Court: But I keep asking myself, in considering the second element, if they're just told generally that you must consider whether the defendant was negligent in the way [it] took care of the premises, how do they make a finding? How do they make a finding if they aren't told what negligence is? I mean, I confess [that] I had never thought of this before going through this and your calling this to my attention. I hadn't thought

of it when trying a defective premises claim. I hadn't thought of it in the past while presiding over one, but—

"[The Plaintiff's Counsel]: I mean, plus it's not—you know, it's not just negligent in the way [it] took care [of the premises]. . . . [I]t's not just that they took care of the premises, they failed to do a reasonable inspection, they failed to make the situation safe. I mean, there was like five or six allegations, which are broader than just that, and you—actually, you include them later on. . . . But this is not consistent with what our complete, you know, all the allegations are. I just think one of those two things . . . has to come out because defining that [it] was—the defendant was negligent in the way it took care of the premises would have to necessarily include the fact that it was—there was a defect. It's . . . baked into it. If they were negligent, then there had to be a defect. They can't be negligent without a defect.

"The Court: I understand that, but that begs the question, doesn't it—what is negligence?

"[The Plaintiff's Counsel]: I understand why you want to define negligence, but I don't think having laid out—we have to prove both defect and negligence. If you take out that we have to prove defect because that's already baked into the negligence.

"The Court: Right.

"[The Plaintiff's Counsel]: Then that takes away the double burden, I think. I understand your point in terms of defining negligence. And my allegations actually refer to negligence in the second amended complaint. So, I accept that, but I just think that this looks like we have to prove defect on top of negligence, but proving negligence presumes defect. That's my biggest issue.

"[The Defendant's Counsel]: Again, Your Honor, I think the way you have it is completely necessary. And

[the issues raised by the plaintiff's counsel] with what are contained in negligence, you include all of the things that he is talking about in that same heading.

"[The Plaintiff's Counsel]: It's the fact that we have two and three. That's the biggest problem. I would delete three and leave in your definition of negligence.

"The Court: You would delete three, the third element?

"[The Plaintiff's Counsel]: Correct. Because to prove negligence, we have to prove—there has to be a defect. Negligence doesn't exist in a void.

"The Court: Right. Alright. Any other exceptions?

"[The Plaintiff's Counsel]: No . . . .

"[The Defendant's Counsel]: No, Your Honor."

After a short recess, the court returned and provided counsel with copies of changes it had made to the proposed instructions. The court stated: "You'll see that I took out the negligence charge, the general negligence charge, and I cut from—I'm sorry, I didn't give you page 13. I cut from page 13, the second full paragraph down to the first whole paragraph on page 14, and then I pasted that into the beginning of the charge on [the] elements of a defective premises claim. So, maybe the best thing to do is, so there's no confusion here, I'll just have the whole thing reprinted so you can see exactly what I did." After another short recess, the following colloquy occurred:

"The Court: . . . Counsel, have you had an opportunity to look at the latest iteration of the negligence charge?

"[The Plaintiff's Counsel]: Yes, Your Honor. . . . I still have the same issues we had before, so that—

but I understand Your Honor is not gonna change his position. So, we just have—

"The Court: Well, I cut it out. . . . It's not in there. . . . That whole thing is out. . . .

"[The Plaintiff's Counsel]: Got it. Okay, Your Honor, then I'm good. . . .

"[The Defendant's Counsel]: Your Honor, I think what you took out should have been left in. I think the jury needs that definition, and now they're not getting it. I take exception to this. Thank you."

The jury thereafter returned, and counsel delivered their closing arguments. Following the closing arguments, the court instructed the jury without specifically defining "negligence" and "reasonable care." The defendant's counsel took exception for the same reasons "raised before . . . ." The case was submitted to the jury, which returned a plaintiff's verdict that same day. The jury found that the defendant was 75 percent liable for the plaintiff's injuries and that the plaintiff was 25 percent liable for her own injuries. The jury awarded the plaintiff $893,922.50 in damages, representing 75 percent of her total damages.

On December 28, 2022, the defendant filed motions for a directed verdict and to set aside the verdict on the basis of insufficient evidence.[2] In both motions, the defendant renewed its argument that there was no evidence that the plaintiff in fact slipped on the Batman decal or that the alleged defect had existed for a sufficient period of time to establish that the defendant should have discovered it. The court denied both motions on March 8, 2023, concluding, "on the basis of

[2] The defendant also filed a motion for remittitur, claiming that the verdict "was based on sympathy for the plaintiff and prejudice as against the defendant." The court denied the motion, and the defendant has not challenged that decision on appeal.

the evidence and the reasonable inferences which could be drawn therefrom, that a reasonable jury could have found for the plaintiff, as this jury did." This appeal followed.

I

On appeal, the defendant claims that the trial court improperly denied its motions for a directed verdict and to set aside the verdict because the plaintiff failed to present sufficient evidence to support the jury's findings that the defendant had constructive notice of the specific defect and that the specific defect caused her injuries. We address each sufficiency challenge in turn.

As an initial matter, we set forth the applicable standard of review. We exercise plenary review of a court's ruling on a motion for a directed verdict based on a claim of insufficient evidence. See *Curran* v. *Kroll*, 303 Conn. 845, 855, 37 A.3d 700 (2012) ("[w]hether the evidence presented by the plaintiff was sufficient to withstand a motion for a directed verdict is a question of law"); see also *Cockayne* v. *Bristol Hospital, Inc.*, 210 Conn. App. 450, 459, 270 A.3d 713, cert. denied, 343 Conn. 906, 272 A.3d 1128 (2022). "The standards governing our review of a sufficiency of evidence claim are well established and rigorous. . . . [I]t is not the function of this court to sit as the seventh juror when we review the sufficiency of the evidence . . . rather, we must determine, in the light most favorable to sustaining the verdict, whether the totality of the evidence, including reasonable inferences therefrom, supports the jury's verdict . . . . In making this determination, [t]he evidence must be given the most favorable construction in support of the verdict of which it is reasonably capable. . . . In other words, [i]f the jury could reasonably have reached its conclusion, the verdict must stand, even if this court disagrees with it. . . .

"We apply this familiar and deferential scope of review, however, in light of the equally familiar principle that there must be sufficient evidence to remove the jury's function of examining inferences and finding facts from the realm of speculation. . . . The jury's verdict cannot be upheld if the jury reasonably and legally could not have reached the determination that [it] did in fact reach or if, without conjecture, [it] could not have found a required element of the cause of action . . . ." (Citations omitted; internal quotation marks omitted.) *Burke* v. *Mesniaeff*, 334 Conn. 100, 127, 220 A.3d 777 (2019); see also *Fisher* v. *Big Y Foods, Inc.*, 298 Conn. 414, 440, 3 A.3d 919 (2010) ("Although it is the jury's right to draw logical deductions and make reasonable inferences from the facts proven . . . it may not resort to mere conjecture and speculation. . . . A directed verdict is justified if . . . the evidence is so weak that it would be proper for the court to set aside a verdict rendered for the other party." (Internal quotation marks omitted.)).

A

The defendant first claims that the plaintiff failed to present sufficient evidence to establish that the defendant had constructive notice of the specific defect. It argues that "[*n*]*o one* saw the Batman decal until *after* the plaintiff slipped and fell. . . . Thus, there is no evidence [regarding] how long the Batman decal had been on the floor—let alone that it had been there for a reasonable length of time. . . . Nor could the jury *reasonably* have inferred this crucial fact from testimony that there were not normally decals on the floor at [the restaurant]; the floor was cleaned after the [restaurant] had closed the previous evening; the floor was inspected that morning prior to the [restaurant's] opening; the [restaurant] was only open for approximately fifteen minutes before the plaintiff fell; and none of the customers at the [restaurant] that morning had children

with them. An inference from nothing leaves nothing. . . . The jury needed 'some basis of definite facts' to find notice; the plaintiff gave it none." (Citations omitted; emphasis in original.) We are not persuaded.

"[A] premises liability claim is a negligence cause of action. . . . The essential elements of a cause of action in negligence are well established: duty; breach of that duty; causation; and actual injury." (Citation omitted; internal quotation marks omitted.) *Diaz* v. *Manchester Memorial Hospital*, 161 Conn. App. 787, 791 n.4, 130 A.3d 868 (2015). "A business owner owes its invitees a duty to keep its premises in a reasonably safe condition." (Internal quotation marks omitted.) *DiPietro* v. *Farmington Sports Arena, LLC*, 306 Conn. 107, 116, 49 A.3d 951 (2012). Nevertheless, "business owners do not breach their duty to invitees by failing to remedy a danger unless they had actual or constructive notice of that danger." (Internal quotation marks omitted.) *Diaz* v. *Manchester Memorial Hospital*, supra, 792. Such "notice is required because, as a general matter, it is unfair to hold a storeowner liable for injuries to customers resulting from an unsafe condition unless the storeowner knew or should have known of that unsafe condition. . . . [T]he basic notice requirement springs from the [notion] that a dangerous condition, when it occurs, is somewhat out of the ordinary. . . . In such a situation the storekeeper is allowed a reasonable time, under the circumstances, to discover and correct the condition, unless it is the direct result of his (or his employees') acts." (Internal quotation marks omitted.) *Kelly* v. *Stop & Shop, Inc.*, 281 Conn. 768, 787, 918 A.2d 249 (2007).

Accordingly, the plaintiff was required to "allege and prove that the defendant either had actual notice of the presence of the specific unsafe condition which caused

[her injury] or constructive notice of it." (Internal quotation marks omitted.) Id., 776; accord *Bisson* v. *Wal-Mart Stores, Inc.*, 184 Conn. App. 619, 628, 195 A.3d 707 (2018). "The controlling question in deciding whether the [defendant] had constructive notice of the defective condition is whether the condition existed for such a length of time that the defendants should, in the exercise of reasonable care, have discovered it in time to remedy it. . . . What constitutes a reasonable length of time is largely a question of fact to be determined in the light of the particular circumstances of a case." (Citation omitted; internal quotation marks omitted.) *Riccio* v. *Harbour Village Condominium Assn., Inc.*, 281 Conn. 160, 163–64, 914 A.2d 529 (2007). "It is settled that circumstantial evidence can establish constructive notice." *Sokolowski* v. *Medi Mart, Inc.*, 24 Conn. App. 276, 287, 587 A.2d 1056 (1991).

Viewing the evidence and the reasonable inferences therefrom in the light most favorable to sustaining the jury's verdict, we conclude that the evidence was sufficient for the jury to find that the defendant had constructive notice of the Batman decal. Although there was no direct evidence of how long the Batman decal had been on the floor before the plaintiff fell, there was circumstantial evidence from which the jury reasonably could infer that the decal had been there since before the restaurant opened that day. In particular, the evidence established that there "tends to be debris" on the floor after the defendant's staff puts chairs down in the morning; the plaintiff slipped and fell fifteen minutes after the restaurant had opened; only one other table had been seated in the area where the plaintiff fell; and no one seated at that table had brought the Batman decal into the restaurant. On the basis of this evidence, the jury reasonably could have inferred that the Batman decal had been on the floor since either the previous night or earlier that morning when the staff removed

the chairs from the tables before the restaurant opened for business.

Furthermore, considering Corso's testimony that the defendant's staff was required to inspect the floors before the restaurant opened each morning to find and remove any debris, and O'Neill's testimony that she instructed the staff to do so on the morning of the accident, it also was reasonable for the jury to conclude that the defendant "should, in the exercise of reasonable care, have discovered [the Batman decal] in time to remedy it." (Internal quotation marks omitted.) *Riccio* v. *Harbour Village Condominium Assn., Inc.*, supra, 281 Conn. 163; see also *Laflin* v. *Lomas & Nettleton Co.*, 127 Conn. 61, 65, 13 A.2d 760 (1940) ("[i]f it appeared that such inspection of the premises as was made by the defendant or his agents ought to have disclosed to them the presence of the toy at the entrance, this would be a basis for a finding of constructive notice and to that extent evidence as to such inspections would be a proper element in the case"); *Kurti* v. *Becker*, 54 Conn. App. 335, 339, 733 A.2d 916 ("jury reasonably could have found that the defendants had constructive notice of their icy driveway because in the performance of a reasonable duty to inspect the premises the defendants would have discovered the defective condition which caused the plaintiff's fall in ample time to remedy it before the accident" (internal quotation marks omitted)), cert. denied, 251 Conn. 909, 739 A.2d 1248 (1999).

In support of its claim to the contrary, the defendant relies on this court's decision in *Hellamns* v. *Yale-New Haven Hospital, Inc.*, 147 Conn. App. 405, 82 A.3d 677 (2013), cert. granted, 311 Conn. 918, 85 A.3d 652 (2014) (appeal withdrawn May 9, 2014). In that case, the plaintiff slipped on a puddle of water in the hallway of a hospital and brought a negligence action against the hospital based on a theory of premises liability. Id., 407.

After a court trial, the trial court rendered judgment for the plaintiff. Id. The court found that the hospital was negligent based in part on the court's finding that a janitor walked by the puddle immediately before the plaintiff fell and could have remedied the defect. Id., 411. The hospital appealed, claiming, inter alia, that the plaintiff failed to establish that it had notice of the defect. Id.

In reversing the judgment on appeal, this court noted that the only evidence presented at trial as to notice was the plaintiff's testimony that a janitor walked by the spill before she fell and the testimony of a hospital employee who observed the spill but was unable to determine the source of the water or how long it had been there. Id., 412–13. We explained that the plaintiff "did not present the janitor, or any other employee of the defendant, to establish for the court that the janitor actually saw the puddle of water before the accident." Id., 413. On the basis of this evidence, we held that the evidence was insufficient to support the court's finding that a hospital employee noticed the defect and could have remedied it before the accident. Id. We reasoned that, "[w]hile circumstantial evidence can establish constructive notice, a plaintiff's assertion that an employee walked past the defect, absent evidence that the employee actually did see the defect, is insufficient. . . . [Likewise, the plaintiff's testimony] establishing that the defective condition existed a few seconds before the accident is insufficient to establish that the defendant had constructive notice of that defect." (Citation omitted.) Id. Last, this court held that "the plaintiff failed to establish that notice could be imputed to the [hospital] because the plaintiff did not present any evidence to establish that cleaning the specific hallway where the accident occurred was within the janitor's scope of employment." Id.

Although the defendant argues that, "[h]ere, the cupboard is even more bare than in *Hellamns*," there is significant evidence in the present case that was lacking in *Hellamns*. In particular, in *Hellamns*, there was no evidence that the janitor was required to clean the specific hallway where the plaintiff fell; *Hellamns* v. *Yale-New Haven Hospital, Inc.*, supra, 147 Conn. App. 413; whereas, in the present case, there was undisputed evidence that the defendant's staff is responsible for inspecting and cleaning the area where the plaintiff fell and that staff was directed to do so the morning of the accident. In addition, the circumstantial evidence regarding the presence of the Batman decal—namely, that the plaintiff fell shortly after the restaurant had opened for the day, in an area of the restaurant where the only other occupants denied knowledge of the Batman decal, and that the defendant's staff is responsible for inspecting the floors before the restaurant opens each day and should discover any debris on the floor at that time—is markedly different than the limited evidence presented in *Hellamns*. Given these factual differences, the reasoning in *Hellamns* does not alter our conclusion as to the sufficiency of the evidence of constructive notice in the present case. See *Riccio* v. *Harbour Village Condominium Assn., Inc.*, supra, 281 Conn. 163–64 ("[w]hat constitutes a reasonable length of time is largely a question of fact to be determined in the light of the particular circumstances of a case" (internal quotation marks omitted)).

Similarly, the defendant's reliance on this court's decision in *Bisson* v. *Wal-Mart Stores, Inc.*, supra, 184 Conn. App. 619, is misplaced. In that case, this court affirmed the summary judgment rendered for the defendant because the defendant's evidence "established a forty second maximum time period between the creation of the defect and the plaintiff's fall"; id., 633;

which, we explained, was insufficient to put the defendant on notice of the alleged defect. In the present case, however, there was no evidence that the defect existed for a matter of seconds before the plaintiff fell. Instead, the circumstantial evidence regarding when and where the plaintiff fell supports the reasonable inference that the defect had existed since before the restaurant opened for the day. On the basis of that fact, the jury reasonably could have found that, had the defendant inspected the floors before the restaurant opened that day, it would have discovered the Batman decal before the plaintiff fell. Thus, the jury reasonably could have found that the defendant had constructive notice of the defect. See, e.g., *Sokolowski* v. *Medi Mart, Inc.*, supra, 24 Conn. App. 287 ("The jury could have concluded from the totality of the evidence that the spilled aftershave lotion had remained on the floor for more than fifteen minutes. From this fact, the jurors could have inferred that the defendant, in the exercise of reasonable care, should have detected and remedied the condition."); *Schwarz* v. *Waterbury Public Market, Inc.*, 6 Conn. App. 429, 433, 505 A.2d 1272 (1986) (on basis of evidence that milk frequently leaked from containers, jury reasonably could have found "that the condition had existed for a length of time, that a reasonable inspection by the defendant would have discovered the existence of the spilled milk . . . and that, therefore, the defendant had constructive notice of the defective condition"). Consequently, we conclude that the jury's finding of constructive notice is supported by the evidence in the record.

B

The defendant also claims that the plaintiff failed to present sufficient evidence to establish that the presence of the Batman decal on the floor caused her injuries. The defendant argues that "no one saw the plaintiff slip on the decal. . . . Though Paterno thought that

the plaintiff slipped on 'something,' and a patron found the decal nearby, that is—at most—evidence of a 'general condition' and not a specific cause. . . . More is required to remove causation from the realm of speculation." (Citations omitted.) The defendant's claim is unavailing.

"To prevail on a negligence claim, a plaintiff must establish that the defendant's conduct legally caused the injuries. . . . The first component of legal cause is causation in fact. Causation in fact is the purest legal application of . . . legal cause. The test for cause in fact is, simply, would the injury have occurred were it not for the actor's conduct." (Internal quotation marks omitted.) *Augustine* v. *CNAPS, LLC*, 199 Conn. App. 725, 729, 237 A.3d 60 (2020). "Circumstantial evidence . . . may provide a basis from which the causal sequence may be inferred." (Internal quotation marks omitted.) *Hall* v. *Winfrey*, 27 Conn. App. 154, 159, 604 A.2d 1334, cert. denied, 222 Conn. 903, 606 A.2d 1327 (1992). Such inferences, however, "must be reasonable and logical, and the conclusions based on them must not be the result of speculation and conjecture." (Internal quotation marks omitted.) Id.

Viewing the evidence in the light most favorable to sustaining the verdict, we conclude that there was sufficient evidence from which the jury reasonably could infer the necessary causal connection between the plaintiff's fall and the Batman decal found on the floor of the restaurant. Specifically, the plaintiff testified that, immediately after she fell, a woman, later identified as Paterno, pointed to the Batman decal on the floor and asked the plaintiff if she slipped on it. Paterno's testimony aligned with the plaintiff's recollection, as Paterno testified that the plaintiff appeared to slip on something and that, immediately after the plaintiff fell, she saw the Batman decal on the floor near the plaintiff's feet. Paterno further explained that she had

assumed that the decal had caused the plaintiff to slip and fall because the decal was near the plaintiff's feet and there was no other explanation for the fall, such as water, salt, or any other slippery substance. From this evidence, the jury reasonably could infer that the plaintiff would not have fallen in the manner that she did unless the Batman decal caused her to slip and fall. See, e.g., *Rockhill* v. *Danbury Hospital*, 176 Conn. App. 39, 54, 168 A.3d 630 (2017) (concluding that it was reasonable to infer divot in sidewalk caused plaintiff to fall based on evidence that divot was only defect in area where plaintiff fell and plaintiff's description of sensation during fall).

The facts involved in the present case differ significantly from those involved in *Monahan* v. *Montgomery*, 153 Conn. 386, 216 A.2d 824 (1966), on which the defendant relies. In that case, the decedent fell while he was raking leaves and sticks along the driveway in front of a garage he shared with his neighbor, the defendant. Id., 387–88. Nobody witnessed the decedent fall, but he stated to his wife, the plaintiff, "and to a neighbor that he tripped over a branch and fell. He never pointed out or identified any particular branch." Id., 388. After the decedent died, the plaintiff filed a negligence action against the defendant, alleging that the defendant failed to maintain her premises in a reasonably safe condition due to the branches and debris in and along the driveway. Id. The jury returned a verdict for the plaintiff, and the trial court denied the defendant's motions for a directed verdict, for judgment notwithstanding the verdict, and to set aside the verdict. Id., 389. The defendant appealed, and our Supreme Court reversed the trial court's judgment and remanded the case with direction to render judgment for the defendant. Id., 389, 393.

In reversing the judgment, the court explained that "[t]here was an abundance of evidence as to the existence of a general condition naturally productive of the

existence on the driveway of a branch over which a person raking the area could fall and sustain injury. As we have noted, however, proof merely of the existence of such a general condition is not sufficient." Id., 391. The court reasoned that "[t]he plaintiff's claim of proof is that the decedent raked up a pile of branches and leaves in front of one stall and then started to rake up a pile in front of the other stall and that '[w]hile in the driveway he tripped over a broken branch' and fell. No particular branch was ever identified. Whether it was a specific isolated branch or a component part of an accumulation of debris is not disclosed. . . . For all that appears the branch may have been a part of the debris which the decedent himself had just collected and gathered into a pile in front of the garage. Nor is there any evidence at all as to how and to what extent the branch was a causative factor in the decedent's fall." Id., 391–92. Thus, the court concluded that "there was no evidence from which the jury could reasonably conclude that the claimed specific defect . . . was a material factor in causing the injuries which the decedent sustained." Id., 392–93.

The defendant argues that, "as in *Monahan*, no one saw the plaintiff slip on the decal. . . . Though Paterno thought that the plaintiff slipped on 'something,' and a patron found the decal nearby, that is—at most—evidence of a 'general condition' and not a specific cause. . . . More is required to remove causation from the realm of speculation." (Citations omitted.) The defendant's analogy fails.

In the present case, unlike in *Monahan* v. *Montgomery*, supra, 153 Conn. 391, where "[t]here were no eyewitnesses to the fall, and the only testimony as to the cause was the statement of the decedent at the scene that he fell over a branch," several people witnessed the plaintiff fall and testified about the specific defect—

the Batman decal—that they inferred caused the plaintiff to fall because it was the only defect present. Given the evidence presented that the floor was dry and clean at the time of the accident, that the plaintiff slipped on something, and that the Batman decal was located near the plaintiff's feet immediately after she fell, it was reasonable and logical for the jury to infer that the Batman decal in fact caused the plaintiff to slip and fall. See, e.g., *Fisher* v. *Big Y Foods, Inc.*, supra, 298 Conn. 440 ("The evidence presented at trial . . . reasonably supported a finding that the plaintiff had slipped on fruit cocktail syrup that somehow had leaked from a product originating in the defendant's store. Although circumstantial, the evidence in this regard was substantial."); see also *Rockhill* v. *Danbury Hospital*, supra, 176 Conn. App. 54.

C

In sum, the trial court correctly denied the defendant's motions for a directed verdict and to set aside the verdict because the jury reasonably and logically could conclude from the evidence presented that the defendant had constructive notice of the Batman decal and that the Batman decal in fact caused the plaintiff's injuries.

II

The defendant next claims that the trial court improperly refused to charge the jury on the definitions of negligence and reasonable care. The following additional procedural history is relevant to the defendant's claim.

In its jury charge, the court set forth the plaintiff's negligence allegations, noting that the plaintiff had alleged "that the defendant . . . its agent, servants, and/or employees were negligent in one or more of the following ways, in that (a) [t]hey failed to conduct or

cause to be conducted reasonable and proper inspections of the floor area where the plaintiff fell; (b) [t]hey failed to remedy, or . . . correct the hazardous condition of the floor area where they could and should have done so; (c) [t]hey failed to warn the plaintiff and others of the hazardous condition of the floor area; (d) [t]hey failed to have adequate and proper maintenance and inspection procedures in place to ensure safe conditions of the floor for the plaintiff and others; (e) [t]hey failed to maintain the floor in a safe condition for the plaintiff and others when they could and should have done so; and (f) [w]hile they knew or had reason to know of the foreign object on the floor area, they failed to have it removed when they could and should have done so." The court explained that "[t]he plaintiff does not have to prove that the [defendant was] negligent in all of the ways alleged. Proof of any one of those specific acts is sufficient to sustain the plaintiff's burden of proving that the defendant acted negligently."

The court then identified five necessary elements of the plaintiff's cause of action: (1) the premises were under the control of the defendant; (2) the defendant was negligent in the way it maintained the premises; (3) the premises were defective; (4) the defendant had either actual or constructive notice of the defect; and (5) the defendant's negligence was a proximate cause of the plaintiff's injuries. The court instructed the jury that, because the defendant admitted that it was in control of the premises, the jury must find that the plaintiff established the first element.

As to the second element, that the defendant was negligent in maintaining the premises, the court explained that, "where it is alleged that one who controls property has failed to keep it free from defects that can cause injury, the law further defines the duty of care that is owed to someone such as the plaintiff. . . . As it is admitted that the plaintiff was an invitee,

the defendant owed [her] the following duties . . . . The duty to use reasonable care to inspect and maintain the premises, and to make the premises reasonably safe. . . . The duty to warn or guard the invitee from being injured by reason of any defects that the invitee could not reasonably be expected to discover. . . . [T]he duty to conduct activities on the premises in such a way as to not injure the invitee.

"As an invitee, the plaintiff must prove that the defendant failed in the duties that I've just described to you. If the plaintiff has proven this to you, you should next consider the other elements of the defective premises case, but if the plaintiff . . . has not proved the defendant failed in [its] duties as I have just described them to you, then you do not need to consider the other three elements, and you must return a verdict for the defendant.

"Again, the other elements are that the premises was defective, that the defendant knew or reasonably should have known of the defect and corrected [it] or warned the plaintiff, and that such negligence was a proximate cause of the injury.

"The third element is the existence of a defect. The plaintiff alleges that, at the time of the plaintiff's alleged fall, the defendant's premises was in an unreasonably dangerous, defective, and/or unsafe condition. If you find that the condition of the floor was . . . unreasonably dangerous, defective, and/or unsafe, you must determine whether this rendered the area no longer 'reasonably safe,' which is the term used in the law regarding the defendant's duty. Put another way, you must determine if this circumstance was one that was likely to cause injury to a visitor on that area of the premises. If you find this to be the case, this element is satisfied. If not, then you will have found that no defect existed, and you do not need to consider the

remaining elements but must return a verdict for the defendant.

"The fourth element to be proved by the plaintiff is notice. . . . Now, in order for the plaintiff to recover in the absence of proof that the defendant actually knew of the defect, the plaintiff must prove that the defendant had constructive notice. That means that the defendant, using reasonable care, should have known of the unsafe condition in time to have taken steps to correct the condition or to take other suitable precautions. You may consider whether the defendant inspected the floor or caused it to be inspected on a regular basis, or in a reasonable way in determining whether the defendant should have known of the defect. You may consider the length of time the condition had existed in determining whether the [defendant] should have known of the defect had the defendant used reasonable care.

"The notice to the defendant must be of the specific defect that the plaintiff claims caused the injury. It is not enough that the plaintiff proved the existence of certain conditions that would likely produce such a defect, even if such conditions did in fact produce the defect. Our law requires that the notice, whether actual or constructive, be of the very defect that resulted in the plaintiff's injury.

"If you find that the defendant knew or should have known of the defect alleged in this case . . . you must find that the defendant . . . had knowledge of that same fact. In deciding the issue of notice, the subsidiary question is whether the defect had existed for such a length of time that the defendant, in the exercise of reasonable care, should have discovered it in time to have remedied it or warned the invitee of it prior to the plaintiff's incident. What constitutes a reasonable time is a question of fact for you to determine based on the circumstances you find to have existed in this

case. It is not the law that the plaintiff is entitled to compensation merely because she is injured while on the premises controlled by the defendant. The defendant is not required to guarantee the safety of all persons on the premises. Rather, the defendant is only liable for the resulting injuries if the plaintiff meets the burden to prove the necessary elements of a defective premises claim as I . . . have explained them to you.

"There are four elements [that] the plaintiff must prove when it comes to proving proximate cause. This fifth and last element is just that. It's proximate cause. Even if you find all four of the elements that I have just outlined for you, that, in and of itself, does not afford the basis for a verdict for the plaintiff. The plaintiff must prove by a preponderance of the evidence the fifth element, that, as a result of the conduct of . . . the defendant, the plaintiff was injured and suffered in some way, such that the defendant's conduct was the legal cause of the injury. . . .

"[T]o recover damages for any injury, the plaintiff must show by a fair preponderance of the evidence that such injury would not have occurred without the conduct of the defendant. That the conduct of the defendant was the cause in fact. Then, the plaintiff must prove that the conduct of the defendant was a proximate cause of the injury. Proximate cause means that it was a substantial factor in bringing about or actually causing the injury. That is, that the injury or damage was a reasonably foreseeable consequence of the defendant's conduct. If the conduct of the defendant was a substantial factor in bringing about or actually causing injury to the plaintiff, then this element is satisfied.

"If you find that the plaintiff complains about an injury, which would have occurred even in the absence of the defendant's conduct, or that the negligent conduct of the defendant was not a substantial factor in

bringing about the injury of which the plaintiff complains, you cannot award damages for it because the plaintiff would have failed to prove that the defendant's negligence was a proximate cause of her injury.

"Your task is to determine whether the plaintiff suffered injuries and, if so, whether they were caused by the negligence of the defendant."

Before turning to damages, the court instructed the jury on the defendant's special defense of contributory negligence. During this portion of the charge, the court stated: "Now, the defendant has raised a special defense and claims that the plaintiff failed to exercise due care for her own safety. Under our law, the plaintiff is presumed to be exercising due care at the time of the incident. And if the defendant makes a claim to the contrary, the burden is on the defendant to prove it. The defense is that the plaintiff failed to keep a proper lookout, failed to make reasonable use of her senses and faculties, failed to avoid the condition she alleges existed, failed to take reasonable caution—precautions for her own safety, and failed to act reasonably under the circumstances. In other words, the defendant claims that the plaintiff was not acting as a reasonably prudent or careful person would have acted under the circumstances that you find existed at the time. If you find that the defendant has proved that the plaintiff was not using reasonable care for her own safety, such that she is wholly or partially responsible for her own fall, then the defendant has proven the special defense, and you must consider the plaintiff's negligence in relation to the defendant's negligence. I'll explain what I mean by that.

"In cases such as this one, where the defendant has [pleaded] and claims that the plaintiff was herself negligent, Connecticut law recognizes a legal principle called

comparative negligence. The application of the comparative negligence rule may bar any recovery by the plaintiff or reduce any award by the percentage of negligence attributable to the plaintiff. The defendant bears the burden of proving to you by a fair preponderance of the evidence that the plaintiff was negligent. Your first consideration in applying the comparative negligence rule is to consider whether the plaintiff's own negligence was greater than that of the [defendant]. If the plaintiff is more at fault for the accident than the defendant, then she cannot recover any damages, and you must return a verdict for the defendant. If the plaintiff is equally at fault for the accident or less, or not at fault for the accident, you must continue on to the [next] step."

On appeal, the defendant argues that "[t]he jury had no yardstick by which to measure the defendant's conduct and, unfamiliar with the law, may have invented its own. . . . Without being told what negligence and reasonable care are, the jury had to invent its own standards. . . . Moreover, the refusal to define negligence and reasonable care was harmful because it is likely that it affected the verdict." (Citations omitted; internal quotation marks omitted.) The plaintiff responds that the court's charge was not improper because "[t]he concepts of 'negligence' and 'reasonable care' were subsumed by the instructions relating to premises liability [and comparative negligence] and need not have been separately stated . . . ." We conclude that, although the court improperly declined to instruct the jury as to the definitions of negligence and reasonable care, the error was harmless.

We begin our analysis with the applicable standard of review and well established legal principles regarding

preserved claims of improper jury instructions.[3] "A challenge to the validity of jury instructions presents a question of law. Our review of this claim, therefore, is plenary." (Internal quotation marks omitted.) *Ocasio* v. *Verdura Construction, LLC*, 215 Conn. App. 139, 151, 281 A.3d 1205 (2022).

"When reviewing [a] challenged jury instruction . . . we must adhere to the well settled rule that a charge to the jury is to be considered in its entirety, read as a whole, and judged by its total effect rather than by its individual component parts. . . . [T]he test of a court's charge is not whether it is as accurate upon legal principles as the opinions of a court of last resort but whether it fairly presents the case to the jury in

[3] The defendant's counsel preserved his instructional challenge by filing a request to charge on the definition of "reasonable care" and by taking exception to the court's refusal to define negligence for the reasons stated on the record during the charging conference. See *Brown* v. *Cartwright*, 203 Conn. App. 490, 510, 249 A.3d 59 (2021) ("[t]o preserve [the] exception . . . a party must either submit a written request to charge or state distinctly the matter objected to and the ground of objection" (internal quotation marks omitted)).

In its proposed jury instructions, the defendant requested that the court charge the jury on reasonable care in accordance with the Judicial Branch's model civil jury instruction on reasonable care. See Connecticut Civil Jury Instruction § 3.9-19, available at https://www.jud.ct.gov/JI/Civil/Civil.pdf (last visited September 23, 2024). Specifically, the defendant requested the following language: "In describing the duties involved in this case, I have used the term 'reasonable care.' Reasonable care is defined as the care which an ordinarily prudent or careful person would use in view of the surrounding circumstances. You must determine the question by placing an ordinarily prudent person in the situation of the defendant and ask yourselves: what would such a person have done? Note that it is the care that such a person would have used under the surrounding circumstances, that is, in view of the facts known or the facts of which the party should have been aware at the time. The standard of care required, that of an ordinarily prudent person under the circumstances, never varies, but the degree or amount of care may vary with those circumstances. For example, in circumstances of slight risk or danger, a slight amount of care might be sufficient to constitute reasonable care, while in circumstances of greater risk or danger, a correspondingly greater amount of care would be required to constitute reasonable care."

such a way that injustice is not done to either party under the established rules of law. . . . As long as [the instructions] are correct in law, adapted to the issues and sufficient for the guidance of the jury . . . we will not view the instructions as improper." (Internal quotation marks omitted.) *Burke* v. *Mesniaeff*, supra, 334 Conn. 116.

"The principal function of a jury charge is to assist the jury in applying the law correctly to the facts which [it] might find to be established . . . . A request to charge which is relevant to the issues of [a] case and which is an accurate statement of the law must be given." (Internal quotation marks omitted.) *Farmer-Lanctot* v. *Shand*, 184 Conn. App. 249, 256, 194 A.3d 839 (2018). "Failure to charge precisely as proposed by a defendant is not error where the point is fairly covered in the charge. . . . Instructions are adequate if they give the jury a clear understanding of the issues and proper guidance in determining those issues." (Internal quotation marks omitted.) *Smith* v. *Greenwich*, 278 Conn. 428, 437, 899 A.2d 563 (2006).

"It is well established that not every improper jury instruction requires a new trial because not every improper instruction is harmful. [W]e have often stated that before a party is entitled to a new trial . . . he or she has the burden of demonstrating that the error was harmful. . . . An instructional impropriety is harmful if it is likely that it affected the verdict." (Internal quotation marks omitted.) *Burke* v. *Mesniaeff*, supra, 334 Conn. 121.

Although the plaintiff's premises liability claim is a negligence cause of action; see *Diaz* v. *Manchester Memorial Hospital*, supra, 161 Conn. App. 791 n.4; the court failed to give a standard negligence charge, which would have defined "negligence" and "reasonable

care." See, e.g., Connecticut Model Civil Jury Instructions 3.6-3, available at https://www.jud.ct.gov/JI/Civil/Civil.pdf (last visited September 23, 2024) ("Commonlaw negligence is the failure to use reasonable care under the circumstances. Reasonable care is the care that a reasonably prudent person would use in the same circumstances."). There is no question that the definitions of negligence and reasonable care are relevant to the issues of a negligence case, which is evidenced by the trial court's repeated use of these terms throughout its charge. See, e.g., *Lindquist* v. *Marikle*, 99 Conn. 233, 235, 121 A. 474 (1923) ("[T]he jury did not have before them any instruction as to what constituted negligence on the part of the defendant, or contributory negligence on the part of the plaintiff. A charge which omits, in a negligence action, these basic rules of guidance, does not adequately present the case to the jury."); *Conway* v. *Waterbury*, 84 Conn. 345, 349–50, 80 A. 83 (1911) ("it is always proper, and generally necessary, for the court . . . to state the standard of duty to be that of a person of ordinary prudence under similar circumstances"). Accordingly, we agree with the defendant that the court improperly failed to define these terms for the jury, and we are not persuaded that these definitions were subsumed within the court's premises liability instructions. The question remains, however, whether the defendant can establish that this error was harmful.

The defendant contends that our Supreme Court's decision in *Mahon* v. *B.V. Unitron Mfg., Inc.*, 284 Conn. 645, 935 A.2d 1004 (2007), "is clear and controlling: The failure to define negligence and reasonable care is harmful error." In *Mahon*, Robert Bowers (decedent) was killed when his motorboat, which had lost power due to a poor connection caused by a defective socket, was struck by another motorboat traveling on a lake. Id., 649–50. The plaintiff, the administrator of the decedent's estate (decedent's estate), brought a product liability action against the manufacturer of the defective

socket.[4] Id., 650. In its answer, the manufacturer asserted comparative negligence as a special defense, alleging "that the accident and any injuries or damages resulting therefrom were due . . . to the decedent's negligent operation of his motorboat and to [his] failure to maintain accessible and operational safety equipment on the boat." Id., 650–51. The manufacturer requested that the court instruct the jury "that the duty of care applicable to the decedent's operation of his motorboat was 'the care which an ordinarily prudent person would use in view of the surrounding circumstances.' . . . [I]n its charge to the jury, the trial court properly explained that the standard of care applicable to the . . . product liability claims was strict liability. . . . [T]he trial court explained: 'It is the unreasonably dangerous condition of the product that makes [a] defendant responsible. It is not whether the [manufacturer] knew of the defect or had notice that the product was defective, and it is not whether the [manufacturer] was negligent in selling the product.' " Id., 651–52. With respect to the manufacturer's comparative negligence special defense, "the trial court did not instruct the jury in accordance with [the manufacturer's] request to charge." Id., 652. The jury returned a verdict for the plaintiff "but determined that the decedent was 33 1/3 percent contributorily negligent." Id., 653. The plaintiff appealed, and our Supreme Court transferred the appeal to itself. Id., 649 n.2.

On appeal, the plaintiff claimed, "that because the trial court's jury charge contained no definition of negligence, it provided the jury with inadequate guidance

[4] Four passengers were aboard the boat at the time; two passengers drowned, and the other two suffered serious injuries as a result of the crash. *Mahon* v. *B.V. Unitron Mfg., Inc.*, supra, 284 Conn. 649–50. Although there were three consolidated product liability actions involved in *Mahon*; see id., 648 n.1; for simplicity, we limit our discussion to the product liability action brought by the decedent's estate against the manufacturer.

for resolving [the manufacturer's] claim that the accident was caused, at least in part, by the decedent's negligence." Id., 655. Our Supreme Court agreed, concluding that "the trial court provided no guidance [as] to the standard that the jury was required to apply in determining whether the decedent was negligent and, if so, the extent to which his negligence was a contributing factor in the accident that resulted in his death. Indeed, the trial court made only one reference to the concept of negligence in its entire jury charge, explaining that strict liability did not require proof that [the manufacturer] had been negligent in selling the product at issue. At no time, however, did the trial court explain that negligence is the failure to exercise the care that an ordinarily prudent person would use under the circumstances. . . . Without an explanation by the court of the applicable legal standard—in this case, negligence—the jury essentially was left to evaluate the decedent's conduct by whatever standard it deemed appropriate. The trial court's instructions, therefore, were plainly inadequate to guide the jury in its deliberations on [the] special defense of comparative negligence. Because the jury decided the issue of the decedent's comparative negligence in an instructional vacuum, we cannot conclude that the trial court's instruction fairly presented [the manufacturer's] comparative negligence claim to the jury in such a way that injustice was not done to the decedent's estate." (Internal quotation marks omitted.) Id., 658–59.

According to the defendant, "[h]ere, as in *Mahon*, the charge left the jury to flounder in an instructional vacuum. . . . The jury had no yardstick by which to measure the defendant's conduct and, unfamiliar with the law, may have invented its own. . . . For example, the jury may have thought—wrongly—that a restaurant is responsible for any injury that any patron suffers on

its property, even though that is not the law. . . . Similarly, the jury wrongly may have assumed that it could assess 'reasonable care' in the abstract, untethered from the circumstances of the case, or based on each juror's subjective view of reasonableness." (Citations omitted; emphasis omitted.) We are not persuaded.

In *Mahon* v. *B.V. Unitron Mfg., Inc.*, supra, 284 Conn. 650, a central point of contention was whether the deaths and injuries resulting from the collision were caused by the manufacturer's defective socket or by the decedent's negligence. Consequently, because the trial court failed to give the jury sufficient guidance to determine whether the decedent was negligent, our Supreme Court concluded: "In such circumstances, the decedent's estate has satisfied its burden of establishing that the instructional impropriety was harmful." Id., 659. Moreover, the trial court made its sole reference to negligence to explain "that strict liability did not require proof that [the manufacturer] had been negligent in selling the product at issue." (Internal quotation marks omitted.) Id., 658. Our Supreme Court specifically noted that, "[a]t no time, however, did the trial court explain that negligence is the failure to exercise the care that an ordinarily prudent person would use under the circumstances." Id. Thus, the court's determination that the instructional error was harmful was based on a consideration of how that error related to the court's instruction as a whole and to the particular issues in dispute in that case. Accordingly, we reject the defendant's claim that *Mahon* requires that we find that the instructional error in the present case was harmful.

Instead, "[t]o determine whether the court's instructional impropriety was harmless, we consider not only the nature of the error, including its natural and probable effect on a party's ability to place his full case before the jury, but the likelihood of actual prejudice as

reflected in the individual trial record, taking into account (1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel's arguments, and (4) any indications by the jury itself that it was misled." (Internal quotation marks omitted.) *Perdikis* v. *Klarsfeld*, 219 Conn. App. 343, 384, 295 A.3d 1017, cert. denied, 348 Conn. 903, 301 A.3d 528 (2023).

The defendant provides a cursory analysis of these factors in its principal appellate brief, arguing that "the 'natural and probable effect' of failing to define negligence and reasonable care was prejudic[ial] to '[its] ability to place [its] full case before the jury' " because "[i]t would have been improper for defense counsel to tell the jury what those terms mean (e.g., in summation)." (Citations omitted.) It further argues that "the record makes the likely impact of the court's error plain. . . . The defendant's negligence was the central issue at trial: The parties discussed it in their opening and closing arguments; [e]very witness testified about facts that bear on it; [and] [s]everal key exhibits were offered to prove it. . . . Consequently, the charge did not 'fairly present . . . [the] negligence claim to the jury in such a way that injustice was not done to the [defendant].' " (Citations omitted; emphasis omitted.) The plaintiff responds that "the defendant cannot prove that the jury was misled or confused in a way that 'tainted' [its] ultimate decision—and thus cannot show that harmful error occurred." We conclude that the defendant has failed to demonstrate that the court's failure to define negligence and reasonable care likely affected the verdict.

There is no indication that the failure to define negligence and reasonable care affected the defendant's ability to present its case to the jury, as the defendant's defense focused on whether the Batman decal caused the plaintiff to fall and whether it was on the floor before the restaurant opened for the day. In other words, the

defendant denied that it was liable because the Batman decal neither caused the plaintiff's fall nor was present for a sufficient time for purposes of establishing that the defendant had constructive notice of the defect. The record reflects that there was no limitation on the defendant's ability to present this defense due to the court's refusal to define negligence and reasonable care in its jury charge.

During opening argument, the plaintiff's counsel argued that "[s]omething happened in terms of human error. They cleaned the place after closing. They obviously missed it. . . . They had two chances to find it, so it had to be there from the night before because no one dropped it that morning, because there was—the restaurant just opened, there was only one table seated. That was Paterno's group, and they didn't have it. So, it had to be there overnight. So, they had plenty of time to find it. They had plenty of time to remove it. They didn't. . . . That is the sequence of events." In contrast, the defendant's counsel argued that "you're gonna hear from the judge that we had to either know about [the Batman decal] or should have known about it. You're not going to hear from anybody where this [Batman decal]—and again, if the [decal] even was what caused the fall, where it came from, or how long it had been there. What you will hear here is that the night before this incident occurred, after closing, all the chairs were picked up off the floor and a full cleaning was done of the restaurant. You're also gonna hear that that morning, we opened at 10:30, this incident happened fifteen or twenty minutes later, that the hostess and all of the serve staff [are] supposed to go around and spot sweep all of their areas. That's all the testimony that you will hear."

The defendant's counsel repeated these arguments in his closing remarks, arguing that, "[n]o one, including the plaintiff, could say that that is what she slipped on.

The plaintiff needs to prove what she slipped on. She needs to prove the defect. No one was able to sit there and tell you that's what she slipped on because they can't. . . . It makes more sense, frankly, that she tripped over her own feet. And that's why she couldn't break her fall. What you also never heard is where it came from. Where—the [Batman decal], where did it come from? . . . You haven't heard how long it was there. You haven't heard how it got there. Never heard that anyone at the [restaurant] knew about it. Never heard . . . any of those things." The defendant further argued that "[i]t's impossible for [the plaintiff] to meet her burden of proof. The restaurant closed the night before and was cleaned after closing and again before opening, some fifteen minutes before this incident occurred. You heard that from multiple people. You heard that from four or five different people. . . . [T]he only decision to be made here is for a defendant's verdict."

In response to the arguments of the defendant's counsel, the plaintiff's counsel argued: "The people at [the Paterno] table found the [Batman decal], and they thought it was connected with the fall, and they brought it to the attention of the restaurant, and the restaurant put it on [its] accident report. This is not some random finding. This is something that they came up with, that was what they saw on the floor, and they thought it was connected, and that's the only rational, reasonable explanation for why she fell. There was no other reason. . . .

"Do we know where the decal came from, no. We're not required to know that. . . . And how long had it been there? I think we have a good idea of that because it had to be there from the night before. It wasn't dropped there [that] morning. There was no one there to drop it. The only table was the adults [at] the Paterno table. They didn't have a Batman decal with them. So,

where was it from? It had to be from the night before. It had to be something that was missed. It was overnight. Two chances to find it. Both failures. They are responsible because . . . they breached their duty to an invitee to keep the premises safe. . . . So, I think all that is pretty clear."

As to the likelihood of actual prejudice, the defendant argues in its reply brief that "[t]his case turned on whether the defendant had constructive notice of the decal. . . . Constructive notice asks whether the defendant, 'using reasonable care, should have known of the unsafe condition in time to have taken steps to correct the condition or take other suitable precautions.' . . . Thus, it was critically important for the jury to evaluate what the defendant should have known about the condition of the floor at the time the plaintiff fell." (Citation omitted.) Therefore, according to the defendant, "[t]he jury's verdict, finding the defendant 75 [percent] at fault notwithstanding a lack of any evidence that the defendant had constructive notice of the decal, indicates that it was misled about the standard it was required to apply." We are not persuaded.

Although the parties disagreed as to whether the Batman decal caused the plaintiff to fall and whether it had been on the floor since before the restaurant opened, there was no dispute that the defendant, exercising reasonable care, either should or would have discovered the decal if it had been on the floor since the previous night. Indeed, all the evidence confirmed that the restaurant floors were cleaned the night before the accident and inspected again in the morning before the restaurant opened, and the defendant's general manager, Corso, conceded that he would expect the nightly cleaning crew and the opening staff to find foreign objects and remove them from the floor as part of their duties. Consistent with the evidence presented, counsels' arguments focused on a lack of notice and

causation, not on whether the defendant should have discovered the Batman decal if it was present before the restaurant opened. Thus, the question for the jury was not whether, in the exercise of reasonable care, the defendant should have inspected the floors or even whether a reasonable inspection of the floors would have revealed the Batman decal, as the defendant did not dispute these points. Instead, the jury had to decide whether the plaintiff slipped on the Batman decal and whether the Batman decal had been on the floor since before the restaurant opened for the day. Given the state of the evidence, which we have concluded was sufficient for the jury to find that the Batman decal caused the plaintiff to slip and fall and that the defendant had constructive notice of the decal, and considering counsels' arguments on the basis of that evidence, we are not persuaded that the jury's verdict "indicates that it was misled about the standard it was required to apply," as the defendant contends.

Moreover, although the court did not define negligence and reasonable care in its jury charge, its other instructions provided sufficient guidance given the dispositive factual issues that were disputed. The trial court set forth each of the plaintiff's allegations of negligence as well as the relevant elements of a premises liability claim, and it correctly identified the applicable duties that the defendant owed to the plaintiff. The defendant does not challenge any of these instructions and fails to identify any deficiency in this regard. Nor is there any indication that the jury was misled as to the issues it needed to resolve, as it requested no further instruction before returning the verdict. Consequently, we conclude that the defendant has failed to demonstrate that the court's failure to define negligence and reasonable care was harmful.

The judgment is affirmed.

In this opinion the other judges concurred.

DONNA DUSO ET AL. *v.* TOWN OF GROTON
(AC 46527)

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

Syllabus

The defendant town appealed from the trial court's judgment declaring that, pursuant to a pension agreement between the defendant and a police union, the plaintiffs, all retirees who formerly had been employed by the defendant, were entitled to the same deductible contribution payments to their health savings accounts as those received by the defendant's active employees. The defendant claimed, inter alia, that, in making its determination, the trial court misinterpreted the language of a collective bargaining agreement between the defendant and the union. The plaintiffs cross appealed from the trial court's judgment denying their motion for sanctions. *Held*:

The trial court had subject matter jurisdiction over the action because the plaintiffs satisfied the requirements for demonstrating standing, as it was clear that they were intended third-party beneficiaries of the pension agreement, and that their claims were ripe.

The trial court properly denied the defendant's motion to strike the complaint because the defendant failed to establish that the police union was a necessary party to the action.

The trial court correctly determined that the defendant's payment of a certain percentage of the annual deductible for its group health insurance plan to the health savings accounts of only its active employees contravened the terms of the pension agreement because the effect of such payments was that the plaintiffs did not receive the same nature and scope of health care coverage as the active employees.

The trial court did not abuse its discretion in awarding the plaintiffs damages, as the evidence supported the trial court's rejection of the defendant's request that it offset the award by the amount of the increase in health insurance premiums that the plaintiffs would have incurred had they received the deductible contributions to their health savings accounts.

The trial court did not abuse its discretion in declining to award attorney's fees to the plaintiffs as a sanction for the defendant's alleged bad faith litigation conduct because the court reasonably could have determined that the plaintiffs failed to prove that the claims raised in the defendant's motion to dismiss were entirely without color and that the defendant had acted in bad faith.

Argued May 29—officially released October 1, 2024

Procedural History

Action seeking, inter alia, a declaratory judgment as to the scope of a certain provision of a pension agreement as it related to the defendant's obligations in connection with the health care coverage provisions of a collective bargaining agreement, and for other relief, brought to the Superior Court in the judicial district of New London, where the court, *Swienton, J.*, denied the defendant's motion to dismiss; thereafter, the court, *Swienton, J.*, denied the plaintiffs' motion for sanctions; subsequently, the court, *Swienton, J.*, denied the defendant's motion to strike; thereafter, the court, *Graff, J.*, adopted the parties' joint stipulation of facts and rendered judgment for the plaintiffs; subsequently, the court, *Graff, J.*, awarded compensatory damages to the plaintiffs, and the defendant appealed and the plaintiffs cross appealed to this court. *Affirmed.*

Kyle J. Zrenda, with whom was *Kristi D. Kelly*, for the appellant-cross appellee (defendant).

Jacques J. Parenteau, for the appellees-cross appellants (plaintiffs).

Opinion

BRIGHT, C. J. In this declaratory judgment action, the defendant, the town of Groton, appeals from the judgment of the trial court rendered in favor of the plaintiffs, Donna Duso, David Menard, James Gauthier, Kathleen Doyle, and Dexter Herron. On appeal, the defendant claims that the court (1) lacked subject matter jurisdiction over the declaratory judgment action because the plaintiffs lack standing and their claim is not ripe, (2) improperly denied the defendant's motion to strike the complaint because the plaintiffs had failed to join a necessary party, (3) misinterpreted the language of a collective bargaining agreement, and (4) improperly awarded damages. The plaintiffs cross

appeal from the judgment of the court denying their motion for sanctions. We affirm the judgment of the court.

The following facts, which were included in the parties' October 19, 2022 joint stipulation of facts (joint stipulation) and adopted by the trial court in its memorandum of decision, and procedural history are relevant to our resolution of this appeal. The plaintiffs are former employees of the defendant and "were represented by a duly elected collective bargaining representative, the Groton Police Union, Local 3428 of Council 15, or Council 4 as successor in interest to Council 15, of AFSCME, AFL-CIO (union). . . . Throughout the course of all [of] the plaintiffs' employment, and in accordance with [the Municipal Employee Relations Act (MERA), General Statutes § 7-467 et seq.], the [defendant] and the union collectively bargained the terms and conditions of the plaintiffs' employment whereby entering into a series of written collective bargaining agreements every few years, each typically covering a time period from two (2) to four (4) years, depending on what the parties thereto (i.e., the [defendant] and the union) agreed upon."

Each of the plaintiffs has retired from their employment with the defendant. "Different collective bargaining agreements were in effect at the time each particular plaintiff retired from employment . . . . Each collective bargaining agreement in effect at the time of any of the plaintiffs' retirement incorporated into it the same collectively bargained pension agreement: An Agreement Between the Town of Groton and the Groton Police Union, Local 3428 of Council 15 AFSCME Concerning Pensions August 1, 2008–June 30, 2012 (pension agreement), which pension agreement remains in effect to the present date. . . . The [defendant] and the union entered into the collective bargaining agreement that is the subject of this declaratory judgment action,

namely, the Agreement Between The Town of Groton and The Groton Police Union Local #3428 Council 4, AFSCME, AFL-CIO July 1, 2016–June 30, 2020 (CBA), which CBA was ratified by the parties on or about November 28, 2017, and which CBA incorporates the pension agreement under its article 25. . . .

"At all times relevant to the plaintiffs' complaint, the [defendant] self-insures its group health insurance benefits. . . . Anthem Blue Cross/Blue Shield (Anthem), through an administrative services contract with the [defendant], administers the benefits on the [defendant's] behalf. . . . As a town offering self-insured health benefits to its employees and retirees, the [defendant] does not pay any portion of a 'premium' to Anthem but is billed by Anthem for the total cost of all claims made by active employees and retirees for health insurance benefits together with an administrative fee collected by Anthem, as the administrator." (Footnotes omitted.)

"During their employment, all five . . . plaintiffs participated in the [defendant's] group health insurance, which at that time was a preferred provider option (PPO) plan design as the primary option, with the option to elect participation in a high deductible health plan (HDHP) design as an alternative." "Under the various PPO plans offered to both active employees and retirees between July, 2013, through June, 2018, there was no annual deductible for in-network medical services, but there were deductibles applicable to out-of-network medical services. . . . Prior to January, 2018, the [defendant] did not contribute any amount of money to any active employee or retiree in relation to any deductible amount associated with either the PPOs or HDHPs offered to employees." (Citations omitted.)

"In 2018, pursuant to article 22.1 of the CBA . . . the [defendant] changed its group health insurance plan

design for active police officers from a managed care PPO to an HDHP. . . . Active employees enrolled in the [defendant's] health insurance were moved from the PPO to the HDHP effective January 1, 2018; retirees, to include the plaintiffs, were required to enroll in the HDHP no later than July 1, 2018. . . . All plaintiffs, as retirees, enrolled in the HDHP effective July 1, 2018. . . .

"Section 16 of the pension agreement articulates the terms and conditions on which retirees . . . may elect coverage under the [defendant's] group health insurance plan. . . . Section 16 (C) and (D) of the pension agreement articulate the scope of health insurance coverage available to retirees, depending on age, and § 16 (F) of [the pension agreement] provides the premium share percentages that retirees . . . are to pay for participation in the [defendant's] health insurance plan. . . . For retirees under the age of sixty-five, which includes all of the plaintiffs, the scope of coverage is as follows . . . . The nature and scope of coverages, including but not limited to deductibles, coinsurance, copays and/or limits, shall be those in effect for active police officers, as those coverages, including but not limited to deductibles, coinsurance, copays and/or limits, may change from time to time, except dental which, if provided to active police officers, shall be limited for retirees, spouses and/or other dependents, where applicable, to basic coverage as provided to active police officers. Said coverages shall be available until such time as the retiree, spouse and/or dependents become eligible for Medicare or reach age sixty-five, whichever is earlier." (Internal quotation marks omitted.)

"Participants in an HDHP are eligible under the Internal Revenue Code [26 U.S.C.] § 223, to open and maintain a tax favored health savings account (HSA). . . . Enrollment in an HDHP does not require a participant

to open an HSA, but the HDHP participant has the option to do so. . . . Article 22.1 (A) (2) of the CBA expressly requires that active employees open and maintain an HSA in conjunction with their enrollment in the HDHP. . . . There is no requirement that any retiree . . . open and maintain an HSA in conjunction with the HDHP; but retirees, including the plaintiffs, may have that option. . . . An HSA is a personally established and owned private bank account that a participant opens and maintains at a bank of their choosing. . . . Similar to the procedures for 'direct deposit' for payment of regular wages (active employees) or monthly pension payments (retirees), an individual provides the [defendant] with a 'direct deposit' authorization form for payment of any funds the individual wishes to have withheld from their wages/payments and directed to their HSA. . . . The [defendant] deducts the respective share of the health insurance premiums for active employees from the employee's wages during each payroll, and from retirees once per month from their monthly pension payment. . . .

"Article 22.1 (A) (2) of the CBA provides for an annual contribution to active employees' HSA, by the [defendant], equal to [50 percent] of the active employee's annual in-network deductible. . . . Under article 22.1 (A) (2), therefore, active employees purchasing 'single' coverage receive a $1000 contribution from the [defendant] to their HSA each July 1, and active employees purchasing 'two-person' or 'family' coverage receive a $2000 contribution from the [defendant] to their HSA each July 1. . . . Under the CBA, commencing on July 1, 2018, and each year since, active employees enrolled in the HDHP have received . . . contributions by the [defendant] to their respective HSA . . . ." (Footnote omitted.) Active employees with single coverage for the years 2018, 2019, 2020, 2021, and 2022, received $1000

per year. Active employees with two person/family coverage for the years 2018, 2019, 2020, 2021, and 2022, received $2000 per year.

Article 22.1 (A) (2) of the CBA contains a "Note," stating: "The [defendant's] fifty percent (50%) contribution toward the funding of the HDHP plan is not an element of the underlying insurance plan, but rather relates to the manner in which the deductible shall be funded for active employees. The [defendant] shall have no obligation to fund any portion of the HDHP deductible for retirees or other individuals upon their separation from employment. Under 65 retirees must enroll in the HDHP as of July 1, 2017, or as soon as legally possible following the ratification of this 2016–2020 agreement, but in no case later than July 1, 2018." (Emphasis omitted.)

"Prior to 2016, the [defendant] used what is referred to [as] a 'Fully-Insured Equivalent Rate' to determine participant cost shares; but, in February of 2016, the [defendant] commenced using what is referred to as an 'Allocated Rate' to determine participant cost share. This resulted in participants being charged a percentage of a lower rate for health insurance benefits. Both the 'Fully-Insured Equivalent Rate' and the 'Allocated Rate' used by the [defendant] to determine participant cost share each year [are] calculation[s] provided by Anthem to the [defendant]. . . . Neither the Fully-Insured [Equivalent] Rate, nor the Allocated Rate remains stagnant; it changes from fiscal year to fiscal year. . . . The Fully-Insured [Equivalent] Rate and/or the Allocated Rate are both alternative terms which may be used interchangeably with the word 'premium,' as that phrase is used in the CBA and pension agreement. . . . The Allocated Rate is derived through an underwriting calculation performed by Anthem and provided to the [defendant] prior to the start of its fiscal year. The underwriting calculation takes into account certain cost

estimates including but not limited to the potential or anticipated claims attributable to the particular group of participants, Anthem's retention fees, potential stop loss fees, and network access fees."

"[I]n plan years 2016 and 2017, under the PPO plan and prior to the move to the HDHP, the Allocated Rate for the active police officers and retirees was the same amount. Following the move of all active police officers and retirees from the PPO plan to the HDHP in 2018, the Allocated Rate for the active police officers, compared to the Allocated Rate for the retirees, in each of the 'Single,' 'Two-Person' and 'Family' categories is approximately 6.5 percent more for active police officers in each of the fiscal years listed. The explanation for this difference is . . . as follows: 'The Allocated Rate, per Anthem, is adjusted (increased) to account for a reduction in consumerism on the part of the participants who receive financial funding to their [HSAs] from their employer.[1] The percentage of the upward adjustment in the base Allocated Rate for such participants is dependent on the financial benefit paid by the employer to the participant.' " (Footnote added.)

The plaintiffs commenced the present action in November, 2018. In the operative amended complaint, dated February 16, 2023,[2] the plaintiffs alleged that,

[1] "[A] reduction in consumerism" appears to refer to the economic theory that health insurance creates a moral hazard in that insureds who receive funding from others toward their health care expenditures will be more likely to consume health care services and will be less discriminating consumers than insureds who must spend their own funds for the same services. See, e.g., P. Molk, "The Ownership of Health Insurers," 2016 U. Ill. L. Rev. 873, 885 (2016) ("In health insurance, moral hazard is the phenomenon where individuals consume more medical services when they are insured than when they are uninsured, because insurance reduces the policyholder's marginal cost of consuming healthcare. . . . This socially-inefficient consumption raises the price of health insurance and contributes to the country's health costs." (Footnote omitted.)).

[2] The amended complaint was attached to a request for leave to amend the complaint, which sought to add the following allegation: "The [defendant] and the union entered into a new collective bargaining agreement for the

following the adoption of the CBA, the defendant failed to provide them with the "nature and scope of coverages . . . in effect for active police officers," in violation of § 16 of the pension agreement. (Internal quotation marks omitted.) Specifically, the plaintiffs alleged that "retirees who are mandated to enroll in the HDHP plan are incurring $1000 for individuals and $2000 for families in deductible contribution expenses that are not being incurred by active employees because the defendant is making a 50 percent contribution of the deductible amount to the HSA." The plaintiffs alleged that the effect of the HDHP/HSA is that the premium is lower for each active employee. The plaintiffs further alleged that, "[b]ecause the payment of a higher deductible in order to reduce the individual employee's premium is a significant element of the underlying insurance plan," the plaintiffs were not receiving the "nature and scope of coverages . . . in effect for active police officers," as required by the pension agreement. (Internal quotation marks omitted.)

The plaintiffs sought a declaratory judgment that, "under the terms of the pension agreement, the 'nature and scope' of the coverage for active police officers includes a requirement that the defendant contribute 50 percent of the deductible amount to the plaintiffs'

period commencing July 1, 2020–June 30, 2023, which did not alter the health insurance plan design provided to active employees or the [defendant's] contribution to the active employees' HSA[s]. The 'Note' contained in the subject CBA, expressly indicating that the HSA contribution does not apply to retirees, is also contained verbatim in the new agreement. The percentage of the Allocated Rate that active employees pay for their insurance was, however, amended and is set forth in article 22.2 of the new agreement." Following the request for leave to amend, the defendant filed an answer to the amended complaint, in which it admitted the additional allegation. In its May 2, 2023 order granting the plaintiffs' request for a mandatory injunction and awarding damages, the court noted that the defendant had not objected to the request to amend and ordered the defendant to continue payment of the HSA contributions through the effective date of the then current CBA.

[HSAs] on a pretax or taxable basis based on the plaintiffs' eligibility to maintain [an HSA]." The plaintiffs additionally sought a mandatory injunction requiring the defendant to pay the deductible amounts to the plaintiffs for the period covered by the CBAs, and attorney's fees and costs. The plaintiffs also sought "[s]uch further legal and equitable relief as the court deems appropriate, including an injunction mandating the payment of sums to fund deductibles . . . ."

The defendant filed motions to dismiss and to strike the plaintiffs' complaint, which were both denied. In its answer, the defendant asserted the following special defenses: the plaintiffs were not third-party beneficiaries of the CBA, the plaintiffs lacked standing, the plaintiffs lacked the irreparable harm and inadequate remedy at law necessary for injunctive relief, and the plaintiffs' request for attorney's fees was barred by the American rule.[3]

In lieu of a court trial involving the testimony of witnesses, the parties submitted the case to the court for resolution on the basis of the joint stipulation, agreed upon exhibits, and memoranda of law. On November 28, 2022, the court, *Graff*, *J.*, issued its memorandum of decision. After first rejecting the defendant's claim that the plaintiffs lacked standing, the court turned to the merits of the dispute over the terms of the CBA and the pension agreement. The court found the language of the pension agreement to be clear and unambiguous. The court noted that "nature and scope,"

[3] "Connecticut adheres to the American rule . . . [which reflects the idea that] in the absence of statutory or contractual authority to the contrary, a successful party is not entitled to recover attorney's fees or other ordinary expenses and burdens of litigation . . . . Despite the general rule, our Supreme Court has recognized exceptions for cases in which the party or its counsel has acted in bad faith . . . and for cases in which attorney's fees are assessed as punitive damages." (Citation omitted; internal quotation marks omitted.) *Palmieri* v. *Cirino*, 226 Conn. App. 431, 438–39, 318 A.3d 440 (2024).

as used in the pension agreement, are not defined terms and consulted dictionary definitions to interpret " 'nature and scope of coverages' " to mean that the "essence and extent of the coverages shall be those in effect for active police officers." Because "coverage" is defined by the pension agreement to include deductibles, the court stated that § 16 of the pension agreement means that "active police officers and retirees shall have the same coverage, which includes deductibles."

The court found that the note contained in article 22.1 (A) (2) of the CBA, pursuant to which the defendant would have no obligation to fund any portion of the HDHP deductible for retirees, contravened the terms of the pension agreement, in that it required the retirees to pay all of the deductible, whereas active police officers paid only one half of the deductible. The court stated: "The funding of the deductible is part of the essence of the deductible. Indeed, how much a deductible is and who pays for the deductible are two of the most important aspects of a deductible. By virtue of article 22, the defendant is paying health insurance claims for active police officers by paying [50 percent] of the active police officers' deductibles. The plaintiffs are not receiving this same treatment. Even setting aside the issue of funding, the court is hard pressed to find that the plaintiffs and the active police officers have the same deductibles. While on paper this may be true, in reality the active police officers are paying $1000 for individuals and $2000 for families while retirees are paying $2000 for individuals and $4000 for families."

Accordingly, the court determined that the plaintiffs were entitled to the same deductible contribution payments as active employees. The court ordered the parties to submit briefs addressing damages, including "what, if any, deductible amounts each of the plaintiffs are entitled to recover," and the plaintiffs' request for attorney's fees and costs. On December 16, 2022, the

defendant filed a motion to reargue, which the court denied.

On January 27, 2023, the parties filed briefs addressing damages and attorney's fees. The plaintiffs argued that they were entitled to prejudgment interest and attorney's fees in addition to HSA contributions for five years beginning in 2018. Specifically, they contended that they were collectively owed contributions in the total amount of $36,000. In its brief, the defendant opposed the plaintiffs' request for a mandatory injunction, argued that it was entitled to an offset from the plaintiffs' claimed damages in an amount equal to the difference in the Allocated Rate active employees paid and the lower rate the plaintiffs paid, and objected to the plaintiffs' request for attorney's fees. The defendant did not address the plaintiffs' request for prejudgment interest. A hearing was held on February 16, 2023. In its May 2, 2023 order, the court awarded compensatory damages in the amount requested by the plaintiffs and declined to award attorney's fees or prejudgment interest. This appeal and cross appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The defendant first challenges the subject matter jurisdiction of the trial court on the basis that the plaintiffs' claim is not justiciable. First, the defendant contends that the plaintiffs lack standing to assert their claim. Second, it argues that "[t]he plaintiffs' prospective claim for an injunction and declaratory judgment is not ripe because they have not alleged or proffered evidence that they will, or are even likely to, need to pay monies toward the deductible." Because these claims are interrelated, we discuss them together. We conclude that the court had subject matter jurisdiction over the action.

The following additional procedural history is relevant. On January 22, 2019, the defendant filed a motion to dismiss the plaintiffs' complaint, alleging in relevant part that the court lacked subject matter jurisdiction. Specifically, the defendant argued: "(1) the plaintiffs lack legal standing to enforce the terms of the [CBA]; (2) the plaintiffs have failed to exhaust their administrative remedies by failing to bring their cause of action before the Connecticut State Board of Labor Relations . . . (3) the plaintiffs have failed to exhaust their administrative remedies by failing to exercise contractual grievance rights set forth in the [CBA]; (4) an injunction action fails for lack of joinder of a necessary and indispensable party, namely [the union]; and (5) the plaintiffs fail[ed] to allege an inadequate remedy at law and irreparable harm in order to maintain an injunction action." The plaintiffs filed a memorandum of law in opposition to the defendant's motion, in which they argued that (1) they have standing as third-party beneficiaries pursuant to the terms of the pension agreement, (2) the administrative remedies suggested by the defendant were not available to the plaintiffs as former members of the union, (3) even if the union were a necessary or indispensable party, that would not implicate the court's subject matter jurisdiction, and (4) whether the plaintiffs are entitled to injunctive relief does not implicate subject matter jurisdiction. The defendant filed a reply brief, and the court, *Swienton*, *J.*, held argument on August 12, 2019.

In its November 12, 2019 memorandum of decision, the court denied the motion to dismiss, determining, inter alia, that, "because the plaintiffs allege that they are each former full-time employees of the defendant who each retired prior to the adoption of the [CBA], the plaintiffs have alleged sufficient facts that demonstrate that they are not parties to the [CBA] and have no duty to exhaust arbitration procedures required by the [CBA]

before bringing a direct action against their employer."[4] In its posttrial brief, the defendant reiterated its contention that the plaintiffs lack standing, arguing that the plaintiffs are not third-party beneficiaries to the CBA, which argument the court rejected in its November 28, 2022 memorandum of decision.

We begin our analysis with our standard of review and relevant legal principles regarding justiciability. "An issue regarding justiciability, which must be resolved as a threshold matter because it implicates this court's subject matter jurisdiction . . . raises a question of law. When . . . the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record." (Citation omitted; internal quotation marks omitted.) *Milford Power Co., LLC* v. *Alstom Power, Inc.*, 263 Conn. 616, 624, 822 A.2d 196 (2003).

"Justiciability comprises several related doctrines, namely, standing, ripeness, mootness and the political question doctrine, that implicate a court's subject matter jurisdiction and its competency to adjudicate a particular matter. . . . 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 judicial power . . . and (4) that the determination of the controversy will result in practical relief to the complainant. . . .

"The declaratory judgment procedure, governed by [General Statutes] § 52-29 and Practice Book § 17-54 et

[4] The defendant filed a motion to reargue the court's denial of its motion to dismiss, which the court denied.

seq., does not relieve the plaintiff from justiciability requirements. A declaratory judgment action pursuant to § 52-29 . . . provides a valuable tool by which litigants may resolve uncertainty of legal obligations. . . . The [declaratory judgment] procedure has the distinct advantage of affording to the court in granting any relief consequential to its determination of rights the opportunity of tailoring that relief to the particular circumstances. . . . A declaratory judgment action is not, however, a procedural panacea for use on all occasions, but, rather, is limited to solving justiciable controversies. . . . Invoking § 52-29 does not create jurisdiction where it would not otherwise exist." (Citations omitted; internal quotation marks omitted.) *Mendillo* v. *Tinley, Renehan & Dost, LLP*, 329 Conn. 515, 523–24, 187 A.3d 1154 (2018).

The defendant in the present case claims that the trial court lacked subject matter jurisdiction on the basis that the plaintiffs failed to satisfy the related requirements of standing and ripeness. "Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he [or she] has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy. . . . When standing is put in issue, the question is whether the person whose standing is challenged is a proper party to request an adjudication of the issue . . . . Standing requires no more than a colorable claim of injury; a [party] ordinarily establishes . . . standing by allegations of injury [that he or she has suffered or is likely to suffer]. Similarly, standing exists to attempt to vindicate arguably protected interests. . . .

"Standing is established by showing that the party claiming it is authorized by statute to bring suit or is classically aggrieved. . . . The fundamental test for

determining [classical] aggrievement encompasses a well-settled twofold determination: first, the party claiming aggrievement must successfully demonstrate a specific, personal and legal interest in [the subject matter of the challenged action], as distinguished from a general interest, such as is the concern of all members of the community as a whole. Second, the party claiming aggrievement must successfully establish that this specific personal and legal interest has been specially and injuriously affected by the [challenged action]. . . . Aggrievement is established if there is a possibility, as distinguished from a certainty, that some legally protected interest . . . has been adversely affected." (Internal quotation marks omitted.) *Browning* v. *Van Brunt DuBiago & Co., LLC*, 330 Conn. 447, 455, 195 A.3d 1123 (2018).

"[T]he rationale behind the ripeness requirement is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements . . . . Accordingly, in determining whether a case is ripe, a trial court must be satisfied that the case before [it] does not present a hypothetical injury or a claim contingent upon some event that has not and indeed may never transpire. . . . [I]n determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged." (Citation omitted; internal quotation marks omitted.) *Pringle* v. *Pattis*, 212 Conn. App. 736, 742–43, 276 A.3d 1042 (2022).

On appeal, the defendant argues that the plaintiffs lack standing because (1) "they have failed to allege or provide any evidence that they have sustained an injury in fact," and (2) "they seek benefits as third-party beneficiaries beyond what is provided in the CBA." The defendant relatedly argues that the plaintiffs' claims are not ripe because "they have not alleged or proffered evidence that they will, or are even likely to, need to

pay monies toward the deductible. Thus, the arguments as to ripeness are the same as those concerning injury in fact . . . .'' We are not persuaded.

"The legal remedies of a pensioner are not wholly prescribed by the collective bargaining agreement itself but by standard contractual principles, including promissory estoppel and third party beneficiary principles." *Flynn* v. *Newington*, 2 Conn. App. 230, 237, 477 A.2d 1028, cert. denied, 194 Conn. 804, 482 A.2d 709 (1984). "A third party beneficiary may enforce a contractual obligation without being in privity with the actual parties to the contract. . . . Therefore, a third party beneficiary who is not a named obligee in a given contract may sue the obligor for breach. . . . [T]he ultimate test to be applied [in determining whether a person has a right of action as a third party beneficiary] is whether the intent of the parties to the contract was that the promisor should assume a direct obligation to the third party [beneficiary] . . . ." (Footnote omitted; internal quotation marks omitted.) *Wilcox* v. *Webster Ins., Inc.*, 294 Conn. 206, 217, 982 A.2d 1053 (2009).

It is clear from the plain language of the pension agreement that the plaintiffs are intended third-party beneficiaries. Section 16 (C) of the pension agreement explicitly provides that the defendant is required to provide the plaintiffs with the same "nature and scope" of health care coverage that it provides to active employees. Nevertheless, the defendant argues that, although "the plaintiffs are third-party beneficiaries to the CBA in that they are contemplated beneficiaries of the pension provisions and health care coverage, the benefits they seek to vindicate are well outside the scope of those contemplated." (Emphasis omitted.) As support for this argument, the defendant analogizes the HSA contributions to a shoe allowance provided to active employees, for which the retirees would not "have standing to make a claim . . . ."

Although the defendant frames this argument as challenging subject matter jurisdiction, we do not view it as such. We view it, instead, as directed toward the merits of the present declaratory judgment action. The plaintiffs, as third-party beneficiaries, have standing to allege that the disparate funding of the health care deductible between the plaintiffs and the defendant's active employees constitutes a breach of the defendant's obligation under § 16 of the pension agreement, regardless of how that question is resolved on the merits. See *Payne* v. *TK Auto Wholesalers*, 98 Conn. App. 533, 538, 911 A.2d 747 (2006) ("The question of standing does not involve an inquiry into the merits of the case. . . . It merely requires allegations of a colorable claim of injury to an interest that is arguably protected by [a] statute or common law." (Internal quotation marks omitted.)). Accordingly, we reject this basis for the defendant's argument that the plaintiffs lacked standing.

With respect to the second prong of the aggrievement test and the defendant's related contention that the plaintiffs' claims are not ripe, the defendant maintains that the plaintiffs failed to allege that they have sustained an injury in fact because they did not allege that they have paid funds toward their deductibles. We are not persuaded that the absence of such allegations necessitates the conclusion that the plaintiffs' interest has not been specially affected or that the case presents a hypothetical injury. Moreover, "a party ordinarily establishes standing by alleging an injury [that] he has suffered *or is likely to suffer* . . . ." (Emphasis in original; internal quotation marks omitted.) *Wilcox* v. *Webster Ins., Inc.*, supra, 294 Conn. 218–19 n.17. Thus, we are persuaded by the plaintiffs' argument that "it makes no difference if the plaintiffs were actually out of pocket for the payment of medical expenses covered by the deductible because it is likely that each would require

some form of medical care or prescription payments during the 365 days covered by the deductible payment that was not made." Consequently, the plaintiffs have alleged that their interests in the pension agreement have been injuriously affected by the defendant's failure to pay 50 percent of the deductible as a contribution to their HSAs.

Indulging every presumption in favor of jurisdiction, we conclude that the plaintiffs have satisfied the requirements for demonstrating standing and that their claims are ripe. Accordingly, we conclude that the trial court had subject matter jurisdiction over the action.

II

The defendant next claims that the court improperly denied its motion to strike because the plaintiffs failed to join the union as a necessary party. We are not persuaded.

The following additional procedural history is relevant to our resolution of this claim. On May 6, 2021, the defendant filed a motion to strike the plaintiffs' complaint, alleging, in relevant part, that the complaint was legally insufficient because of the absence of a necessary party, the union.[5] The plaintiffs objected to the motion to strike, and the court, *Swienton*, *J.*, heard argument on September 21, 2021. In its September 29, 2021 order, the court denied the defendant's motion. The court found meritless the defendant's argument that the union was a necessary party to the action to determine the plaintiffs' rights as third-party beneficiaries to the pension agreement. The court reasoned that "[t]he entire controversy is between the [defendant] and the [plaintiffs] who claim, as third-party beneficiaries, that they are entitled to receive certain benefits in

[5] The defendant previously had raised the issue of nonjoinder in a motion to dismiss the plaintiffs' complaint, but it later withdrew that basis for its motion to dismiss.

the same manner as the 'active' police officers." The court determined that it could "proceed to a decree without affecting any rights of the union."

We begin by setting forth the relevant legal principles and standard of review. "Necessary parties . . . are those [p]ersons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. . . . [B]ut if their interests are separable from those of the parties before the court, so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court, the latter are not indispensable parties." (Internal quotation marks omitted.) *Garden Homes Profit Sharing Trust, L.P.* v. *Cyr*, 189 Conn. App. 75, 82 n.4, 206 A.3d 230 (2019). "Practice Book §§ 10-39 and 11-3 . . . provide that a party's exclusive remedy for nonjoinder or for misjoinder of parties is by the filing of a motion to strike." (Emphasis omitted; footnotes omitted.) *Izzo* v. *Quinn*, 170 Conn. App. 631, 640, 155 A.3d 315 (2017). "A motion to strike attacks the legal sufficiency of the allegations in a pleading. . . . In reviewing the sufficiency of the allegations in a complaint, courts are to assume the truth of the facts pleaded therein and to determine whether those facts establish a valid cause of action. . . . Because a motion to strike challenges the legal sufficiency of a pleading, and, consequently, requires no factual findings by the trial court, our review of the court's ruling on [a motion to strike] is plenary." (Internal quotation marks omitted.) *Pelletier Mechanical Services, LLC* v. *G & W Management, Inc.*, 162 Conn. App. 294, 300, 131 A.3d 1189, cert. denied, 320 Conn. 932, 134 A.3d 622 (2016).

The defendant's principal argument in support of its claim that the union was a necessary party is that the

plaintiffs sought "a reformation of the CBA, and the trial court has granted that relief, effectively striking the note in article [22.1 (A) (2)] of the CBA." According to the defendant, the union was a necessary party to the effective reformation of the contract. We are not persuaded that the present action involved a reformation of the CBA agreement such that the union was a necessary party. To the contrary, the present action required the trial court to interpret the benefits provided in the pension agreement in relation to the benefits provided in the CBA to active employees. The judgment rendered by the trial court did not adjust the rights of the active employees in the union.

The defendant also argues that the collective bargaining process "involves the sacrifice of certain positions in negotiation but not others. The inclusion of HSA contributions for active employees demonstrates that those provisions *may be of significant importance* to the union. A declaratory judgment adverse to the [defendant] in this case would have the effect of materially increasing the cost of that benefit, making it more difficult to bargain for in future CBAs." (Emphasis added.) Initially, we note that this argument is being raised for the first time on appeal. The defendant did not argue in support of its motion to strike that a possible impact on future negotiations constituted a sufficiently concrete interest that made the union a necessary party to this action. Furthermore, mere speculation as to the possible effect of the judgment on future negotiations is insufficient to compel the conclusion that the union's rights would be affected such that it is a necessary party to the action.[6] Accordingly, we conclude that the defendant failed to establish that the union was a necessary party to the action and the court

[6] There is nothing in the stipulated record that supports the defendant's assertion that the court's interpretation of the CBA would have any impact on future negotiations between the defendant and the union.

properly denied the defendant's motion to strike the complaint.

III

The defendant's third claim is that the court incorrectly interpreted the language of the CBA to conclude that the defendant was contractually obligated, pursuant to § 16 (C) of the pension agreement, to contribute 50 percent of the deductible amount to the plaintiffs' HSAs. The defendant argues that "the trial court gave the term 'deductible' an overly broad interpretation, far beyond the word's ordinary meaning and usage, as well as the parties' expressed intent," in concluding that the definition of deductible included the manner in which the deductible is funded. We disagree.

We begin our analysis with the applicable standard of review and relevant legal principles regarding contract interpretation. "Principles of contract law guide our interpretation of collective bargaining agreements. . . . When, as in the present case, the trial court based its interpretation solely on the language of the contract, our standard of review is plenary." (Internal quotation marks omitted.) *Gallagher* v. *Fairfield*, 339 Conn. 801, 807, 262 A.3d 742 (2021). "The intent of the parties as expressed in a contract is determined from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction. . . . [T]he intent of the parties is to be ascertained by a fair and reasonable construction of the written words and . . . the language used must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the contract. . . . Where the language of the contract is clear and unambiguous, the contract is to be given effect according to its terms. A court will not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity . . . . Similarly,

any ambiguity in a contract must emanate from the language used in the contract rather than from one party's subjective perception of the terms." (Internal quotation marks omitted.) *Honulik* v. *Greenwich*, 293 Conn. 698, 710, 980 A.2d 880 (2009).

With respect to the defendant's obligation to provide the plaintiffs with health care insurance, § 16 (C) of the pension agreement provides in relevant part: "The nature and scope of coverages, including but not limited to deductibles, co-insurance, co-pays and/or limits, shall be those in effect for active Police Officers, as those coverages, including but not limited to deductibles, co-insurance, co-pays and/or limits, may change from time to time . . . ." As noted previously, because "nature and scope" are not defined in the pension agreement, the court appropriately consulted dictionary definitions to interpret "nature and scope of coverages" to mean that the "essence and extent of the coverages shall be those in effect for active police officers." See *Garcia* v. *Hartford*, 292 Conn. 334, 345, 972 A.2d 706 (2009) ("[w]e ordinarily look to the dictionary definition of a word to ascertain its commonly approved usage").

The court determined that "[c]overage is defined by the CBA to include deductibles. Thus, § 16 (C) of the pension agreement means that active police officers and retirees shall have the same coverage, which includes deductibles." The court went on to determine whether active employees and retirees had the same deductible, in light of the defendant's 50 percent funding of the active employees' deductibles by way of contributions to their HSAs. The court concluded that "[t]he funding of the deductible is part of the essence of the deductible. Indeed, how much a deductible is and who pays for the deductible are two of the most important aspects of a deductible. By virtue of article 22 [of the CBA], the defendant is paying health insurance claims for active police officers by paying [50 percent] of the active police

officers' deductibles. The plaintiffs are not receiving this same treatment. Even setting aside the issue of funding, the court is hard pressed to find that the plaintiffs and the active police officers have the same deductibles. While on paper this may be true, in reality the active police officers are paying $1000 for individuals and $2000 for families while retirees are paying $2000 for individuals and $4000 for families." Accordingly, the court concluded that, by failing to pay 50 percent of the deductible as contributions to the HSAs of the plaintiffs, the defendant breached its obligation to provide them with coverage of the same nature and scope that it provided to active employees.

On appeal, the defendant argues that "HSA contributions, or in-kind payments made to active employees under the CBA, do not constitute 'coverage' or the 'deductible' for four principal reasons: (1) Such a construction unreasonably broadens the plain meanings of these terms; (2) such a conclusion fails to interpret the pension agreement in its proper context as one part of the larger CBA; (3) such an expansive interpretation contravenes the manner in which the federal government regulates HSAs; and (4) such a determination is at odds with sister state court decisions." We examine each argument in turn.

The defendant's first argument requires that we construe the term deductible as used in the pension agreement. "We often consult dictionaries in interpreting contracts . . . to determine whether the ordinary meanings of the words used therein are plain and unambiguous, or conversely, have varying definitions in common parlance." (Internal quotation marks omitted.) *Centerplan Construction Co., LLC* v. *Hartford*, 343 Conn. 368, 396–97, 274 A.3d 51 (2022). Black's Law Dictionary (9th Ed. 2009) p. 475, defines "deductible" as, "[u]nder an insurance policy, the portion of the loss to be borne by the insured before the insurer becomes

liable for payment." This common usage of the term is consistent with the definition set forth in General Statutes § 17b-290 (7), and relied on by our Supreme Court in *NEMS, PLLC* v. *Harvard Pilgrim Health Care of Connecticut, Inc.*, Conn. , , A.3d (2024), which provides that " '[d]eductible' means the amount of out-of-pocket expenses that would be paid for health services on behalf of a member before becoming payable by the insurer . . . ." General Statutes § 17b-290 (7).

We agree with the trial court both that the relevant provision of the pension agreement is unambiguous and that it precludes the defendant from contributing 50 percent of the deductible to active employees' HSAs without making the same contribution to the plaintiffs' HSAs. In other words, the defendant's failure to pay 50 percent of the deductible as a contribution to the plaintiffs' HSAs resulted in the plaintiffs effectively having different deductibles and a different "nature and scope" of coverage from active employees, in contravention of the terms of the pension agreement. Because active employees in effect were obligated to pay only $1000 for individuals or $2000 for families before the defendant, the self-insured employer, begins paying their claims, the active employees' deductibles were less than those of the plaintiffs.

The defendant maintains, however, that the plaintiffs and active employees have the same deductible because the deductible does not include "the source by which the deductible is paid."[7] In support of this contention,

[7] The defendant argues: "These definitions are wholly untethered from the source by which the deductible is paid. The most obvious reason for this is that a deductible exists even if it never needs to be paid. If a person has an insurance plan with a deductible but never makes a claim against the insurance plan, and thus never has need to pay or fund the deductible, the insurance coverage nonetheless has a deductible. If the essence of a deductible is the source by which it is paid, as the trial court held, it could not exist if it does not need to be paid. This is at odds [with] the ordinary usage of the term 'deductible.' Virtually every insured person whose coverage

the defendant argues that a contrary interpretation of the term deductible would mean that, "if the union negotiated an increase in salaries, overtime pay, or shoe allowances to offset rising deductibles, retirees, who undeniably have no right to such things under the CBA, would be able to claim those same cash payments as part of the deductible's funding." We disagree. The defendant did not elect to indirectly compensate its current employees to cover higher employee health care costs by way of any of those unrelated benefits but, rather, negotiated article 22.1 (A) (2) of the CBA to specifically describe the HSA contribution as a "fifty percent . . . contribution toward the funding of the HDHP plan . . . ." (Emphasis omitted.) The hypotheticals the defendant posits simply are not before us. What is before us is a plan by which the defendant expressly reduced the deductible of its current employees by 50 percent but did not do the same for the plaintiffs. Thus, the payment of 50 percent of the deductible as a contribution to an HSA is distinct from other possible benefits that the defendant could have negotiated that would be untethered to the employees' health care insurance.

Furthermore, when, as in the present case, the employer is also the insurer, there is little difference between whether the defendant provides its employees with a lower deductible or funds a portion of the deductible. As previously noted in this opinion, a deductible "means the amount of out-of-pocket expenses that would be paid for health services on behalf of a member before becoming payable by the insurer . . . ." General Statutes § 17b-290 (7). The defendant, as a self-insured employer, in effect bears the first $1000 or $2000 of its current employees' health care costs *before* the employees become responsible for any costs when it deposits one half of the deductible amount in each employee's

includes a deductible would acknowledge its existence regardless of whether a claim against their insurance policy had ever been made."

HSA. Thus, the deductible for which the defendant's current employees actually are responsible is 50 percent of that for which the plaintiffs are responsible.

Finally, the defendant's argument ignores the prefatory language of § 16 (C) of the pension agreement, on which the trial court relied. Section 16 (C) provides in relevant part: "*The nature and scope of coverages, including but not limited to* deductibles . . . shall be those in effect for active Police Officers . . . ." (Emphasis added.) This language is broad and expressly is not limited to the examples, including deductibles, set forth in § 16 (C). Thus, we agree with the trial court that the proper inquiry is whether the nature and scope, i.e., the "essence and extent of the coverages," are the same. Even if we were to agree with the defendant that how the deductible is funded is different than what the deductible is, there is no question that the nature or essence of the coverage the plaintiffs receive is less than that of active police officers.

The defendant's second argument is that the court failed to interpret the pension agreement in its proper context as one part of the larger CBA. Noting that the pension agreement was incorporated into the CBA, the defendant states that the defendant and the union had no reason to address the treatment of contributions to HSAs in the pension agreement because the defendant did not offer an HDHP until 2018. At that time, "the [defendant] and the union specifically considered whether a financial contribution to an HSA fell within the 'nature and scope of coverages' of a health insurance plan since they wrote into the CBA that such a financial contribution does not relate to the underlying plan but rather it relates to the funding of the plan for active employees."[8] Because the language of the pension

[8] Although the defendant mentions article 19 of the pension agreement in the facts section of its principal appellate brief, it argues for the first time in its reply brief that the pension agreement was modified pursuant to article 19 of that agreement, which provides in relevant part that the

agreement is silent as to financial contributions to HSAs, the defendant contends that the CBA addressed a previously unaddressed issue.[9] The defendant additionally relies on general principles of contract interpretation to maintain that the terms of the pension agreement must be interpreted consistently with the CBA. The defendant contends that the court's findings that the HSA contribution is part of the deductible is "wholly inconsistent with" the note in article 22.1 (A) (2) of the CBA.[10]

pension agreement shall continue until a new agreement is signed by the parties and that negotiations must be in accordance with MERA. "It is a well established principle that arguments cannot be raised for the first time in a reply brief." (Internal quotation marks omitted.) *Houghtaling* v. *Commissioner of Correction*, 203 Conn. App. 246, 287, 248 A.3d 4 (2021). Consequently, we decline to consider this argument raised for the first time in the defendant's reply brief.

[9] The defendant cites *Gallagher* v. *Fairfield*, supra, 339 Conn. 812, in support of its argument. In *Gallagher*, a 1985 collective bargaining agreement (1985 CBA) provided that certain retired individuals would be entitled to town paid health insurance coverage. Id., 807–808. Federal law was amended thereafter to permit municipal employees to participate in Medicare. Id., 814. The question before our Supreme Court was whether the town, pursuant to a 2010 collective bargaining agreement, could terminate the retired plaintiff's private health insurance and provide him with comparable town paid Medicare supplemental insurance, while requiring him to pay the cost of his Medicare premiums. Id., 803–804, 808–809.

The court in *Gallagher* agreed with the trial court that the 1985 CBA did not preclude the town from terminating the plaintiff's private health insurance, so long as the town provided him with "substantially similar benefits in the form of supplemental Medicare coverage." Id., 816. Notably, the court rejected the plaintiff's argument that the 1985 CBA required that he be placed on the same health insurance plan as the town's active employees, recognizing that "[t]he term 'active employees' does not appear anywhere in the 1985 CBA . . . ." Id., 810. The court explained: "Although it is reasonable to assume that the parties intended that employees who retired during the three years when the 1985 CBA was in effect would continue to receive the retirement benefits enumerated in article IX [of the 1985 CBA] after the agreement expired in 1987, whether those benefits were to remain static, be pegged to those due to future active employees under future collective bargaining agreements, or be defined in some other manner is never expressly set forth in the agreement." (Emphasis omitted.) Id. *Gallagher*, thus, has little relevance to the present case in which the pension agreement expressly pegged the plaintiffs' benefits to those of active employees.

[10] The defendant additionally contends that the court failed to consider language contained elsewhere in the CBA that "compels a narrower interpre-

The note to article 22.1 (A) (2) of the CBA provides that the defendant's 50 percent "contribution toward the funding of the HDHP plan is not an element of the underlying insurance plan, but rather relates to the manner in which the deductible shall be funded for active employees. The [defendant] shall have no obligation to fund any portion of the HDHP deductible for retirees . . . ." (Emphasis omitted.) We are not persuaded by the defendant's arguments that the note to article 22.1 (A) (2) of the CBA constituted a clarification of the pension agreement or that it resolved a previously unaddressed issue. Instead, the language of the pension agreement is broad enough, considering the definition of deductible, in light of the "nature and scope" prefatory language, to contemplate that the defendant could not avoid its obligation to provide the same coverage by giving active employees targeted dollars to pay their deductible as opposed to giving them a reduced deductible. Such a conclusion would render the "nature and scope" and "but not limited to" language of § 16 (C) of the pension agreement meaningless.

Moreover, as the plaintiffs argue with respect to the note to article 22.1 (A) (2) of the CBA, "[a] statement claiming [that] contributions to the HDHP deductible are not elements does not show [that] the parties agreed to modify the terms of the . . . pension agreement," in that the pension agreement does not refer to "elements" of health insurance.

tation of the terms 'coverage' and 'deductible.' " Specifically, the defendant argues that, because retirees are obligated to pay a greater percentage of their insurance premiums than active employees, the "only reasonable conclusion to be drawn from this premium structure is that the parties to the CBA meant to provide the same coverage, with the same deductible amount, but at disparate costs." We are not persuaded by the defendant's argument. As the trial court noted, § 16 (F) of the pension agreement expressly sets forth the percentages of the premiums to be paid by retirees. Thus, in contrast with deductibles, the pension agreement contemplated different costs of premiums for retirees and for active employees.

The defendant's third argument is that an expansive interpretation of the term deductible to account for the HSA contributions "contravenes the manner in which the federal government regulates HSAs . . . ." In support of this argument, the defendant maintains that HSA funds can be used on items other than the payment of deductibles. The plaintiffs respond by emphasizing that this argument was not raised before the trial court and it "relies upon information that is not in the record . . . ." We agree with the plaintiffs. Both the joint stipulation and the posttrial briefs submitted to the trial court are devoid of any facts or argument regarding the manner in which HSA funds may be used.[11] Thus, the trial court was not apprised of the defendant's position, raised for the first time on appeal, that the nature of the HSA funds should be considered in determining whether the plaintiffs received the same deductible as active employees. In addition, the plaintiffs were never given an opportunity to address this argument in the trial court. Consequently, allowing the defendant to raise the argument now would constitute trial by ambuscade. See *Martin* v. *Todd Arthurs Co.*, 225 Conn. App. 844, 855, 317 A.3d 98 (2024) ("to permit a party to raise a claim on appeal that has not been raised at trial—

[11] As noted previously, the joint stipulation's facts related to HSAs are limited to the following statements: "Participants in an HDHP are eligible under the Internal Revenue Code (IRC) § 223, to open and maintain a tax favored [HSA]. . . . Enrollment in an HDHP does not require a participant to open an HSA, but the HDHP participant has the option to do so. . . . Article 22.1 (A) (2) of the CBA expressly requires that active employees open and maintain an HSA in conjunction with their enrollment in the HDHP. . . . There is no requirement that any retiree (e.g., any plaintiff) open and maintain an HSA in conjunction with the HDHP; but retirees, including the plaintiffs, may have that option. . . . An HSA is a personally established and owned private bank account that a participant opens and maintains at a bank of their choosing. . . . Similar to the procedures for 'direct deposit' for payment of regular wages (active employees) or monthly pension payments (retirees), an individual provides the [defendant] with a 'direct deposit' authorization form for payment of any funds the individual wishes to have withheld from their wages/payments and directed to their HSA."

after it is too late for the trial court or the opposing party 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)). Finally, we are in no position to assess the defendant's factual assertions when there is no evidence in the record to support them. Accordingly, we conclude that we cannot address this argument because of an inadequate record. See *D2E Holdings, LLC* v. *Corp. for Urban Home Ownership of New Haven*, 212 Conn. App. 694, 709, 277 A.3d 261 (record was inadequate to consider argument on appeal), cert. denied, 345 Conn. 904, 282 A.3d 981 (2022).

The defendant's fourth and final argument relies on nonbinding authority from the Wisconsin Court of Appeals. In *Wisconsin Professional Police Assn.* v. *Wisconsin Employment Relations Commission*, 352 Wis. 2d 218, 221, 841 N.W.2d 839 (App. 2013), the court considered two statutory limitations on public sector collective bargaining under the Wisconsin Municipal Employment Relations Act (Wisconsin act), Wis. Stat. § 11.70 (2011–2012), as amended by 2011 Wis. Act 32. The Wisconsin act prohibited bargaining regarding "[t]he design and selection of health care coverage plans by the municipal employer for public safety employees" and regarding "the impact of the design and selection of the health care coverage plans on the wages, hours, and conditions of employment of the public safety employee." (Internal quotation marks omitted.) Id., 222–23. Eau Claire County (county) selected a medical benefit plan, which set deductibles for individuals and families, covering the deputy sheriffs employed by the county. Id., 223. The association representing the deputy sheriffs (association) made a proposal pursuant to which the deputy sheriffs would pay the first portion of the deductible in the amounts of $250 for single persons or $500 for families. Id., 223–24. In response,

the county maintained that the proposal concerned a subject that could not be bargained under the Wisconsin act. Id., 224.

The county and the association jointly sought from the Wisconsin Employment Relations Commission (commission) a declaratory ruling as to whether the proposal addressed a prohibited subject, and the commission concluded that it did. Id. The circuit court reversed the commission's decision, and the commission and the county appealed. Id. On appeal, the court concluded that "the only reasonable interpretation is that the [Wisconsin act] does not prohibit bargaining regarding" what it termed the "deductible payment allocation"; id., 226; that is, "the allocation of responsibility between employees and employers to pay deductibles required under a health care coverage plan."[12] Id., 222.

The court proceeded with its statutory interpretation, relying on the following premises: "[T]he [c]ounty is free to design and select, in any manner it chooses and without negotiation with the [a]ssociation, a plan that includes no deductibles or deductibles of any amount. That is, the existence and amounts of deductibles are elements of a plan, or elements of plan design, that the [c]ounty may unilaterally create or pick in any way." Id., 232. Thus, the dispute centered on whether the deductible payment allocations were elements of "health care coverage plans . . . ." (Internal quotation marks omitted.) Id. The court concluded, as a matter of plain language interpretation, that they were not.

[12] The court in *Wisconsin Professional Police Assn.* v. *Wisconsin Employment Relations Commission*, supra, 352 Wis. 2d 230, first identified a point of agreement between the parties, specifically, that the "design and selection of . . . plans" language in the Wisconsin act "covers the decision as to whether a plan will have deductibles, and if so, in what amounts. Consistent with this understanding, the [a]ssociation did not propose bargaining with the [c]ounty over the existence or size of the deductibles in the plan selected by the [c]ounty, and does not now suggest that this is a mandatory bargaining subject." (Internal quotation marks omitted.)

Id. Specifically, the court reasoned that health care coverage plans address the rights and obligations flowing between the insurer and the insured and that any element of a plan must concern these rights and obligations. Id., 233. Although a deductible concerns these rights and obligations, the court found the deductible payment allocation to be extrinsic to these rights and obligations because it is "an allocation not between insurer and insured, but between employer and employee." Id. The defendant in the present case also quotes an unpublished Wisconsin decision that relies on *Wisconsin Professional Police Assn.* to conclude that "the allocation between [Manitowoc] County and its employees of payments made into an employee's HSA is not an element of the 'health care coverage plan' designed and selected by [Manitowoc] County and is therefore not a prohibited subject of bargaining." *Manitowoc County Sheriff Dept. Employees* v. *Manitowoc County*, Docket No. 2013AP1, 2015 WL 13123098, *2 (Wis. App. March 4, 2015), review denied, 865 N.W.2d 502 (Wis. 2015).

We are not persuaded by the nonbinding authority cited by the defendant. First, we disagree with the defendant that the issue considered by the Wisconsin Court of Appeals was "precisely the same as the one at bar." The Wisconsin court was tasked with interpreting a statute containing different prefatory language than that at issue in the present case. Specifically, the Wisconsin act prohibited bargaining regarding "the design and selection of health care coverage plans" and the court, in conducting its analysis, considered whether the deductible payment allocation constituted an "element" of a health care coverage plan. (Emphasis omitted; internal quotation marks omitted.) *Wisconsin Professional Police Assn.* v. *Wisconsin Employment Relations Commission*, supra, 352 Wis. 2d 231–32. This analysis contrasts with the question presented before

this court, namely, whether "the nature and scope of coverages, including but not limited to deductibles" are the same for the plaintiffs as for the active employees where the defendant funds 50 percent of the active employees' deductibles through HSA contributions.

Wisconsin Professional Police Assn. is distinguishable in another important respect. Its reasoning was premised on the relationship between three parties—the employer, the insured employee, and an insurer. See *Wisconsin Professional Police Assn.* v. *Wisconsin Employment Relations Commission*, supra, 352 Wis. 2d 233. Indeed, the court determined that the deductible payment allocation was "extrinsic" to the rights and obligations between the insurer and the insured because it is "an allocation not between insurer and insured, but between employer and employee." Id. As the parties in the present case stated in their joint stipulation, the defendant "self-insures its group health insurance benefits. . . . [Anthem], through an administrative services contract with the [defendant], administers the benefits on the [defendant's] behalf. . . . As a town offering self-insured health benefits to its employees and retirees, the [defendant] does not pay any portion of a 'premium' to Anthem but is billed by Anthem for the total cost of all claims made by active employees and retirees for health insurance benefits together with an administrative fee collected by Anthem, as the administrator." Thus, the present case is factually distinguishable from *Wisconsin Professional Police Assn.* because the defendant is both the employer and the insurer, and its payment of 50 percent of the deductible into the active employees' HSAs means that the defendant effectively pays the first $1000 or $2000 of costs before the active employees use the portion of the deductible that they funded.

For the foregoing reasons, we conclude that the trial court correctly determined that the defendant's payment of 50 percent of the deductible as a contribution

to only the active employees' HSAs contravenes the terms of the pension agreement because the effect of the defendant's action is that the plaintiffs do not receive the same "nature and scope of coverages, including but not limited to deductibles," as active employees.

IV

The defendant's final claim on appeal is that the court erred in awarding damages to the plaintiffs. Specifically, the defendant argues that the court's damages award "places the plaintiffs in a materially better position than they would have been had they been paid HSA contributions or other in-kind payments." We are not persuaded.

The following additional procedural history is relevant. As noted previously, the court, in its memorandum of decision, ordered the parties to submit briefs addressing damages. The plaintiffs, in their brief, in addition to requesting prejudgment interest and attorney's fees, argued that they were entitled to HSA contributions for five years beginning in 2018. In its brief, the defendant argued, inter alia, that the plaintiffs were not entitled to the full amount of the HSA contributions on the basis of the following stipulated fact: "Following the move of all active police officers and retirees from the PPO plan to the HDHP in 2018, the Allocated Rate for the active police officers, compared to the Allocated Rate for the retirees, in each of the 'Single,' 'Two-Person' and 'Family' categories is approximately 6.5 percent more for active police officers in each of the fiscal years listed." According to the defendant, because the plaintiffs would have been charged higher Allocated Rates for their health insurance premiums had they received the HSA contributions, the defendant was entitled to offset the HSA contributions to cover the percentage of the higher Allocated Rates that the plaintiffs would have paid. The plaintiffs responded that, because

"the financial benefit justifying the upward adjustment was not paid by the employer to benefit the participant in the applicable plan year, it is apparent that the underlying condition justifying the rate increase did not occur." Specifically, the plaintiffs referred the court to the joint stipulation, which provided the explanation for the difference in the Allocated Rate, specifically, that " '[t]he Allocated Rate, per Anthem, is adjusted (increased) to account for a reduction in consumerism on the part of the participants who receive financial funding to their [HSAs] from their employer. The percentage of the upward adjustment in the base Allocated Rate for such participants is dependent on the financial benefit paid by the employer to the participant.' " According to the plaintiffs, "[i]t must be presumed that there was no 'reduction in consumerism' in the plaintiffs' spending on health care costs to warrant the premium increase because the plaintiffs did not receive the benefit in the applicable plan year." The court held a hearing on February 16, 2023. In its May 2, 2023 order, the court declined to deduct the 6.5 percent increase in premium from its award of the HSA contributions.

On appeal, the defendant's claim with respect to damages is limited to its contention that the court erred in declining to deduct the 6.5 percent from the plaintiffs' damages. We begin with the applicable standard of review. "As a general matter, [t]he trial court has broad discretion in determining whether damages are appropriate. . . . Its decision will not be disturbed on appeal absent a clear abuse of discretion."[13] (Internal quotation marks omitted.) *Wall Systems, Inc.* v. *Pompa*, 324 Conn. 718, 729, 154 A.3d 989 (2017).

[13] The defendant contends that the proper standard of review of the court's award of damages is plenary. We disagree, as the defendant's claim does not present questions of law but, rather, challenges the propriety of the court's damages award. Thus, the abuse of discretion standard is appropriate.

With this deferential standard in mind, we conclude that the damages award was appropriate. The court expressly rejected the defendant's contention that it was entitled to an offset for the 6.5 percent increase in premium that the plaintiffs would have incurred had they received the HSA contributions. This rejection was supported by the undisputed evidence that the increase in premium was "to account for a reduction in consumerism on the part of [the] participants who receive financial funding to [their HSAs] from their employer." Thus, we are persuaded by the plaintiffs' argument that, because they did not receive the benefit of the contributions to their HSAs in real time, the justification of a reduction in consumerism underlying the premium increase did not occur and the reduction should not be applied retroactively to them. Accordingly, we conclude that the court did not abuse its discretion in awarding damages.

V

In their cross appeal, the plaintiffs claim that the court abused its discretion in denying their request for attorney's fees as a sanction for the defendant's bad faith litigation conduct. We are not persuaded.

The following additional procedural history is relevant to our resolution of this claim. On November 21, 2019, the plaintiffs filed a motion for sanctions and a memorandum of law in support. Therein, they sought recovery of attorney's fees incurred in responding to the defendant's motion to dismiss, which they alleged raised baseless claims that were without factual support and were contrary to controlling precedent.[14] The defendant filed an objection and a memorandum of law in

[14] The plaintiffs also alleged that the "defendant engaged in deceitful conduct to obtain a postponement of [a] hearing scheduled for December 17, 2018, at which time the plaintiff[s] would have (at the very least) been able to obtain a ruling on subpoenaed documents. The defendant then refused to abide by the agreement to provide documents subpoenaed, which was a prerequisite to the plaintiffs' agreement that led to the postponement of the hearing on December 17, 2018."

opposition to the motion for sanctions. The court, *Swienton, J.*, denied the motion, stating that it could not find that the defendant had acted in bad faith in moving to dismiss the plaintiffs' complaint. In their January 27, 2023 posttrial brief addressing damages and attorney's fees, the plaintiffs reiterated their claimed entitlement to sanctions related to the defendant's motion to dismiss, which the defendant disputed in its posttrial brief. The court held a hearing on February 16, 2023, during which both parties presented argument with respect to attorney's fees.[15]

In its May 2, 2023 order, the court declined to award attorney's fees because the plaintiffs failed to establish that the defendant had acted in bad faith. Specifically, the court stated: "The record does not reflect clear evidence that the challenged acts by the defendant are entirely without color or that the acts were taken for reasons of harassment or delay or for other improper purposes. . . . Indeed, both sides made arguments in good faith to the court regarding the interpretation of the pension agreement and the CBA." (Citation omitted.)

We begin our analysis by setting forth the relevant legal principles regarding awards of attorney's fees for litigation misconduct. "[T]his state follows the general rule that, except as provided by statute or in certain defined exceptional circumstances, the prevailing litigant is ordinarily not entitled to collect a reasonable [attorney's] fee from the loser. . . . That rule does not apply, however, where the opposing party has acted in bad faith. . . . It is generally accepted that the court

[15] The plaintiffs' counsel stated: "I know that the motion for sanctions has already been decided and would be considered the law of the case and, of course, Your [Honor is] not bound by the law of the case if Your Honor believes a different decision would be made, but I suspect that if I have—that the only review of that decision . . . for me or my clients would be on appeal."

has the 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. . . .

"We have explained that, in order to impose sanctions under the bad faith exception, the trial court must find both that the litigant's claims were entirely without color and that the litigant acted in bad faith. . . . The court must make these findings with a high degree of specificity . . . . The requirement of an independent finding that the challenged actions or claims are entirely without color ensures that fear of an award of [attorney's] fees against them will not deter persons with colorable claims from pursuing those claims . . . . The requirement of that independent finding means that, if a court concludes that a claim is colorable, it cannot award attorney's fees, even if the court were to conclude that the person against whom sanctions are sought acted in bad faith. When, as in the present case, the actor's bad faith is predicated on the theory that he knowingly brought claims entirely lacking in color, colorability and bad faith are, by necessity, closely linked. . . .

"Colorability is measured by an objective standard, whereas bad faith is measured by a subjective one. Colorability focuses on the merits of the claim. A colorable claim is defined as one that is legitimate and that may reasonably be asserted, given the facts presented and the current law (or a reasonable and logical extension or modification of the current law). . . . Put another way, a claim is colorable if, given the facts presented and the current law (or a reasonable extension thereof), the claim arguably has merit. Although we have stated that the standard for colorability varies

depending on whether the person against whom sanctions are sought is a party or the party's attorney . . . the inquiry is the same in either case. As the United States Court of Appeals for the Second Circuit has explained, [a] claim is colorable, for the purpose of the bad faith exception, when it has some legal and factual support, considered in light of the reasonable beliefs of the individual making the claim. . . . Put simply, the colorability inquiry asks whether there is a reasonable basis, given the facts, for bringing the claim, regardless of whether it is brought by an attorney or a party.

"A determination of bad faith, by contrast, rather than focusing on the objective, reasonable beliefs of the person against whom sanctions are sought, focuses on subjective intent. We have emphasized that, in determining whether a party has engaged in bad faith, [t]he appropriate focus for the court . . . is the conduct of the party in instigating or maintaining the litigation. . . . From that conduct, the court may infer the subjective intent of the person against whom sanctions are sought. Some examples of evidence that would support a finding of bad faith include a party's use of oppressive tactics or its wilful violations of court orders . . . or a finding that the challenged actions [are taken] for reasons of harassment or delay or for other improper purposes . . . ." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Lederle* v. *Spivey*, 332 Conn. 837, 843–46, 213 A.3d 481 (2019).[16]

[16] The plaintiffs rely on *Lederle* v. *Spivey*, supra, 332 Conn. 846, in support of their claim that the court abused its discretion in declining to award attorney's fees. We note that our Supreme Court in *Lederle* applied the appropriate deferential standard of review to conclude that the trial court did not abuse its discretion in awarding attorney's fees. Id. In contrast, the plaintiffs in the present case must overcome the high hurdle of establishing an abuse of discretion. See *Jacques* v. *Jacques*, 223 Conn. App. 501, 510, 309 A.3d 372 (2024) ("[u]nder the abuse of discretion standard of review, [w]e will make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion" (internal quotation marks omitted)). The plaintiffs have not cited any cases in which our appellate courts have determined that a trial court abused its discretion

"Generally, we apply the abuse of discretion standard when reviewing a trial court's decision to deny an award of attorney's fees. Under the abuse of discretion standard of review, [w]e will make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion. . . . [Thus, our] review of such rulings is limited to the questions of whether the trial court correctly applied the law and reasonably could have reached the conclusion that it did." (Internal quotation marks omitted.) *Barber* v. *Barber*, 193 Conn. App. 190, 203–204, 219 A.3d 378 (2019).

In the present case, the court accurately set forth the relevant legal standard in denying the plaintiffs' request for attorney's fees. See *Cokic* v. *Fiore Powersports, LLC*, 222 Conn. App. 216, 229, 304 A.3d 179 (2023). The court then made findings that the plaintiffs failed to prove both that the defendant's claims were entirely without color and that the defendant acted in bad faith. As noted previously, the plaintiffs' failure to prove either prong required the court to deny their request for attorney's fees. See *Berzins* v. *Berzins*, 306 Conn. 651, 663, 51 A.3d 941 (2012) (reversing judgment awarding attorney's fees because, although court found administrator's actions were without color, it did not make separate finding that administrator acted in bad faith).

The defendant responds to the plaintiffs' claim by maintaining that the plaintiffs' failure to offer any evidence in support of their request for attorney's fees "deprived the court of any basis on which to find that the [defendant's] claims were not colorable, let alone that they were made with subjective bad faith." The plaintiffs, in their reply brief, acknowledged that they

in declining to award attorney's fees in response to a claim of bad faith litigation conduct.

had received a hearing on their motions for sanctions and that they did not request to present evidence. They maintain that evidence was unnecessary because their motion for sanctions was based on the defendant's claims as raised in its motion to dismiss. On this record, we conclude that the plaintiffs have not sustained their burden of demonstrating that the court abused its discretion in denying their request for attorney's fees because the court reasonably could have determined that the plaintiffs failed to prove both that the defendant's claims, as raised in its motion to dismiss, were entirely without color and that the defendant acted in bad faith.[17] See *Jacques* v. *Jacques*, 223 Conn. App. 501, 516, 309 A.3d 372 (2024) ("[c]onclusory statements that the plaintiff lacked a colorable claim or acted in bad faith are not sufficient to meet the high threshold required under our law").

Accordingly, we conclude that the court did not abuse its discretion in declining to award attorney's fees.

The judgment is affirmed.

In this opinion the other judges concurred.

THE CROSSING CONDOMINIUM ASSOCIATION, INC. *v.* JOSEPHINE S. MILLER ET AL.
(AC 46334)

U.S. BANK TRUST, N.A., TRUSTEE *v.* JOSEPHINE S. MILLER ET AL.
(AC 46586)

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

Syllabus

The defendant, in two separate appeals, appealed from the judgment of the trial court denying her motion to open and vacate the judgment of foreclosure

[17] In light of our conclusion, we need not address the defendant's contention that the plaintiffs' motion improperly failed to specify whether the award for attorney's fees was sought against the defendant or its counsel.

rendered for the plaintiff condominium association in connection with a statutory lien (§ 47-258) for unpaid common assessments, and from the judgment of foreclosure by sale rendered by the trial court for the plaintiff bank in a mortgage foreclosure action. The defendant claimed in each appeal, inter alia, that the trial court abused its discretion. *Held*:

The trial court did not abuse its discretion in denying the defendant's motion to open and vacate the judgment of foreclosure by sale in the lien foreclosure action, as an erroneous statement in the court's written orders was a scrivener's error and was not raised or discussed during the lien foreclosure proceeding.

The trial court did not abuse its discretion in ordering a judgment of foreclosure by sale in the mortgage foreclosure action; contrary to the defendant's claim, the sale of the property to the bank in connection with the lien foreclosure action was never approved by the court, as the committee for sale withdrew its motion to approve the sale due to the pendency of the defendant's appeal to this court in the lien foreclosure action.

Argued May 30—officially released October 1, 2024

Procedural History

Action, in the first case, to foreclose a statutory lien on certain real property of the named defendant, and for other relief, brought to the Superior Court in the judicial district of Danbury, where the named defendant was defaulted for failure to plead, and action, in the second case, to foreclose a mortgage on certain real property of the named defendant, and for other relief, brought to the Superior Court in the judicial district of Danbury; thereafter, in the first case, the court, *Shaban*, *J.*, rendered a judgment of foreclosure by sale and denied the named defendant's motion to open the judgment, and the named defendant appealed to this court; subsequently, in the second case, the court, *Shaban*, *J.*, granted the plaintiff's motion for summary judgment and rendered a judgment of foreclosure by sale, from which the named defendant appealed to this court. *Affirmed.*

Josephine S. Miller, self-represented, the appellant in both appeals (named defendant).

Jonathan W. Fazzino, with whom, on the brief, were *Alexander Copp* and *Joshua Pedreira*, for the appellee in Docket No. 46334 (plaintiff).

Benjamin T. Staskiewicz, for the appellee in Docket No. 46586 (plaintiff).

Opinion

ELGO, J. These related appeals brought by the self-represented defendant, Josephine S. Miller, concern two distinct foreclosure proceedings involving the same real property. In Docket No. AC 46334, the defendant appeals from the judgment of foreclosure by sale rendered by the trial court in favor of The Crossing Condominium Association, Inc. (association), claiming that the court abused its discretion in denying her motion to open and vacate that judgment.[1] In Docket No. AC 46586, the defendant appeals from the judgment of foreclosure by sale rendered by the trial court in favor of the plaintiff, U.S. Bank Trust, N.A., as trustee for LSF9 Master Participation Trust (bank), claiming that the court abused its discretion in so doing.[2] We affirm the judgments of the trial court.

The relevant facts in AC 46334 are largely undisputed. The association is a common interest community; see General Statutes § 47-202 (9); located in Danbury. At all relevant times, the defendant was a member of that common interest community by virtue of her ownership

[1] Also named as defendants in the complaint underlying the appeal in AC 46334 were U.S. Bank Trust, N.A., as Trustee for LSF9 Master Participation Trust, the United States Department of the Treasury–Internal Revenue Service, the Connecticut Department of Revenue Services, and Danbury Hospital. Those parties were defaulted shortly after the action commenced and have not participated in the appeal in AC 46334.

[2] The complaint underlying the appeal in AC 46586 also named the Connecticut Department of Revenue Services, Danbury Hospital, the United States Department of the Treasury–Internal Revenue Service, and the association as defendants. Those parties were defaulted after the action commenced and have not participated in the appeal in AC 46586.

of a unit therein, known as 130 Deer Hill Avenue, Unit 13-B (property). When she failed to pay certain common assessments, the association filed a statutory lien on the property. See, e.g., *Coach Run Condominium, Inc.* v. *Furniss*, 136 Conn. App. 698, 704, 47 A.3d 413 (2012) (condominium associations are authorized to impose statutory liens on units for unpaid assessments "[t]o protect the financial integrity of common interest communities").

In June, 2021, the association brought an action to foreclose on the statutory lien on the property pursuant to General Statutes § 47-258 (lien foreclosure action). On August 10, 2021, the defendant was defaulted due to her failure to plead. See General Statutes § 52-119; Practice Book §§ 10-8 and 17-32. The court thereafter rendered a judgment of foreclosure by sale on September 27, 2021.

On October 14, 2021, the defendant notified the court that she had filed a bankruptcy petition pursuant to chapter 13 of the United States Bankruptcy Code, which resulted in an automatic stay of the lien foreclosure action. After the association obtained relief from that automatic stay, it filed a motion to open the judgment of foreclosure by sale on September 9, 2022. The court held a hearing on the association's motion, in which both parties participated. On November 14, 2022, the court issued an order opening and modifying the foreclosure judgment, finding the total debt and fees to be $25,524 and setting a March 18, 2023 sale date. In that order, the court incorrectly stated that the association was "the holder of the original note and the assignee of the mortgage."[3]

[3] It is undisputed that, at all relevant times, U.S. Bank Trust, N.A., as Trustee for LSF9 Master Participation Trust, was the holder of the note and assignee of the mortgage in question. The association's counsel stated at a March 17, 2023 hearing: "[I]t has never been our position, throughout this entire foreclosure process, that we had been the holder of the note, that we are foreclosing on a mortgage on the property. We have always established from the outset that this is a foreclosure to account for unpaid

On December 21, 2022, the association filed a notice of judgment, in which it averred that the total debt and fees equaled $27,749. On February 3, 2023, the court issued a supplemental order on the association's motion to open the judgment of foreclosure by sale. Other than adjusting the dates on which the committee could incur expenses, that order was identical to its November 14, 2022 order. Notably, the total debt and fees specified in the February 3, 2023 order remained $25,524—the same figure specified in the court's November 14, 2022 order. A copy of the February 3, 2023 order was furnished to the defendant by the court.

Two days before the scheduled sale date of March 18, 2023, the defendant filed a motion to open and vacate the judgment of foreclosure by sale. The court held a hearing the following day, at which the defendant explained that her motion was predicated (1) on the incorrect statement in the court's November 14, 2022 and February 3, 2023 orders that the association was "the holder of the original note and the assignee of the mortgage" and (2) on the association's failure to provide her notice of the court's February 3, 2023 order in accordance with the standing orders for foreclosures by sale.

At that time, the court noted that the November 14, 2022 hearing had been conducted remotely and that the association's status as the holder of the note or assignee of the mortgage was never discussed during that hearing. The court acknowledged that the statement in its November 14, 2022 and February 3, 2023 orders that the association was the holder of the original note and the assignee of the mortgage was "incorrect"; see footnote 3 of this opinion; and then stated that it went "back and listen[ed] to . . . a recording of the [November 14, 2022 hearing], and the court never said those words.

common charges that are due on the property. This is a statutory foreclosure and at no point have we misrepresented that."

I think the error came about due to a template that sometimes is used in foreclosure matters and may have been incorrectly rolled into this judgment. . . . [T]o the extent that it may be viewed as a scrivener's error, there's certainly some merit to that . . . . But it's clear that [the transcript reflects] what judgment was actually entered on the day of the hearing before the court." The court then furnished a copy of the transcript of the November 14, 2022 hearing to the parties and took a recess to allow them an opportunity for review.[4]

When the hearing resumed, the defendant and the association's counsel both confirmed that they had reviewed the November 14, 2022 transcript, a copy of which was marked as court exhibit 1. The court noted for the record that, "contrary to [what was] in the [November 14, 2022 and February 3, 2023 orders] where it said the [association] is the holder of the original note and the assignee of the mortgage, [the court] did not say those words at the time of the hearing, as referenced in the transcript." The court then asked the defendant if she took "issue with that at all"; the defendant replied, "No, Your Honor."

The court then posed the following question to the defendant: "[H]ow would proceeding with the sale be prejudicial to you in light of the fact that those words were [included in the November 14, 2022 and February 3, 2023 orders], though at the actual hearing they were never recited?" In response, the defendant stated that the notice of judgment filed by the association on December 21, 2023 "conflicted with what the court ordered."[5] The defendant thus stated that she was confused "in terms of what is the actual amount that would

[4] The November 14, 2022 transcript totals seven pages in length. It contains no reference whatsoever to the holder of the note or the assignee of the mortgage on the property.

[5] We reiterate that, in its December 21, 2022 notice of judgment, the association averred that the total debt and fees equaled $27,749. Despite that averment, the total debt and fees specified in the court's February 3,

be expected to be paid off prior to a sale going forward. . . . [I]t is not clear to me what the amount of the debt is."

In response, the court noted that the defendant had not raised any such issue in her motion to open. The court further noted the total debt and fees specified in the court's February 3, 2023 order "are the same numbers [and are] consistent with" those specified by the court on November 14, 2022. The court also observed that, at the conclusion of the November 14, 2022 hearing, it specifically asked the defendant if she had any questions or if she believed that the court had overlooked anything, and the defendant had answered in the negative.

The defendant then argued that "[t]here is nothing on the docket sheet to show" that the association had provided her with notice of the court's February 3, 2023 order.[6] In response, the association's counsel stated that the defendant did not raise that notice issue in her motion to open. At the conclusion of the hearing, the court asked the defendant what remedy she was seeking. The defendant stated that she was asking the court to "vacate the judgment, correct these errors, and set a new sale date."

By order dated March 17, 2023, the court denied the defendant's motion to open the judgment of foreclosure by sale. In that order, the court stated in relevant part: "Practice Book § 17-4 vests discretion in the trial court to determine whether there is a good and compelling reason to modify or vacate its judgment. . . . No good or compelling reason has been provided to the court

2023 order nonetheless remained $25,524—the same figure specified in the court's prior order on November 14, 2022.

[6] The record before us reflects that the court sent a copy of its February 3, 2023 order to the defendant on that date. At oral argument before this court, the defendant was asked if she had received that judicial notice. She answered: "I am pretty sure I did get it."

which would lead it to the conclusion that the judgment should be reopened. . . . [A]t the November 14, 2022 hearing, the court specifically inquired of each counsel including the defendant as to whether the court had overlooked any aspect of the consideration of the [association's] motion to reset the law days and the court's findings. Each party, including the defendant, replied that they were not aware of anything being overlooked. . . . Further, the error complained of by the defendant as to the wording of the judgment which referenced that the [association] was the holder of the original note and assignee of the mortgage was a scrivener's error. To vacate the judgment on that basis would elevate form over substance, especially given that the defendant was present at the time the judgment was placed on the record and heard it recited as set forth in the transcript of that proceeding filed with the court during the present hearing. The court acknowledges the error in the written notice issued in that the [association] was the condominium association seeking to foreclose on the property due to delinquent common charges. However, the error was harmless as it did not affect the findings as to the fair market value of the property, the debt and expenses found, and the date of the sale. . . . [W]hether or not the language was present, the terms of the judgment would have been the same.

"Lastly, the court notes that the defendant suffers no prejudice from the denial of the motion in that, because the Unites States is a party, a sale of the property is mandated by law. To cancel the sale and order another sale would only increase the costs and expenses incurred by defendant should she ultimately elect to redeem. This would be to her financial detriment. At the hearing on the present motion, the defendant indicated, in part, the judgment should be opened because it was unclear from the notice issued what the actual

debt was. This is unavailing as the defendant was present when the debt was found by the court and announced as part of its judgment. Moreover, her argument rings hollow at this point in time as there was no evidence presented at the hearing on her motion that she had ever inquired of the [association] since the date of the judgment as to what the outstanding debt was with respect to possible redemption of the property and payment of the outstanding balance." (Citations omitted.)

I

In AC 46334, the defendant claims that the court abused its discretion by denying her motion to open and vacate the judgment of foreclosure by sale in the lien foreclosure action. We do not agree.

"The standard of review of [a denial of a motion to open] a judgment of foreclosure by sale . . . is whether the trial court abused its discretion." (Internal quotation marks omitted.) *Milford* v. *Recycling, Inc.*, 213 Conn. App. 306, 309, 278 A.3d 1119, cert. denied, 345 Conn. 906, 282 A.3d 981 (2022). "A foreclosure action is an equitable proceeding. . . . The determination of what equity requires is a matter for the discretion of the trial court. . . . In determining whether the trial court has abused its discretion, we must make every reasonable presumption in favor of the correctness of its action. . . . Our review of a trial court's exercise of the legal discretion vested in it is limited to the questions of whether the trial court correctly applied the law and could reasonably have reached the conclusion that it did." (Internal quotation marks omitted.) *Federal Deposit Ins. Corp.* v. *Owen*, 88 Conn. App. 806, 811–12, 873 A.2d 1003, cert. denied, 275 Conn. 902, 882 A.2d 670 (2005).

Our review of the record convinces us that the court was well within its discretion to deny the defendant's

motion to open. A review of the record—and the transcripts of the November 14, 2022 and March 17, 2023 hearings in particular—demonstrates that the erroneous statement contained in the court's November 14, 2022 and February 3, 2023 written orders regarding the holder of the note and assignee of the mortgage was the result of a scrivener's error, as that issue was neither raised nor discussed at any time during this statutory lien foreclosure proceeding. Moreover, the defendant at all times was aware that the association was pursuing that action in its capacity as a common interest community to recover common assessments due to it, as the complaint plainly indicates.

Equally unavailing is the defendant's contention that the plaintiff failed to comply with the court's standing orders by failing to provide her notice of the court's February 3, 2023 order modifying the foreclosure judgment. To be sure, those standing orders, available on the Judicial Branch website, require notice by certified mail of the entry of a judgment of foreclosure by sale "to all *nonappearing* defendant owners of the equity . . . ." (Emphasis added.) Uniform Standing Orders for Foreclosure by Sale, Form JD-CV-79. See Official Court Webforms, Form JD-CV-79, available at https://www.jud.ct.gov/webforms/forms/CV079.pdf (last visited September 25, 2024). That notice provision has no application in the present case, as the defendant appeared and actively participated in the lien foreclosure action. Furthermore, it is undisputed that the defendant received a copy of the February 3, 2023 order in question via judicial notice, as she confirmed at oral argument before this court. See footnote 6 of this opinion. For those reasons, we conclude that the court did not abuse its discretion in denying the defendant's motion to open and vacate the judgment of foreclosure by sale in the lien foreclosure action.

II

In AC 46586, the defendant claims that the court abused its discretion by rendering a judgment of foreclosure by sale in a separate foreclosure action. We disagree.

The following additional facts are relevant to that claim. Approximately two months after the association commenced the lien foreclosure action that is the subject of the appeal in AC 46334, the bank commenced this action to foreclose on a promissory note secured by a mortgage deed on the property (mortgage foreclosure action). The defendant filed an appearance on October 5, 2021. On October 14, 2021, the defendant filed a notice that she had filed a bankruptcy petition pursuant to chapter 13 of the United States Bankruptcy Code, which resulted in an automatic stay of the mortgage foreclosure action. On May 5, 2022, the bank filed a notice that it had obtained relief from that automatic stay.

The defendant filed her answer and special defenses on May 19, 2022. Approximately four months later, the bank moved for summary judgment. Following a hearing at which the defendant failed to appear, the court granted the bank's motion for summary judgment on January 23, 2023.[7]

[7] In rendering summary judgment in favor of the bank, the court stated in relevant part: "[T]he court has listened to the argument of counsel for the [bank] and reviewed the materials offered in support of the motion for summary judgment. The court finds that the [bank] has established that there remains no genuine issue of material fact with respect to liability and that the special defenses raised by the defendant are insufficient to defeat the claims of the [bank]. . . . Lastly, the court notes that the defendant is a self-represented party and as such is granted greater leeway by the courts even though she is a practicing attorney who is familiar with court procedures as evidenced by the special defenses and pleadings she has filed in response to the [mortgage] foreclosure action. Nonetheless, she has failed to file any responsive pleading to rebut the allegations and submissions of evidence offered by the [bank]. The [bank] has established that there is no genuine issue of material fact as to her liability for the debt and for the cause of action seeking reformation of the mortgage."

On Friday, March 17, 2023, the court in the lien foreclosure action denied the defendant's motion to open and vacate the judgment of foreclosure by sale. Unbeknownst to the bank, the defendant filed an appeal of that judgment with this court at 4:48 p.m. that Friday—nineteen hours before the foreclosure sale in the lien foreclosure action was scheduled to occur. As a result, that foreclosure sale went forward on Saturday, March 18, 2023, and the bank was the high bidder. Although the committee for sale initially sought approval of the sale, it filed a motion to withdraw that request on April 5, 2023, which the court granted.

While the defendant's appeal in the lien foreclosure action was pending, the bank filed a motion for a judgment of strict foreclosure in the mortgage foreclosure action on April 27, 2023. In the weeks that followed, the bank filed copies of the note and mortgage documents, a notice of EMAP compliance as required by General Statutes § 8-265ee (a), an appraisal of the property, an affidavit of debt, a foreclosure worksheet, and affidavits of attorney's fees with the court. By order dated May 31, 2023, the court rendered a judgment of foreclosure by sale and set a sale date of September 16, 2023.[8] From that judgment, the defendant now appeals.

On appeal, the defendant contends that the court improperly rendered a judgment of foreclosure by sale in the mortgage foreclosure action. That claim also is governed by the abuse of discretion standard of review. As our Supreme Court has explained, "[a] foreclosure action is an equitable proceeding. . . . The determination of what equity requires is a matter for the discretion of the trial court. . . . In determining whether the trial court has abused its discretion, we must make every reasonable presumption in favor of the correctness of

[8] The court found the fair market value of the property to be $319,000 and the outstanding debt to be $420,245.87.

its action. . . . Our review of a trial court's exercise of the legal discretion vested in it is limited to the questions of whether the trial court correctly applied the law and could reasonably have reached the conclusion that it did." (Internal quotation marks omitted.) *Deutsche Bank National Trust Co.* v. *Angle*, 284 Conn. 322, 326, 933 A.2d 1143 (2007); see also *Deutsche Bank Trust Co. Americas* v. *DeGennaro*, 149 Conn. App. 784, 793, 89 A.3d 969 (2014) ("[t]he standard of review of a judgment of foreclosure by sale or by strict foreclosure is whether the trial court abused its discretion" (internal quotation marks omitted)).

Where a foreclosure defendant's liability has been established by summary judgment, as is the case here, "all that remains for the court to determine at the judgment hearing is the amount of the debt and the terms of the judgment." *GMAC Mortgage, LLC* v. *Ford*, 144 Conn. App. 165, 186, 73 A.3d 742 (2013). Following the filing of the bank's motion for a judgment of foreclosure and related documentation, the defendant did nothing in response, such as objecting to the evidence of debt submitted by the bank. The record indicates that the defendant's last filing with the court in the mortgage foreclosure action was a motion for an extension of time "to conduct discovery" filed on December 28, 2022—more than five months prior to the court's decision to render a judgment of foreclosure by sale.

The defendant nonetheless argues that the court abused its discretion because the property "had already been sold" to the bank at the March 18, 2023 foreclosure sale in the lien foreclosure action. She overlooks the fact that her timely filing of an appeal in the lien foreclosure action hours prior to that foreclosure sale rendered that purported sale void, as an appellate stay automatically applied to those proceedings. See Practice Book § 61-11. For that reason, the sale that transpired on March 18, 2023 was never approved by the court, as

the committee for sale withdrew its motion to approve the sale due to the pendency of the defendant's appeal. In light of the foregoing, we conclude that the court did not abuse its discretion in ordering a judgment of foreclosure by sale in the mortgage foreclosure action.

The judgments are affirmed and the cases are remanded for the purpose of setting a new sale date.

In this opinion the other judges concurred.

MEMORANDUM DECISIONS

CONNECTICUT APPELLATE REPORTS

VOL. 228

MEMORANDUM DECISIONS

U.S. BANK NATIONAL ASSOCIATION,
TRUSTEE *v.* HJJM, LLC, ET AL.
(AC 46920)

Elgo, Moll and Pellegrino, Js.

Submitted on briefs September 16—officially released October 1, 2024

Appeal by the defendant John T. O'Reilly from the Superior Court in the judicial district of New Haven, *Spader*, *J.*

Per Curiam. The judgment is affirmed.

STEVEN K. STANLEY *v.* KIM SUCH ET AL.
(AC 47112)

Elgo, Seeley and Bishop, Js.

Argued September 18—officially released October 1, 2024

Plaintiff's appeal from the Superior Court in the judicial district of Tolland, *Gordon*, *J.*

Per Curiam. The judgment is affirmed.

STEVEN K. STANLEY *v.* KRISTINE BARONE ET AL.
(AC 47298)

Elgo, Seeley and Bishop, Js.

Argued September 18—officially released October 1, 2024

Plaintiff's appeal from the Superior Court in the judicial district of Tolland, *Gordon*, *J.*

Per Curiam. The judgment is affirmed.

ANDRES R. SOSA *v.* COMMISSIONER
OF CORRECTION
(AC 46705)

Elgo, Clark and Westbrook, Js.

Argued September 13—officially released October 1, 2024

Petitioner's appeal from the Superior Court in the judicial district of Tolland, *Newson*, *J.*

Per Curiam. The appeal is dismissed.

JOSE RAMOS ET AL. *v.* HEATHER HOLLEY ET AL.
(AC 46780)

Clark, Seeley and Prescott, Js.

Argued September 19—officially released October 1, 2024

Plaintiffs' appeal from the Superior Court in the judicial district of New London, *Goodrow*, *J.*

Per Curiam. The appeal is dismissed.

ALEJANDRO VELEZ *v.* COMMISSIONER OF CORRECTION
(AC 45373)

Moll, Seeley and Bear, Js.

Submitted on briefs September 19—officially released October 1, 2024

Petitioner's appeal from the Superior Court in the judicial district of Tolland, *Klatt*, *J.*

Per Curiam. The appeal is dismissed.

JAMEELA ANDROULIDAKIS *v.* GOSHEN MORTGAGE, LLC, ET AL.
(AC 46860)

Alvord, Cradle and Vertefeuille, Js.

Argued September 16—officially released October 1, 2024

Plaintiff's appeal from the Superior Court in the judicial district of Stamford-Norwalk, *Hon. Edward T. Krumeich II*, judge trial referee.

Per Curiam. The judgment is affirmed.

KEYBANK NATIONAL ASSOCIATION *v.*
GEORGE BERKA, JR.
(AC 47081)

Alvord, Seeley and Palmer, Js.

Argued September 17—officially released October 1, 2024

Defendant's appeal from the Superior Court in the judicial district of Middletown, *Hon. Edward S. Domnarski*, judge trial referee.

Per Curiam. The judgment is affirmed and the case is remanded for the purpose of setting a new sale date.

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NOTICE OF CONNECTICUT STATE AGENCIES

Connecticut Higher Education Supplemental Loan Authority

Notice of Intent to Amend CHESLA Loan Program Manual

In accordance with the provisions of Connecticut General Statutes § 1-121, notice is hereby given that the Connecticut Higher Education Supplemental Loan Authority ("CHESLA"), pursuant to Connecticut General Statutes § 10a-224(f)(6), intends to amend the Release of Co-Borrowers section of the CHESLA Loan Program – Program Manual (the "Program Manual") by: (i) adding a "," after the term "Maine", (ii) deleting the term "and" after the term "Maine", and (iii) adding the language "and for Education Loans originated on or after October 31, 2024, the provisions of this subsection shall not apply to Co-Borrowers who are residents of Illinois" after the term "Nevada".

Such amendments shall be deemed adopted and effective October 31, 2024, unless the CHESLA Executive Director, in her sole discretion, shall determine based on comments received from members of the public during the 30-day period after publication of this notice that it would be desirable or appropriate to defer such effectiveness so that the CHESLA Board of Directors ("Board") may reconsider the proposed amendments to the Program Manual in light of such comments, such determination to be conclusively evidenced by the Executive Director's notice thereof to the Board.

A copy of the proposed amendments to the Program Manual is available at no cost by sending a written request to Jeanette W. Weldon, Executive Director, Connecticut Higher Education Supplemental Loan Authority, 1 Financial Plaza, 20th Floor, Suite 2000, Hartford, CT 06103 or via email to jweldon@chesla.org.

All views and comments regarding the proposed amendments to the Program Manual may be submitted in writing, within thirty (30) days of the publication of this notice, either by email to Jeanette W. Weldon, Executive Director at jweldon@chesla.org (please put "Pubic Comment – CHESLA Loan Program Manual" in the subject line) or by mail addressed to Jeanette W. Weldon, Executive Director, Connecticut Higher Education Supplemental Loan Authority, 1 Financial Plaza, 20th Floor, Suite 2000, Hartford, CT 06103.

Connecticut Higher Education Supplemental Loan Authority

Notice of Intent to Adopt CHESLA Financial Literacy Scholarship Program - Program Manual

In accordance with the provisions of Connecticut General Statutes § 1-121, notice is hereby given that the Connecticut Higher Education Supplemental Loan Authority ("CHESLA"), pursuant to Connecticut General Statutes § 10a-224(f)(6), intends to adopt the CHESLA Financial Literacy Scholarship Program - Program Manual ("Manual") to set forth the guidelines, procedures and eligibility criteria for the scholarship program.

The Manual shall be deemed adopted and effective thirty (30) days after this notice has been published in the Connecticut Law Journal, unless the CHESLA's Executive Director, in her sole discretion, shall determine based on comments received from members of the public during such thirty (30) day period that it would be desirable or appropriate to defer the adoption and effective date so that the CHESLA Board of Directors ("Board") may reconsider the proposed Manual in light of such comments, such determination to be conclusively evidenced by the Executive Director's written notice thereof to the Board.

A copy of the proposed Manual is available at no cost by sending a written request to Jeanette W. Weldon, Executive Director, Connecticut Higher Education Supplemental Loan Authority, 1 Financial Plaza, 20th Floor, Suite 2000, Hartford, CT 06103 or via email to jweldon@chesla.org.

All views and comments regarding the proposed Manual may be submitted in writing, within thirty (30) days of the publication of this notice, either by email to Jeanette W. Weldon, Executive Director at jweldon@chesla.org (please put "Pubic Comment – CHESLA Financial Literacy Scholarship Program" in the subject line) or by mail addressed to Jeanette W. Weldon, Executive Director, Connecticut Higher Education Supplemental Loan Authority, 1 Financial Plaza, 20th Floor, Suite 2000, Hartford, CT 06103.

Commission on Human Rights and Opportunities

Notice of Noncompliance

The State of Connecticut Commission on Human Rights and Opportunities ("CHRO") hereby publishes notice pursuant to Regs. Conn. State. Agencies § 46a-68j-41(c), that The Nunes Companies, Inc. n/k/a NC Incorporated AMN, has been found to be in noncompliance with and in violation of the nondiscrimination and affirmative action provisions and set aside programs of General Statues §§ 4a-60, 4a-60g, and 46a-68c through 46a-68f inclusive.

All inquiries concerning the compliance or noncompliance of contractors shall be directed to the CHRO and not the commission on official legal publications.