CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

THE CADLE COMPANY *v.* FRANK F. OGALIN
(AC 38635)

DiPentima, C. J., and Beach and Westbrook, Js.*

Syllabus

The plaintiff, the assignee of a judgment rendered against the defendant in 1994, brought this action in 2013 seeking, in a two count complaint, to enforce the 1994 judgment, which remained unsatisfied. After the trial court granted in part the plaintiff's motion to strike the defendant's special defenses directed at count one of the complaint, it granted the plaintiff's motion for summary judgment as to the first count of the complaint. Thereafter, the court issued an amended memorandum of decision rendering judgment in favor of the plaintiff as to count one and awarding the plaintiff postjudgment interest. Subsequently, the court granted the plaintiff's motion to withdraw the second count of the complaint, and the defendant appealed to this court. *Held*:

1. The defendant could not prevail on his claim that the trial court improperly granted the plaintiff's motion to strike his second special defense to count one of the complaint, which alleged that because the plaintiff already had taken steps in 2013 to collect on the 1994 judgment via weekly payments, wage executions and property executions, the present action was duplicative, unfair, inequitable, vexatious and oppressive: although an action on a judgment is not favored as being generally vexatious and oppressive, our Supreme Court has determined previously that the weight of authority is that an allegation of nonpayment is sufficient reason for initiating an action, and the plaintiff here alleged nonpayment of the 1994 judgment; moreover, the defendant failed to

* The listing of judges reflects their seniority status on this court as of the date of oral argument.

provide any authority in support of his claim that the present action was unfair and duplicative due to the fact that active collection proceedings remained pending before the trial court.

2. The trial court properly granted the plaintiff's motion for summary judgment as to count one of the complaint; that court properly determined that the defendant's special defense of laches, an equitable defense, was not applicable to the plaintiff's action for monetary damages, which was filed within the relevant limitation period pursuant to statute (§ 52-598), and that even if the doctrine of laches applied, the defendant had not alleged facts other than the mere lapse of time that would create a genuine issue of material fact as to whether he was prejudiced by any delay in enforcement, especially given that the action was brought within the period authorized by § 52-598, and, thus, it was presumed that there was no prejudice, and the doctrine of laches was not imputed to the plaintiff's claim.

3. This court declined to consider the defendant's claim, raised for the first time on appeal, that the trial court improperly awarded the plaintiff postjudgment interest; although the defendant claimed on appeal that because the 1994 judgment did not award postjudgment interest, it was res judicata as to the issue of postjudgment interest, the defendant failed to specifically plead the issue of res judicata as a special defense, nor was it mentioned in his opposition to the motion for summary judgment.

Argued March 9—officially released July 25, 2017

Procedural History

Action, inter alia, to enforce a judgment, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the court, *Kamp*, *J.*, granted in part the plaintiff's motion to strike the defendant's special defenses; thereafter, the court, *Hon. Richard P. Gilardi*, judge trial referee, granted the plaintiff's motion for summary judgment; subsequently, the court, *Hon. Richard P. Gilardi*, judge trial referee, issued a corrected memorandum of decision and rendered summary judgment for the plaintiff; thereafter, the plaintiff withdrew the complaint in part, and the defendant appealed to this court. *Affirmed.*

Roy W. Moss, for the appellant (defendant).

Paul N. Gilmore, with whom, on the brief, was *Christopher A. Klepps*, for the appellee (plaintiff).

Opinion

DiPENTIMA, C. J. The defendant, Frank F. Ogalin, appeals from the judgment of the trial court rendered in favor of the plaintiff, The Cadle Company. On appeal, the defendant claims that the court improperly (1) granted the plaintiff's motion to strike his second special defense, (2) granted the plaintiff's motion for summary judgment and (3) awarded postjudgment interest to the plaintiff. We disagree, and, accordingly, affirm the judgment of trial court.

The following facts and procedural history are relevant to our discussion. On September 25, 2013, the plaintiff commenced the present action via a two count complaint alleging a common-law action on a judgment and an action on a judgment under principles of unjust enrichment.[1] Specifically, the complaint alleged that the plaintiff was the assignee of a judgment rendered against the defendant in the amount of $137,055.17 in a case titled *Great Country Bank* v. *Ogalin*, Superior Court, judicial district of Fairfield Docket No. CV-93-0303908-S, (March 15, 1994) (1994 judgment). The plaintiff claimed that the 1994 judgment remained unsatisfied and fully enforceable. The plaintiff sought the entry of a new judgment for the outstanding amount from the 1994 judgment, as well as postjudgment interest.

The defendant filed an answer and raised three special defenses with respect to the first count of the complaint. First, he claimed that the first count failed to

[1] "[A] party obtaining a judgment for money damages in Connecticut has two means to enforce that judgment; it may seek an execution of the judgment or it may initiate an independent action. See General Statutes § 52-598 (a); see also 30 Am. Jur. 2d 84, Executions and Enforcement of Judgments § 47 (2005) (distinguishing between execution and action on judgment). [As a general matter], under § 52-598 (a), a party has twenty years to execute the judgment and twenty-five years to enforce it through a separate action." *Investment Associates* v. *Summit Associates, Inc.*, 309 Conn. 840, 849, 74 A.3d 1192 (2013).

state a cognizable cause of action. Second, he alleged that "[i]n 2013 [the] plaintiff obtained an order of weekly payments and wage and property executions in the action referred to in the first count. By virtue of pending postjudgment motions and proceedings, [the] plaintiff is seeking to collect the prior judgment. Under the foregoing circumstances, this action is duplicative, unfair, inequitable, vexatious, and oppressive against [the] defendant." Third, the defendant claimed that the plaintiff had not sought an order of payment or execution on the 1994 judgment until more than eighteen years had passed, and, therefore, the doctrine of laches barred the present action.

The plaintiff moved to strike the special defenses directed at count one of the complaint. The defendant filed a memorandum of law in opposition to the motion to strike. The court, *Kamp, J.*, held a hearing on September 15, 2014, on the plaintiff's motion to strike and granted the plaintiff's motion with respect to the first and second special defenses to count one. It denied the motion as to the third special defense alleging laches.

On April 23, 2014, the plaintiff filed a motion for summary judgment as to the first count of the complaint. The court denied this motion, without prejudice, on July 7, 2014. The plaintiff filed a second motion for summary judgment as to the first count on December 22, 2014. The defendant filed a memorandum in opposition to this motion on February 11, 2015. On June 10, 2015, the court, *Hon. Richard P. Gilardi*, judge trial referee, issued a memorandum of decision granting the plaintiff's motion for summary judgment.

The court first concluded that General Statutes § 52-598 authorized the present action on the 1994 judgment and that the plaintiff had commenced it timely. Next, the court considered the question of whether the present action was vexatious and oppressive. It reasoned that

while a separate action on a judgment *may* be considered vexatious and oppressive, this type of action constituted a viable option for the plaintiff under our law. Additionally, the defendant had failed "to provide, nor has there been found, any support for the proposition that an action on a judgment is permitted only where a plaintiff establishes that the action is neither vexatious nor oppressive. To require otherwise would misconstrue the nature of an action on a judgment and place an additional burden on plaintiffs not contemplated by the law." Additionally, the court determined that the defense of laches did not apply to the present action because it was not a case brought in equity; further, even if laches did apply, the defendant failed to demonstrate an issue of fact as to whether he had been prejudiced by the lapse of time.

Finally, the court addressed the claim that postjudgment interest accrued from the 1994 judgment at the original contract rate of 9.75 percent. The defendant had countered that genuine issues of material fact existed as to whether the plaintiff was entitled to such interest. Relying on General Statutes § 37-1 and our Supreme Court's decision in *Sikorsky Financial Credit Union, Inc.* v. *Butts*, 315 Conn. 433, 438–45, 108 A.3d 228 (2015), the trial court concluded that postjudgment interest was mandatory at the statutory default rate of 8 percent.

On July 14, 2015, the court issued an "amended" memorandum of decision. It awarded the plaintiff $369,957.57, which consisted of the principal owed from the 1994 judgment in the amount of $137,055.17 and $232,902.40 in postjudgment interest, calculated from March 15, 1994 through June 15, 2015, at the statutory rate of 8 percent. Approximately five weeks later, the plaintiff moved for permission to withdraw count two of its complaint, which the court granted on October

29, 2015.[2] This appeal followed. Additional facts will be set forth as necessary.

I

The defendant first claims that the court improperly granted the plaintiff's motion to strike his second special defense. This defense alleged that the plaintiff had taken steps, in 2013, to collect on the 1994 judgment via weekly payments, wage executions and property executions; the present action, therefore, was duplicative, unfair, inequitable, vexatious and oppressive. The plaintiff counters that the court properly struck the second special defense. We agree with the plaintiff.

We begin by setting forth our standard of review. "Because a motion to strike challenges the legal sufficiency of a pleading and, consequently, requires no factual findings by the trial court, our review of the court's ruling on [a motion to strike] is plenary. . . . A party wanting to contest the legal sufficiency of a special defense may do so by filing a motion to strike. The purpose of a special defense is to plead facts that are consistent with the allegations of the complaint but demonstrate, nonetheless, that the plaintiff has no cause of action. . . . In ruling on a motion to strike, the court must accept as true the facts alleged in the special defenses and construe them in the manner most favorable to sustaining their legal sufficiency." (Citations omitted; internal quotation marks omitted.) *Barasso* v. *Rear Still Hill Road, LLC*, 64 Conn. App. 9, 12–13, 779 A.2d 198 (2001); see also *Doe* v. *Hartford Roman Catholic Diocesan Corp.*, 317 Conn. 357, 398, 119 A.3d 462 (2015); *R.S. Silver Enterprises, Inc.* v. *Pascarella*, 163 Conn. App. 1, 20, 134 A.3d 662, cert. denied, 320 Conn. 929, 133 A.3d 460 (2016).

The defendant's second special defense alleged that "[i]n 2013 [the] plaintiff obtained an order of weekly

[2] See Practice Book §§ 61-1 and 61-2.

payments and wage and property executions in the action referred to in the first count. By virtue of pending postjudgment motions and proceedings, [the] plaintiff is seeking to collect the prior judgment. Under the foregoing circumstances, this action is duplicative, unfair, inequitable, vexatious, and oppressive against the defendant." In the memorandum of law opposing the motion to strike, the defendant argued that a second action on a judgment generally is considered vexatious and oppressive.

The plaintiff, in its motion to strike, claimed that this special defense was legally insufficient and was contrary to the controlling precedent from our Supreme Court. Specifically, the plaintiff alleged that the present case was not duplicative, vexatious, oppressive, unfair or inequitable, and that the passage of time statutorily had barred it from obtaining an execution on the 1994 judgment. The plaintiff also alleged that any pending motions from that case did not impact the propriety of the present action.

The sum of the defendant's appellate argument with respect to this issue is as follows: "The foregoing defense alleges facts that exemplify why a second action on a money judgment is generally considered vexatious and oppressive. *Garguilo* v. *Moore*, 156 Conn. 359 [242 A.2d 716] (1968). In the present case, as alleged in the second special defense, the action is duplicative and unfair, if for no other reason than the prior action remains pending with active collection proceedings before the court. For the foregoing reason, [the defendant's] second [special] defense as to the first count state[s] a valid defense. It was error to strike said defense."

The defendant's reliance on *Garguilo* is misplaced. In that case, our Supreme Court stated: "Although an action on a judgment is not favored as being generally

vexatious and oppressive, *the weight of authority is to the effect that an allegation of nonpayment is sufficient reason for instituting suit. Denison* v. *Williams*, 4 Conn. 402, 404 [(1822)] . . . ." (Emphasis added.) *Garguilo* v. *Moore*, supra, 156 Conn. 361. The plaintiff alleged nonpayment of the 1994 judgment; *Garguilo*, therefore, does not support the defendant's appellate argument herein.

With respect to the issue of the effect of the "active collection proceedings," the defendant failed to provide this court with any authority in support of his argument. We will not reverse the trial court on the basis of a party's bald assertion. "We consistently have held that [a]nalysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . [F]or this court judiciously and efficiently to consider claims of error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs. We do not reverse the judgment of a trial court on the basis of challenges to its rulings that have not been adequately briefed. . . . The parties may not merely cite a legal principle without analyzing the relationship between the facts of the case and the law cited. . . . It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones." (Internal quotation marks omitted.) *NRT New England, LLC* v. *Jones*, 162 Conn. App. 840, 856, 134 A.3d 632 (2016); see *Bernhard-Thomas Bluilding Systems, LLC* v. *Dunican*, 100 Conn. App. 63, 69–70 n.6, 918 A.2d 889 (2007), aff'd, 286 Conn. 548, 944 A.2d 329 (2008); see also *Quickpower International Corp.* v. *Danbury*, 69 Conn. App. 756, 759–60, 796 A.2d 622 (2002) (minds of appellate judges are swayed by thorough and rigorous legal analysis supported by citation to competent authority and, therefore, in order to prevail, appellant

must do more than assert unsubstantiated claims). Accordingly, we conclude that the defendant failed to persuade us that the court improperly granted the motion to strike his second special defense.[3]

II

The defendant next claims that the court improperly granted the plaintiff's motion for summary judgment. Specifically, he argues that a genuine issue of material fact existed with respect to his special defense of laches. We agree with the trial court that laches, an equitable defense, is inapplicable to the plaintiff's action for monetary damages, which was filed timely pursuant to the relevant statute of limitations, and that the defendant had failed to establish a genuine issue of material fact that he was prejudiced by the delay. The court, therefore, properly granted the plaintiff's motion for summary judgment.

As a preliminary matter, we set forth our standard of review and the relevant legal principles. "Practice Book [§ 17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party

[3] The plaintiff, of course, is not entitled to recover under both the 1994 judgment and the present action. "As [our Supreme Court] has stated, [t]he rule precluding double recovery is a simple and time-honored maxim that [a] plaintiff may be compensated only once for his just damages for the same injury. . . . Connecticut courts consistently have upheld and endorsed the principle that a litigant may recover just damages for the same loss only once. The social policy behind this concept is that it is a waste of society's economic resources to do more than compensate an injured party for a loss and, therefore, that the judicial machinery should not be engaged in shifting a loss in order to create such an economic waste." (Citation omitted; internal quotation marks omitted.) *Carlson* v. *Waterbury Hospital*, 280 Conn. 125, 150–51 n.30, 905 A.2d 654 (2006); see also *Gionfriddo* v. *Gartenhaus Cafe*, 211 Conn. 67, 73, 557 A.2d 540 (1989) (double recovery foreclosed by rule that only one satisfaction may be obtained for loss that is subject of two or more judgments).

is entitled to judgment as a matter of law. . . . As the burden of proof is on the movant, the evidence must be viewed in the light most favorable to the opponent. . . . When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue. . . . Once the moving party has met its burden, however, the opposing party must present evidence that demonstrates the existence of some disputed factual issue. . . . It is not enough, however, for the opposing party merely to assert the existence of such a disputed issue. Mere assertions of fact . . . are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court under Practice Book § [17-45]. . . . Our review of the trial court's decision to grant [a] motion for summary judgment is plenary." (Internal quotation marks omitted.) *Rieffel* v. *Johnston-Foote*, 165 Conn. App. 391, 400, 139 A.3d 729, cert. denied, 322 Conn. 904, 138 A.3d 289 (2016); see *Capasso* v. *Christmann*, 163 Conn. App. 248, 257, 135 A.3d 733 (2016). Finally, we note that "because any valid special defense raised by the defendant ultimately would prevent the court from rendering judgment for the plaintiff, a motion for summary judgment should be denied when any [special] defense presents significant fact issues that should be tried." (Internal quotation marks omitted.) *Ulster Savings Bank* v. *28 Brynwood Lane, Ltd.*, 134 Conn. App. 699, 704, 41 A.3d 1077 (2012).

The following additional facts are necessary for our discussion. The third special defense alleged that the doctrine of laches barred the first count of the complaint.[4] The trial court rejected this defense for two

[4] Specifically, the defendant alleged: "No order of payments or execution on the judgment was sought until more than [eighteen] years elapsed from the date of entry of the judgment. No attempt was made to foreclose judgment liens lodged in connection with the judgment. This action is barred

reasons: "The plaintiff here is not seeking equitable relief from the court, but rather a judgment for money damages. The doctrine of laches is, therefore, inapplicable. Even assuming arguendo that the doctrine of laches was applicable, the defendant had not alleged facts other than the mere lapse of time which would create an issue of fact as to whether the defendant was prejudiced by any delay in enforcement. In fact, since the action was brought within the statutory period authorized by § 52-598, presumptively there is no prejudice and the doctrine should not be imputed to the plaintiff's claim. See *John H. Kolb & Sons, Inc.* v. *G & L Excavating, Inc.*, [76 Conn. App. 599, 613, 821 A.2d 774, cert. denied, 264 Conn. 919, 828 A.2d 617 (2003)]."

We recently explained that "[t]he defense of laches, if proven, bars a plaintiff from seeking equitable relief in a case in which there has been an inexcusable delay that has prejudiced the defendant. First, there must have been a delay that was inexcusable, and, second, that delay must have prejudiced the defendant. . . . We further noted that there must be unreasonable, inexcusable and prejudicial delay for the defense to apply. . . . [A] laches defense is not . . . a substantive right that can be asserted in both legal and equitable proceedings. *Laches is purely an equitable doctrine*, is largely governed by the circumstances, and *is not to be imputed to one who has brought an action at law within the statutory period.* . . . It is an equitable defense allowed at the discretion of the trial court in *cases brought in equity*." (Citation omitted; emphasis in original; internal quotation marks omitted.) *Wiblyi* v. *McDonald's Corp.*, 168 Conn. App. 92, 103–104, 144 A.3d 530 (2016).

These statements from *Wiblyi* echoed those of our Supreme Court in *Doe* v. *Hartford Roman Catholic*

by [the] plaintiff's laches or other failure to take prompt action to enforce the judgment."

Diocesan Corp., supra, 317 Conn. 398–99. Two points from *Doe* and *Wiblyi* apply and directly control the present appeal; first, laches does not apply to an action at law brought within the statutory time period and second, for laches to apply, there must be an unduly prejudicial delay in bringing the action. Id.; *Wiblyi* v. *McDonald's Corp.*, supra, 168 Conn. App. 103–104. The trial court correctly applied these maxims in rejecting the defendant's special defense of laches in the present case. The defendant's appellate brief fails to address how the trial court misapplied these principles regarding laches. Accordingly, we reject this claim.[5]

III

The defendant's final claim is that the court improperly awarded the plaintiff postjudgment interest because genuine issues of material fact existed as to whether the plaintiff was entitled to interest. Specifically, he claimed that because the 1994 judgment did not award postjudgment interest, that judgment, devoid of such an award, "was res judicata as to the postjudgment interest." The plaintiff counters that the defendant failed to raise the issue of res judicata as a special defense and is barred from doing so for the first time on appeal. It further contends that the court properly awarded postjudgment interest from the 1994 judgment.[6] We agree with the plaintiff.

[5] As a result, we need not address the defendant's arguments regarding the plaintiff's purported use, in the proceedings before the trial court, of hearsay documents or the decision from the United States Bankruptcy Court.

[6] We note that our Supreme Court has held that § 37-1 applies to interest "as compensation for a loan (interest eo nomine) . . . ." *Sikorsky Financial Credit Union, Inc.* v *Butts*, supra, 315 Conn. 439. This statute sets a default rule that a loan of money is subject to interest eo nomine at a rate of 8 percent. Id., 440. "Under § 37-1 (b), unless the parties agree otherwise, postmaturity interest will accrue at the legal rate on the unpaid balance of the loan. Thus, if the parties fail to specify whether interest will accrue after maturity, or fail to specify the rate of postmaturity interest, § 37-1 (b) mandates that interest eo nomine shall continue to accrue after maturity at the legal rate. . . . *Furthermore, postmaturity interest under § 37-1 (b) continues to accrue even after the entry of judgment and until the*

"[R]es judicata and collateral estoppel are affirmative defenses that may be waived if not properly pleaded." *Singhaviroj* v. *Board of Education*, 124 Conn. App. 228, 233, 4 A.3d 851 (2010); see also *Red Buff Rita, Inc.* v. *Moutinho*, 151 Conn. App. 549, 558, 96 A.3d 581 (2014); Practice Book § 10-50. The defendant did not specifically plead the special defense of res judicata, nor was it mentioned in his opposition to the motion for summary judgment. We decline, therefore, to consider this argument that was raised for the first time on appeal. *Noonan* v. *Noonan*, 122 Conn. App. 184, 190–91, 998 A.2d 231, cert. denied, 298 Conn. 928, 5 A.3d 490 (2010).

The judgment is affirmed.

In this opinion the other judges concurred.

NERISSA HOSEIN *v.* SCOT EDMAN ET AL.
(AC 38472)

Sheldon, Keller and Prescott, Js.

Syllabus

The plaintiff sought to recover damages for personal injuries she sustained when her motor vehicle collided with a motor vehicle owned by the defendant Department of Transportation and operated by the defendant E, an employee of the department, in the course of his employment. In an amended complaint, the plaintiff alleged a claim against the department for vicarious liability, claiming that she was traveling southbound on a roadway in Meriden when the vehicle operated by E moved from a stopped position on the shoulder into the travel lane and suddenly, without warning, struck the plaintiff's vehicle from the right side. Despite the allegations in the amended complaint, the plaintiff testified at trial

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outstanding balance is paid in full. . . . Consequently, an award of prejudgment and postjudgment interest on a loan that carries postmaturity interest is not discretionary; it is an integral part of enforcing the parties' bargain. . . . The trial court must, therefore, as part of any judgment enforcing a loan, allow prejudgment and postjudgment interest at the agreed rate, or the legal rate if no agreed rate is specified. The trial court is relieved of this obligation only if the parties disclaim any right to interest eo nomine after maturity." (Citations omitted; emphasis added; internal quotation marks omitted.) Id., 441–42.

that she never observed the department's vehicle move, while E testified that his vehicle was parked when it was struck from behind by the plaintiff's vehicle. Following a trial to the court, the trial court rendered judgment in favor of the department, and the plaintiff appealed to this court. She claimed that the trial court improperly discredited the testimony of her expert witness, C, an accident reconstructionist, and effectively precluded C's testimony without affording her an evidentiary hearing. *Held* that the plaintiff's claim that the trial court effectively precluded C's testimony was unavailing; although that court initially sustained several of the department's objections to C's testimony, it ultimately admitted his testimony in full and repeatedly stated to the parties that it was admitting all of C's testimony into evidence so that it could later decide what weight, if any, to afford C's testimony in deciding the issues before it, which was within the court's province to do as the trier of fact, and even though the trial court ultimately determined that C's testimony was based on conjecture and speculation and did not rely on it in deciding the issues presented, that statement was indicative of the court's weighing, considering, and ultimately rejecting the substance of C's testimony, not its preclusion of the testimony as evidence at trial.

Argued April 12—officially released July 25, 2017

Procedural History

Action to recover damages for the named defendant's alleged negligence, and for other relief, brought to the Superior Court in the judicial district of New Haven and tried to the court, *Hon. Howard F. Zoarski*, judge trial referee; judgment for the defendant Department of Transportation; thereafter, the court, *Hon. Howard F. Zoarski*, judge trial referee, denied the plaintiff's motion for a new trial, motion to reargue, motion for articulation, and motion to set aside the verdict, and the plaintiff appealed to this court; subsequently, the court, *Hon. Howard F. Zoarski*, judge trial referee, issued a corrected memorandum of decision. *Affirmed*.

Daniel P. Scholfield, with whom, on the brief, was *Brendan J. Keefe*, for the appellant (plaintiff).

James E. Coyne, with whom, on the brief, were *Colleen D. Fries* and *Joseph M. Walsh*, for the appellee (defendant Department of Transportation).

Opinion

SHELDON, J. The plaintiff, Nerissa Hosein, commenced this action against the defendant Department of Transportation (department) to recover damages for injuries she allegedly suffered due to the department's vicarious negligence on December 14, 2011, in a motor vehicle collision between her personal automobile and a department owned vehicle. The plaintiff claimed that the collision and her resulting injuries were caused by the negligence of a department employee, Scot Edman, who was then operating the department's vehicle in the course of his employment duties.[1] After a bench trial, the court rendered judgment in favor of the department on the grounds that the plaintiff had failed to prove her claim of negligence by a preponderance of the evidence and, in fact, that the plaintiff's own negligence was the proximate cause of the collision and injuries, in that she had failed to keep a proper lookout and failed to keep her vehicle under proper control at or about the time of the collision.

The plaintiff's sole claim on appeal is that the trial court erred in completely discrediting the testimony of her expert witness, an accident reconstructionist, and thereby "effectively precluding" that witness' testimony, without affording her an evidentiary hearing pursuant to *State* v. *Porter*, 241 Conn. 57, 698 A.2d 739 (1997), cert. denied, 523 U.S. 1058, 118 S. Ct. 1384, 140 L. Ed. 2d 645 (1998). We conclude that the trial court did not preclude the testimony of the plaintiff's expert, but, rather, admitted that testimony in its entirety, before ultimately deciding not to afford it any weight. Accordingly, we affirm the judgment of the trial court.

[1] The plaintiff's initial complaint contained two counts, one against Edman directly for his negligence and another against the department claiming vicarious liability for Edman's negligence. Edman moved to strike the claim against him pursuant to General Statutes § 4-165. The plaintiff thereafter amended her complaint, deleting the count against Edman.

On December 14, 2011, at approximately 9:00 a.m., the plaintiff was traveling southbound on Frontage Road in Meriden, approaching the point where it turns into an on-ramp to Route 15, when she observed the department's vehicle, which was then being operated by Edman, parked on the grass on the right side of the roadway. As she was passing by the department's vehicle, she heard a loud noise, after which her vehicle flipped over onto its roof, and then began to slide forward and across the road. Although the plaintiff testified that her attention, as she was passing the department's vehicle, was focused forward instead of to her right, and thus she never saw the department's vehicle move, she alleged in her complaint that Edman "moved [the department's vehicle] from a stopped position on the shoulder [of the roadway and] into the [travel] lane, suddenly and without warning, and struck the [plaintiff's] motor vehicle . . . from the front right side . . . ."

The department denied the plaintiff's allegation that Edman had caused the collision between her vehicle and his department owned vehicle by suddenly moving into the travel lane of the roadway. Edman testified that, on the morning of the accident, he had been setting up construction signs along the roadway in preparation for landscaping work that was scheduled for that day. Edman testified that his vehicle was parked "two thirds in the grass" on the side of the road, that its flashing lights were activated, and that its wheels were "cocked" to the left pursuant to the department's policy, in order to prevent harm to workers who might be working on the side of the road, in the event that the vehicle was struck from behind. He placed a white sign along the side of the road that warned of construction ahead, then returned to his vehicle and fastened his seat belt. He recalled that he was just about to put his vehicle into drive when it was struck from behind. He had not

yet looked in his rearview mirror, so he did not see the plaintiff's vehicle approach or strike his vehicle. He testified that his vehicle was pushed twenty to thirty feet as a result of the impact from the collision. The right front of the plaintiff's vehicle impacted the left rear bumper of the department's vehicle.[2]

By way of special defense, the department alleged that the plaintiff's own negligence had proximately caused the collision between her vehicle and the department's vehicle. The department alleged, inter alia, that the plaintiff had been negligent in failing to keep a proper lookout, failing to keep her vehicle under reasonable and proper control and operating her vehicle at a rate of speed greater than what was reasonable in light of the width, traffic and use of the roadway. The plaintiff denied all of the allegations in the department's special defense.

On August 20, 2014, the plaintiff filed a disclosure of expert witness, pursuant to Practice Book § 13-4, in which she disclosed her intention to present at trial the testimony of Alfred Cipriani, an accident reconstructionist, who would opine that "the collision was caused by . . . Edman moving the [department's vehicle] from the shoulder of the road into the southbound travel lane and into the path of [the plaintiff's vehicle]." The department moved to preclude the testimony of Cipriani on the sole ground that the plaintiff's disclosure of him was untimely, and thus that it would not have an adequate opportunity to depose him before trial or to make a later determination as to whether to retain a defense expert. When, however, the trial was rescheduled for a later date, the parties were afforded adequate

[2] The court also noted: "The defense also presented an independent third-party witness, Kevin Gause, who had just passed the signs and . . . the [department's] vehicle was stopped and the sign was there in the placed position prior to the collision."

time to complete discovery and depose Cipriani. Therefore, the department did not pursue its motion to preclude or seek to preclude Cipriani's testimony on any other basis prior to trial.

The case was tried to the court on June 18 and 19, 2015. At trial, the plaintiff called, inter alios, Cipriani to testify on her behalf. During the direct examination of Cipriani, the department repeatedly objected to his testimony on the ground that it was speculative. Initially, the court sustained many of those objections. Later, however, upon reminding the parties of its ultimate role in the case as the fact finder, it advised the parties that it was going to permit Cipriani to testify fully as to his expert opinions, despite the department's objections, so it could hear everything the witness had to say before deciding what weight, if any, his testimony truly deserved. On that subject, the court explained its approach as follows: "[T]his is a court trial, and I think there are a lot of objections that have been made back and forth. And I think, ultimately, the issue regarding the weight to be given to any conclusion or opinions through this expert witness would be part of the decision the court has to make. So . . . at this time, I'm aware of the [department's] position about objecting to all of the testimony. But I'm going to permit it all to come in, and let me hear what it is, and that will be an ultimate decision for me to make in this matter."

When the plaintiff continued with her direct examination of Cipriani, the department again objected to the admission of his testimony on the ground that it was speculative. In response to that objection, the court reiterated: "As I indicated, I'm going to overrule the objection at this point, based on the statement I made at the beginning of this proceeding . . . . [Y]ou'll have the right to cross-examine the witness, and then ultimately it'll be the court's decision regarding the weight

to be given to the total testimony." The plaintiff then resumed her direct examination of Cipriani.

Despite the court's clear rulings rejecting the department's objections, the department again objected to Cipriani's testimony on the ground that it was "clearly speculative." In response, the court once again reiterated: "Well, again, for the reasons I've stated earlier, I'm going to overrule your [objection]. And, at this point, I'm going to continue to hear this witness' testimony." The court further stated: "I'm going to permit cross-examination by defense counsel at the appropriate time. But I want to hear your evidence on direct."

After Cipriani stated certain of his opinions, the department moved, repeatedly, that those opinions be stricken from the record on the ground that they were speculative. Each time, the court denied the department's motion, stating that it would hear all the challenged testimony, then determine, as the ultimate fact finder, what weight to give to that testimony. The court told the department, "I fully want to hear what it is [Cipriani] has to say and what his opinion is. . . . [I]t's for the court to determine the weight to be given to the opinion." The court thus admitted Cipriani's direct examination testimony in its entirety, after which the department was permitted to cross-examine him.

On July 9, 2015, after both parties filed posttrial briefs, the court filed a memorandum of decision rendering judgment in favor of the department. The court therein found, inter alia, that Cipriani's opinion "was based upon speculation and conjecture [and] was not necessary to assist [it] in deciding the issues." The court concluded its analysis of liability as follows: "This court finds that, based on the evidence, the plaintiff failed to prove her claims of [the department's] negligence by a fair preponderance of the evidence. The court also finds the plaintiff's negligence was the proximate cause of

this collision. The plaintiff failed to keep a proper lookout and failed to keep her vehicle under proper control."

The plaintiff thereafter filed motions for a new trial, to reargue and to set aside the verdict. The plaintiff also filed a motion for articulation and rectification. Each of those motions, to which the department objected, challenged the court's finding that Cipriani's opinion was based upon speculation and conjecture. The court held a hearing on September 21, 2015, during which it explained, inter alia: "I didn't feel I need[ed] that expert opinion's assistance to help me decide the merits or the—what decision should be made in this case. It was based upon the evidence that was presented [at] trial. And [I], then, drew reasonable legal conclusions, which is my job to do. So, the mere fact that I did not give any weight to the expert['s] [testimony] is not a basis for me to set aside this verdict." The court indicated that it "took all of the evidence [into consideration in order] to come to [its] findings of fact and [its] ultimate conclusion . . . ." The court denied the plaintiff's motions[3] and this appeal followed.

The plaintiff claims that the court erred by not relying at all upon Cipriani's testimony, by which, she claims, it effectively precluded such testimony without holding a *Porter* hearing. We disagree.

"It is well settled that [t]he trial court has wide discretion in ruling on the admissibility of expert testimony and, unless that discretion has been abused or the ruling involves a clear misconception of the law, the trial court's decision will not be disturbed." (Internal quotation marks omitted.) *Hicks* v. *State*, 287 Conn. 421, 444,

[3] The trial court denied the plaintiff's motion for articulation, from which the plaintiff sought review from this court. This court dismissed the plaintiff's motion for review, but sua sponte, ordered the trial court to rectify its July 9, 2015 memorandum of decision to indicate that the "plaintiff presented a purported accident reconstructionist . . . ."

948 A.2d 982 (2008). Similarly, "we give great deference to the findings of the trial court because of its function to weigh and interpret the evidence before it and to pass upon the credibility of witnesses . . . ." (Internal quotation marks omitted.) *Wyszomierski* v. *Siracusa*, 290 Conn. 225, 237–38, 963 A.2d 943 (2009).

Here, the plaintiff's claim that the court precluded Cipriani's testimony is belied by the record. Although the court initially sustained several of the department's oral objections to Cipriani's testimony on the ground that it was speculative, it ultimately admitted his testimony in full. Thereafter, Cipriani testified extensively, over repeated defense objections. In overruling those objections, the court repeatedly stated that it was admitting all of Cipriani's testimony into evidence so that it could later decide what weight, if any, to give that testimony in deciding the issues before it. Having done so, the court was free to evaluate Cipriani's opinion testimony, and reject it in whole or in part, because "[t]he acceptance or rejection of the opinions of expert witnesses is a matter peculiarly within the province of the trier of fact and its determinations will be accorded great deference by this court. . . . In its consideration of the testimony of an expert witness, the [finder of fact] might weigh, as it sees fit, the expert's expertise, his opportunity to observe the defendant and to form an opinion, and his thoroughness. It might consider also the reasonableness of his judgments about the underlying facts and of the conclusions which he drew from them. . . . It is well settled that the trier of fact can disbelieve any or all of the evidence proffered . . . ." (Internal quotation marks omitted.) *State* v. *Washington*, 155 Conn. App. 582, 593–94, 110 A.3d 493 (2015). Although the court ultimately determined that Cipriani's testimony was based on conjecture and speculation, and that it was not necessary for the court to

rely on it in deciding the issues presented, that statement is indicative of the court's weighing, consideration, and ultimate rejection, of the substance of Cipriani's testimony, not its preclusion as evidence at trial.

Because the record does not support the plaintiff's contention that the court precluded her expert's testimony, but, rather, reveals that it admitted that testimony and then properly acted within its role as the finder of fact in weighing and rejecting that testimony, her claim on appeal must fail.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* ZACHERY FRANKLIN (AC 39180)

DiPentima, C. J., and Keller and Beach, Js.

Syllabus

Convicted of multiple crimes as a result of the shooting death of the victim in the city of Waterbury, the defendant appealed, claiming, inter alia, that the evidence was insufficient to sustain his conviction of murder and criminal possession of a firearm, and that the trial court abused its discretion by admitting certain uncharged misconduct evidence. The defendant and another individual had exited a black Acura automobile, approached a motorcycle that was parked in a driveway, and, from a distance of about eight and one-half feet, shot its operator to death. The shooting continued as the motorcycle crashed into a stop sign. The next day, the defendant and another individual, S, who had been with the defendant in Waterbury the previous day, were seen in New Haven shooting handguns before driving off in a black Acura. Bullet evidence recovered there by the police matched bullet evidence that they recovered at the murder scene. S was later arrested and implicated the defendant in the murder. The police also developed evidence that during the events leading up to the murder, the defendant had a cell phone that was owned by S's sister, I. While the defendant was incarcerated and awaiting trial, he told another individual, H, who was incarcerated in the same correctional center and who testified at the defendant's trial,

that he had killed the victim for the purpose of stealing the victim's motorcycle and a neck chain that the victim wore. *Held*:

1. Contrary to the defendant's claim, the evidence was sufficient to support his conviction of murder: the evidence supported the jury's finding that the defendant was one of the individuals who exited the Acura and shot at the victim, as H testified that the defendant told him while they were incarcerated together that he exited the Acura and shot the victim in an attempt to rob him, and that the defendant stated that he was linked to the shooting as a result of both S's having spoken to the police, and the recovery by the police of video footage and firearms evidence, and the jury in turn credited H's testimony regarding the defendant's confession; furthermore, the jury's finding that the defendant possessed the intent to kill the victim was supported by evidence that the defendant wanted to rob the victim of the motorcycle and the chain that the victim wore, that the defendant fired several gunshots at the motorcycle from a distance of eight and one-half feet, and that he fled from the shooting scene without providing medical assistance to the victim and was in possession of false identification when he was detained by the police.
2. There was sufficient evidence to support the defendant's conviction of criminal possession of a firearm, the parties having stipulated at trial that the defendant had been convicted of a felony prior to the shooting of the victim, and the evidence having been sufficient for the jury to find that the defendant was one of the individuals who had exited the Acura and shot at the victim while he was on the motorcycle.
3. The trial court did not abuse its discretion when it admitted uncharged misconduct evidence, offered by the state to demonstrate that the defendant possessed a firearm that was used in the victim's shooting in Waterbury, that included a photograph of a crime scene in New Haven that depicted police tape and testimony that the defendant, on the day after the shooting in Waterbury, possessed and fired a weapon in the back of a building in New Haven: in light of the details of the crimes at issue in this case, evidence that the defendant possessed and discharged a firearm in the back of a building would not unduly arouse the emotions, hostility or sympathy of the jury, as the court heard oral argument from the parties, considered their motions and briefs, and prevented the jury from hearing the most inflammatory details of the uncharged misconduct evidence; furthermore, the probative value of the misconduct evidence outweighed its prejudicial effect because it helped identify the defendant as a shooter in Waterbury, the court instructed the jurors to refrain from considering the police tape in the photograph taken in New Haven, and there was ample testimony that the police investigated that location after a report that gunshots had been fired there.
4. The defendant could not prevail on his claim that his right to a fair trial was violated when the prosecutor made certain allegedly improper remarks during closing argument to the jury: although the prosecutor's

incorrect statement that a witness testified that two men approached the motorcycle after it crashed into a stop sign may have been improper, it did not appear to have been intentional, the defendant did not object to the comment when it was made, the comment was only a small part of the prosecutor's summation and was not related to a critical issue in the case, and the state's case against the defendant was strong; furthermore, the prosecutor's comments that the defendant possessed and used a certain phone belonging to I during the events leading up to the murder, and that H's testimony included an admission by the defendant that he shot the victim and took the victim's neck chain were based on evidence, and although the prosecutor's characterization of the neck chain was not part of the evidence, it did not violate the defendant's right to due process.

Argued February 6—officially released July 25, 2017

Procedural History

Substitute information charging the defendant with the crimes of murder, felony murder, attempt to commit robbery in the first degree, conspiracy to commit robbery in the first degree and criminal possession of a firearm, brought to the Superior Court in the judicial district of Waterbury and tried to the jury before *Cremins*, *J.*; thereafter, the court sustained in part the defendant's objection to the admission of certain evidence; verdict of guilty; subsequently, the court denied the defendant's motion for a judgment of acquittal and for a new trial, and rendered judgment in accordance with the verdict; thereafter, the court vacated the conviction of felony murder, and the defendant appealed. *Affirmed.*

Alice Osedach, assistant public defender, for the appellant (defendant).

Harry Weller, senior assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *David A. Gulick*, senior assistant state's attorney, for the appellee (state).

Opinion

DiPENTIMA, C. J. The defendant, Zachery Franklin, appeals from the judgment of conviction, following a

jury trial, of murder, in violation of General Statutes § 53a-54a, attempt to commit robbery in the first degree in violation of General Statutes §§ 53a-49 (a) (2) and 53a-134 (a) (2), conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-8 (a) and 53a-134 (a) (2), and criminal possession of a firearm in violation of General Statutes § 53a-217 (a) (1).[1] On appeal, the defendant claims that (1) the evidence was insufficient to sustain his conviction of murder and criminal possession of a firearm, (2) the court abused its discretion by admitting certain uncharged misconduct evidence and (3) his right to a fair trial was violated as a result of prosecutorial impropriety. We disagree, and, accordingly, affirm the judgment of conviction.

The jury reasonably could have found the following facts. During the evening of July 7, 2011, James Beaulieu rode on a two seat, three-wheeled motorcycle known as a T-Rex[2] driven by the victim, Luis Cruz. The two returned to Boyden Street in Waterbury, where Beaulieu had parked his motorcycle. At approximately 1:30 a.m. on July 8, 2011, Adam Maringola, who was working in a nearby building, heard a loud noise and watched as the victim pulled into a driveway and stopped briefly.

[1] The jury also found the defendant guilty of felony murder in violation of General Statutes § 53a-54c. The trial court initially rendered judgment of conviction in accordance with the jury's verdict as to the felony murder count. After sentencing, the court vacated the conviction of felony murder, citing to our decision in *State* v. *Miranda*, 145 Conn. App. 494, 508, 75 A.3d 742 (2013), aff'd, 317 Conn. 741, 120 A.3d 490 (2015), in which this court stated: "Our Supreme Court, however, has specifically concluded that the legislature intended that intentional murder and felony murder are alternative means of committing the same offense and should be treated as a single crime for double jeopardy purposes. . . . Because . . . felony murder and intentional murder are the same offense for double jeopardy purposes . . . the vacatur remedy adopted in [*State* v. *Polanco*, 308 Conn. 242, 61 A.3d 1084 (2013)] must apply." (Citations omitted; internal quotation marks omitted.)

[2] Adam Maringola, a witness to the incident, described the T-Rex as a "custom vehicle" with two wheels in the front and one wheel in the back, and having two car seats.

Maringola observed a black Acura near the T-Rex. He then saw two people exit the Acura and walk toward the T-Rex. The victim became alarmed and backed out of the driveway. The two individuals from the Acura began shooting at the T-Rex from a distance of approximately eight and one-half feet. The shooting continued as the T-Rex crashed into a stop sign. Beaulieu pushed himself out of the T-Rex and ran up a hill. Maringola watched the two men from the Acura shoot at Beaulieu as he fled.

One of the men from the Acura approached the T-Rex and ordered the victim to exit. The victim replied that he was unable to do so and then was shot multiple times. This shooter continued to pull the trigger of the firearm even though he had discharged all of its ammunition. After the cessation of gunshots, another witness, Sade Canada, heard someone say, "just leave him, let's go," and the shooters returned to the Acura and drove off. Later that evening, the defendant was overheard telling his girlfriend, Isis Hargrove, that "we just did some hot shit," and appeared nervous.

After a brief period of time, Beaulieu returned to the T-Rex and saw that the victim had remained in it and was not moving. Waterbury police officers arrived and secured the area. At 1:37 a.m., paramedic Joshua Stokes was dispatched to the scene. He observed that the victim had lost a "copious" amount of blood, suffered multiple gunshot wounds and had no pulse or lung sounds. After consulting with a physician from Waterbury Hospital via telephone, the victim was pronounced dead at the scene.[3]

The next day, July 9, 2011, Antonio Lofton, a resident of New Haven, was in his backyard. Lofton observed

[3] Susan Williams, a pathologist with the state's chief medical examiner's office, who conducted the autopsy of the victim, concluded that the victim died as a result of suffering multiple gunshot wounds.

the defendant and Earl Simpson shoot handguns five or six times before driving off in a black Acura.[4] The noise from the firearms resulted in a report to the police, and Myra Nieves, a New Haven police detective, commenced an investigation. She recovered six bullet casings and one projectile from that area. These items were sent to the state forensics laboratory for testing.

At the location of the Waterbury shooting, Brian Juengst, a crime scene technician, participated in the recovery of thirteen shell casings and three intact projectiles.[5] Orlando Rivera, a detective with the Waterbury Police Department, investigated the homicide and learned that a dark-colored vehicle, later determined to be a black Acura, had been used by the shooters. Rivera obtained video from businesses located near the shooting. These videos showed the black Acura following the T-Rex until it pulled into the driveway on Boyden Street. Rivera also learned that the casings and projectiles found at the Waterbury crime scene were

[4] We note that the defendant was convicted of murder, felony murder, robbery or attempt to commit robbery in the first degree, carrying a pistol without a permit and criminal possession of a pistol or revolver as a result of this incident. See *State* v. *Franklin*, 162 Conn. App. 78, 81–82, 129 A.3d 770 (2015), cert. denied, 321 Conn. 905, 138 A.3d 281 (2016). The jury in the present case was unaware of these charges and the defendant's conviction.

[5] Juengst also explained the difference between a casing and a projectile: "Well, if you were to take a complete bullet, it consists of a projectile, which is what we normally associate with a bullet. It's usually a metal slug. Oftentimes, it may contain a jacket which is copper that covers or partially covers that slug, and the casing is what contains the gunpowder, the primer, and is capped off by the bullet." Juengst further indicated the method by which shell casings are left behind at the scene of a shooting. "[A] semiautomatic handgun will eject a casing after the gun has been fired and the bullet [has] left the casing through the chamber of the gun and eject the casing out of the gun. Whereas, with a revolver, if you were to fire a revolver, it would leave the casing insider the chamber of the revolver. It could be, of course, manually removed by the shooter and left behind at the scene. But those are the only two ways that a casing or a spent casing can be left behind at the scene of a shooting."

connected to a criminal investigation in New Haven.[6] Rivera communicated with investigators in New Haven and obtained the names of the defendant, Isis Hargrove, Simpson and Shaquan Armour. Hargrove, who was the girlfriend of the defendant and the sister of Simpson, owned the black Acura. Using this information, Rivera obtained a search warrant for the cell phone records of Simpson and Hargrove. These records established that Hargrove was in the area of the Waterbury shooting at the time of that incident. After successfully applying for a warrant on August 26, 2011, Rivera seized the Acura. Discolorations on this vehicle matched those that were visible on the videos from the night of the shooting.

On July 29, 2011, Rivera learned that Simpson had been arrested in North Carolina. Approximately six weeks later, Rivera interviewed Simpson, who provided a written statement regarding the events of July 8, 2011. Simpson admitted that he and the defendant were in the area of Boyden Street in Waterbury at the time of the shooting. As a result of the investigation, Rivera obtained an arrest warrant for the defendant, and he was taken into custody on November 16, 2011.[7]

During the defendant's pretrial incarceration, he spoke with Joshua Habib, who also was held at the New Haven Correctional Center. Habib offered to transport a letter from the defendant to Hargrove, who at that time was incarcerated with Habib's girlfriend in another correctional facility. During their conversation, the two men discussed the shooting in Waterbury. The defendant told Habib that the victim had been killed for

[6] James Stephenson, a state firearms and tool mark examiner, testified that two guns had fired all of the bullets at the Waterbury and New Haven locations.

[7] At the time he was arrested and taken into custody, the defendant possessed an identification card that listed a false name. When presented with documents containing his true name and photograph, the defendant "sighed heavily . . . dropped his head and nodded."

the purpose of stealing the T-Rex and a chain. The defendant provided specifics regarding the Waterbury shooting, telling Habib that "he got out of the car and shot [the victim], and they were attempting or he—intentions was to rob [the victim] for the [T-Rex] . . . ." The defendant also told Habib that the case against him was based on circumstantial evidence.

The jury found the defendant guilty on all charges. The court sentenced the defendant to seventy-five years incarceration, thirty-two of which were mandatory. On August 27, 2014, the court vacated the conviction of felony murder, but did not alter the length of the defendant's sentence.[8] This appeal followed. Additional facts will be set forth as necessary.

I

The defendant first claims that the evidence was insufficient to sustain his conviction of murder and criminal possession of a firearm.[9] Specifically, he argues that the state failed to present sufficient evidence that he had fired the gun during the Waterbury shooting, and therefore, his conviction of murder and criminal possession of a firearm cannot stand. We are not persuaded.

As a preliminary matter, we note that the defendant preserved this claim by moving for a judgment of acquittal at the conclusion of the state's evidence, pursuant to Practice Book §§ 42-40 and 42-41.[10] See *State* v. *Taft*,

[8] See footnote 1 of this opinion.

[9] We begin with this claim because if the defendant prevails on the sufficiency claim, he is entitled to a directed judgment of acquittal on these charges, rather than to a new trial. See *State* v. *Moore*, 100 Conn. App. 122, 126 n.2, 917 A.2d 564 (2007); see also *State* v. *Badaracco*, 156 Conn. App. 650, 656 n.11, 114 A.3d 507 (2015).

[10] "Even if this claim had not been preserved, we would review it on appeal. Our Supreme Court has observed that any defendant found guilty on the basis of insufficient evidence has been deprived of a constitutional right, and would therefore necessarily meet the four prongs of [*State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989)]. . . . Accordingly, because there is no practical significance . . . for engaging in a *Golding*

306 Conn. 749, 753 n.6, 51 A.3d 988 (2012); *State* v. *Brown*, 118 Conn. App. 418, 422, 984 A.2d 86 (2009), cert. denied, 295 Conn. 901, 988 A.2d 877 (2010). Specifically, defense counsel argued that there was no evidence that he possessed a firearm on July 8, 2011. With respect to the murder charge, defense counsel contended that there was no evidence that the defendant had been one of the two shooters who had exited the black Acura. Additionally, defense counsel noted that two of the eyewitnesses had testified that the shooters had dark skin, but that the defendant had light skin. The court denied the defendant's motion. The defendant also filed a postverdict motion for a judgment of acquittal[11] that the court denied prior to sentencing.

Next, we set forth our standard of review and the legal principles relevant to a claim of evidentiary insufficiency. We recently iterated that "a defendant who asserts an insufficiency of the evidence claims bears an arduous burden." (Internal quotation marks omitted.) *State* v. *Leniart*, 166 Conn. App. 142, 169, 140 A.3d 1026, cert. granted on other grounds, 323 Conn. 918, 149 A.3d 499, 150 A.3d 1149 (2016). "In reviewing the sufficiency of the evidence to support a criminal conviction 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 [finder of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . .

analysis, we review an unpreserved sufficiency of the evidence claim as though it had been preserved. . . . *State* v. *Revels*, 313 Conn. 762, 777, 99 A.3d 1130 (2014), cert. denied, U.S. , 135 S. Ct. 1451, 191 L. Ed. 2d 404 (2015)." (Internal quotation marks omitted.) *State* v. *Terry*, 161 Conn. App. 797, 804 n.4, 128 A.3d 958 (2015), cert. denied, 320 Conn. 916, 131 A.3d 751 (2016).

[11] See Practice Book § 42-51.

"We note that the 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 [finder] of fact is not required to accept as dispositive those inferences that are consistent with the defendant's innocence. . . . The [finder of fact] may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical. . . .

"Finally, [a]s we have often noted, proof beyond a reasonable doubt does not mean proof beyond all possible doubt . . . nor does proof beyond a reasonable doubt require acceptance of every hypothesis of innocence posed by the defendant that, had it been found credible by the [finder of fact], would have resulted in an acquittal. . . . On 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 [finder of fact's] verdict of guilty." (Internal quotation marks omitted.) *State* v. *Badaracco*, 156 Conn. App. 650, 657–58, 114 A.3d 507

(2015); see also *State* v. *Bush*, 325 Conn. 272, 285–86, 157 A.3d 586 (2017). Guided by these principles, we consider the defendant's appellate arguments in turn.

A

The defendant first argues that the evidence was insufficient to support his conviction of murder[12] because the "state presented no direct evidence that identified the defendant as one firing shots or one that solicited, requested, commanded, importuned or intentionally aided anyone in the shooting of the victim. The circumstantial evidence presented in this case was not sufficient to have found the defendant guilty of murder." Specifically, he contends that the state failed to prove that he was one of the individuals who fired a gun at the victim or that he had intended to kill the victim. We are not persuaded.

The operative information did not charge the defendant with murder as an accessory. It is not disputed, however, that he was tried as a principal or an accessory on the murder charge.[13] Thus, to convict the defendant,

[12] General Statutes § 53a-54a provides: "(a) A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person or of a third person or causes a suicide by force, duress or deception; except that in any prosecution under this subsection, it shall be an affirmative defense that the defendant committed the proscribed act or acts under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be, provided nothing contained in this subsection shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime."

[13] Our Supreme Court has stated that "consistent with well established underlying principles of accessorial liability, the state must prove that [a] defendant acted as an accessory by soliciting, requesting, commanding, importuning or intentionally aiding . . . in causing [a] victim's death. . . . This is because accessorial liability is designed to punish one who intentionally aids another in the commission of a crime and not one whose innocent acts in fact aid one who commits an offense. . . . Mere presence as an inactive companion, passive acquiescence, or the doing of innocent acts which may in fact aid the one who commits the crime must be distinguished

the state was required to prove that he was one of the two men, who, after exiting the Acura, shot at the victim in the T-Rex. See, e.g., *State* v. *Jackson*, 257 Conn. 198, 206, 777 A.2d 591 (2001) (question of identity of perpetrator of crime is question of fact for jury to resolve); *State* v. *Rodriguez*, 133 Conn. App. 721, 728, 36 A.3d 724 (2012) (same), aff'd, 311 Conn. 80, 83 A.3d 595 (2014). The state was not required, however, to prove that the defendant fired the fatal gunshot. *State* v. *Allen*, 289 Conn. 550, 559–60, 958 A.2d 1214 (2008); *State* v. *Hamlett*, 105 Conn. App. 862, 866–67, 939 A.2d 1256, cert. denied, 287 Conn. 901, 947 A.2d 343 (2008).

1

The defendant contends that there was no evidence that he exited the Acura and fired a gun at the victim. This claim, however, ignores the testimony of Habib, the individual who spoke with the defendant about the shooting while incarcerated at the New Haven Correctional Center. Habib initially testified that the defendant had told him that "*they* killed [the victim] for the—his chain, and *they* basically were going to rob [the victim] of the three-wheeler that he was riding and—which *they* ended up not taking. *They* just took his chain." (Emphasis added.) Habib then clarified his testimony

from the criminal intent and community of unlawful purpose shared by one who knowingly and wilfully assists the perpetrator of the offense in the acts which prepare for, facilitate or consummate it." (Citations omitted; internal quotation marks omitted.) *State* v. *Gonzalez*, 311 Conn. 408, 421, 87 A.3d 1101 (2014); see also General Statutes § 53a-8 (a).

We also note that the state did not charge the defendant with conspiracy to commit murder, and therefore did not attempt to convict the defendant under the *Pinkerton* doctrine. See *Pinkerton* v. *United States*, 328 U.S. 640, 647–48, 66 S. Ct. 1180, 90 L. Ed. 1489 (1946). "[U]nder the *Pinkerton* doctrine, a conspirator may be found guilty of a crime that he or she did not commit if the state can establish that a coconspirator did commit the crime and that the crime was within the scope of the conspiracy, in furtherance of the conspiracy, and a reasonably foreseeable consequence of the conspiracy." (Internal quotation marks omitted.) *State* v. *VanDeusen*, 160 Conn. App. 815, 845, 126 A.3d 604, cert. denied, 320 Conn. 903, 127 A.3d 187 (2015).

as follows: "[The defendant] said that *he* got out of the car and shot [the victim] and they were attempting or *he*—intentions was to rob him for the three-wheeler they were riding or *he*—the . . . [*h*]*is* intentions were to rob the—the victim of the three-wheeler he was riding and whatever he may have had on him . . . ." (Emphasis added.)

Our Supreme Court has noted that "[w]here the authenticity and reliability of a confession are established, it is certainly true that we have before us the highest sort of evidence." (Internal quotation marks omitted.) *State* v. *Ruth*, 181 Conn. 187, 197, 435 A.2d 3 (1980). In *Ruth*, the court concluded that the defendant's confession, coupled with "more than ample evidence of the corpus delicti" and accomplice testimony constituted overwhelming evidence of guilt. Id., 199. In the present case, the state presented Habib's testimony in which the defendant admitted that he exited the Acura and then shot the victim. Contrary to the defendant's appellate argument, the state produced evidence that the defendant possessed the gun and shot the victim in Waterbury in the early hours of July 8, 2011.

Habib also testified that he never had lived in New Haven, and that he met the defendant for the first time while incarcerated at the New Haven Correctional Center in March, 2012. Specifically, Habib indicated that he "didn't know nothing" about the defendant at that time. The defendant told Habib that the case against him was based entirely on circumstantial evidence and that the only thing that linked him to death of the victim was that Simpson had spoken to the police following his arrest "down South." The defendant also stated to Habib that the video footage recovered by the police did not show the defendant's face or the license plates on Hargrove's Acura, but did include the bullet holes present on the vehicle. Finally, the defendant revealed

to Habib that some firearms evidence had been recovered from his home that linked him to the shooting of the victim. These additional details bolstered Habib's credibility, despite his status as a jailhouse informant.[14] The jury, in turn, credited Habib's testimony regarding the defendant's confession, which served as the link between the death of the victim and the defendant.[15] See *State* v. *Farnum*, 275 Conn. 26, 33, 878 A.2d 1095 (2005).

Construing the evidence in the light most favorable to sustaining the verdict, we conclude that the evidence in the present case was sufficient to support the jury's finding that the defendant was one of the individuals who exited the Acura and shot at the victim. Accordingly, we conclude that the defendant's claim to the contrary must fail.

[14] Habib met the definition of a jailhouse informant because he was incarcerated at the time of his testimony at the defendant's trial and his testimony was about a crime that he had not witnessed personally, but a confession or inculpatory statements made by the defendant during their incarceration. See *State* v. *Diaz*, 302 Conn. 93, 102–104, 25 A.3d 594 (2011); see also *State* v. *Arroyo*, 292 Conn. 558, 564–70, 973 A.2d 1254 (2009), cert. denied, 559 U.S. 911, 130 S. Ct. 1296, 175 L. Ed. 2d 1086 (2010); *State* v. *Patterson*, 276 Conn. 452, 465, 886 A.2d 777 (2005); cf. *State* v. *Carattini*, 142 Conn. App. 516, 523–24, 73 A.3d 733 (witness was not jailhouse informant because he was not incarcerated at time of testimony and did not testify about confession or inculpatory statements made at time when both were incarcerated together), cert. denied, 309 Conn. 912, 69 A.3d 308 (2013).

Our Supreme Court has noted that "[t]estimony by a jailhouse informant about a jailhouse confession is inherently suspect because of the ease with which such testimony can be fabricated, the difficulty in subjecting witnesses who give such testimony to meaningful cross-examination and the great weight that juries tend to give to confession evidence. . . . In contrast, when a witness testifies about events surrounding the crime that the witness observed, the testimony can be compared with the testimony of other witnesses about those events, and the ability of the witness to observe and remember the events can be tested." (Citations omitted; internal quotation marks omitted.) *State* v. *Diaz*, 302 Conn. 93, 109–10, 25 A.3d 594 (2011). Nevertheless, the jury, properly instructed on informant testimony, remained free to accept and credit Habib's testimony, despite his status as a jailhouse informant.

[15] During its deliberations, the jury requested to rehear Habib's testimony.

The defendant next contends that the state failed to prove that he had intended to kill the victim. This contention is based, in large part, on the defendant's argument that there was insufficient evidence to prove that he was one of the men who exited the Acura and shot at the victim. Having rejected that underlying premise in part I A 1 of this opinion, we similarly are not persuaded by the defendant's contention that the state failed to produce sufficient evidence regarding the element of intent.

In order to convict the defendant of murder, the state was required to prove, beyond a reasonable doubt, that he had the intent to cause the death of another person. *State* v. *White*, 127 Conn. App. 846, 851–52, 17 A.3d 72, cert. denied, 302 Conn. 911, 27 A.3d 371 (2011). "Under . . . § 53a-54a (a), the state must prove that the defendant acted with the specific intent to cause the death of the victim. . . . Intent is a mental process which ordinarily can be proven only by circumstantial evidence. An intent to cause death may be inferred from circumstantial evidence such as the type of weapon used, the manner in which it was used, the type of wound inflicted and the events leading to and immediately following the death. . . . The use of inferences based on circumstantial evidence is necessary because direct evidence of the accused's state of mind is rarely available. . . .

"Whether a criminal defendant possessed the specific intent to kill is a question for the trier of fact. . . . This court will not disturb the trier's determination if, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. . . . [I]n viewing evidence which could yield contrary inferences, the [fact finder] is not barred from

drawing those inferences consistent with guilt and is not required to draw only those inferences consistent with innocence. The rule is that the [fact finder's] function is to draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical." (Citation omitted; internal quotation marks omitted.) *State* v. *Ames*, 171 Conn. App. 486, 507, 157 A.3d 660 (2017); see also *State* v. *Medina*, 228 Conn. 281, 303, 636 A.2d 351 (1994) (defendant acts intentionally in causing death of another when he has conscious objective to cause another's death); *State* v. *Leniart*, supra, 166 Conn. App. 175–76 (same).

Our Supreme Court has recognized that "[i]ntent to cause death may be inferred from the type of weapon used, the manner which it was used, the type of wound inflicted and the events leading to and immediately following the death. . . . 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. *Otto*, 305 Conn. 51, 66–67, 43 A.3d 629 (2012).

In the present case, there was evidence that the defendant wanted to rob the victim of the T-Rex vehicle and of a chain worn around his neck. After following the victim for a period of time, the defendant exited the Acura armed with a firearm. From a distance of approximately eight and one-half feet, the defendant aimed the firearm at the T-Rex and fired several rounds. He then fled without providing any medical assistance, and, when detained by law enforcement, possessed false identification. On the basis of these facts, we conclude that there was evidence for the jury to conclude that the defendant possessed the intent necessary to support his conviction of murder. See, e.g., *State* v. *Gary*, 273 Conn. 393, 408–409, 869 A.2d 1236 (2005); see also *State* v. *Floyd*, 253 Conn. 700, 720, 756 A.2d 799 (2000) (jury

could infer intent to cause victim's death where defendant fired multiple gunshots at victim as he lay on ground); *State* v. *Sanchez*, 166 Conn. App. 665, 679–80, 146 A.3d 344 (defendant's firing of series of gunshots at crowd and immediately leaving scene of shooting constituted evidence of specific intent to kill or injure another person), cert. denied, 323 Conn. 917, 149 A.3d 498 (2016); *State* v. *Leniart*, supra, 166 Conn. App. 177 (defendant's failure to obtain, or attempt to obtain, medical assistance for victim constituted evidence of intent to kill); *State* v. *Grant*, 149 Conn. App. 41, 50, 87 A.3d 1150 (consciousness of guilt evidence may be used to draw inference of intent to kill), cert. denied, 312 Conn. 907, 93 A.3d 158 (2014); *State* v. *Wright*, 77 Conn. App. 80, 93, 822 A.2d 940 (fleeing scene of shooting while in possession of gun indicative of intent to commit murder), cert. denied, 266 Conn. 913, 833 A.2d 466 (2003). We conclude, therefore, that sufficient evidence existed to support the jury's finding that the defendant possessed the intent necessary to find him guilty of murder.

B

The defendant also argues that the evidence was insufficient to support his conviction of criminal possession of a firearm. We note that this claim is based on the contention that the defendant was not one of the individuals who exited the Acura and shot at the victim on the T-Rex. In part I A of our opinion, we rejected that argument. We further conclude that the evidence was sufficient to support the defendant's conviction of criminal possession of a firearm in violation of § 53a-217.

Section 53a-217 (a) provides in relevant part that "[a] person is guilty of criminal possession of a firearm . . . when such person possesses a firearm, ammunition or an electronic defense weapon and (1) has been convicted of a felony committed prior to, on or after October 1, 2013 . . . ." See also *State* v. *Beavers*, 99 Conn.

App. 183, 189, 912 A.2d 1105, cert. denied, 281 Conn. 925, 918 A.2d 276 (2007). The term "firearm" is statutorily defined in General Statutes § 53a-3 (19) as "any sawed-off shotgun, machine gun, rifle, shotgun, pistol, revolver or other weapon, whether loaded or unloaded from which a shot may be discharged . . . ." (Emphasis in original; internal quotation marks omitted.) *State* v. *Beavers*, supra, 189.

In the present case, the parties stipulated that the defendant had been convicted of a felony prior to July 8, 2011. Additionally, we have concluded that there was sufficient evidence for the jury to find that he was one of the two individuals who exited the Acura and shot at the victim while he was on the T-Rex. Accordingly, we conclude that there was sufficient evidence to support the defendant's conviction of criminal possession of a firearm.

II

The defendant next claims that the court abused its discretion in admitting uncharged misconduct evidence. Specifically, he argues that the prejudicial impact of certain evidence from the New Haven crime scene outweighed its probative value. We are not persuaded.

The following additional facts are necessary for our discussion. On December 20, 2013, the state filed notice of its intent to offer into evidence uncharged acts of misconduct by the defendant.[16] Specifically, it sought

[16] The state set forth four acts of uncharged misconduct that it might seek to have admitted into evidence. The first act was that in June, 2011, the defendant possessed a firearm and threatened another person. The second act was that the day after the Waterbury shooting, the defendant shot and killed another victim in New Haven and that Simpson and the defendant were present at both crime scenes. The third act was that after the Waterbury and New Haven shootings, the defendant fled Connecticut and was subject to a traffic stop by a New Jersey state police officer. During this stop, the defendant provided the officer with a false name, and there were guns in the trunk of the automobile. The fourth act was that he possessed an

to present evidence that approximately sixteen and one-half hours after the Waterbury shooting, the defendant shot and killed another person during a robbery in New Haven. Further, the state sought to introduce evidence that the firearm was used in both the Waterbury and New Haven killings, and that Simpson was with the defendant during both crimes. The defendant objected to the uncharged misconduct evidence. During jury selection, the court directed counsel to review *State* v. *Collins*, 299 Conn. 567, 10 A.3d 1005, cert. denied, 565 U.S. 908, 132 S. Ct. 314, 181 L. Ed. 2d 193 (2011), which was applicable, in the court's view, to the uncharged misconduct issue in the present case. At this point, the state noted that it intended to "sanitize" the evidence from the New Haven shooting to show only that the defendant had possessed a firearm used in the Waterbury shooting the previous day.

On May 13, 2014, the court ruled that the state would be permitted to present evidence that the defendant had possessed and fired a weapon in New Haven the day after the Waterbury shooting. On May 19, 2014, the state called Antonio Lofton as a witness. Prior to his testimony and outside of the presence of the jury, the court provided a cautionary warning where it instructed Lofton to refrain from mentioning the New Haven homicide and to limit his testimony to the fact that he had

identification card containing his picture and a different name at the time of his arrest.

For the limited purpose of demonstrating the defendant's consciousness of guilt, the court permitted the state to present evidence that the defendant had fled from Connecticut and had provided law enforcement in New Jersey with a false name. The defendant has not challenged that ruling in this appeal. The court also determined that the state could present evidence regarding the defendant's discharge of a firearm on the day following the Waterbury shooting, but not that he shot at a person. The court granted the motion in limine with respect to the first act of uncharged misconduct. Thus, we will not discuss in further detail the first, third and fourth alleged acts set forth in the state's pleading regarding uncharged misconduct.

observed the defendant possess and discharge a firearm on July 9, 2011.

Defense counsel also noted his objection to a photograph of the New Haven crime scene that included police tape. After a brief discussion, some of which was held off the record at sidebar, the court indicated that it would allow the photograph to be admitted into evidence. Defense counsel argued that the prejudicial impact of the police tape in the photograph outweighed its probative value. As Lofton took the witness stand, the court specifically instructed him to refrain from mentioning the homicide that had occurred in New Haven.[17]

Lofton testified that he lived in New Haven on July 9, 2011, and that his sister was pregnant with the defendant's child. In the early evening, Lofton was sitting in his backyard when he heard multiple gunshots coming from behind a nearby brick building. Lofton stated that he had observed the defendant and Simpson shoot handguns five or six times before driving off in a black Acura. The prosecutor presented a photograph, which was admitted into evidence over the defendant's objection. The court instructed the jury that it was not to consider the police tape depicted in the photograph.

During the trial, the state also presented evidence from Nieves, a New Haven police detective, and James Stephenson, a state firearms and tool mark examiner, regarding the bullets and casings recovered from the site of the New Haven shooting. These witnesses established that the two firearms used in the New Haven shooting were the same as those used in the Waterbury shooting.

[17] Specifically, the court stated: "Mr. Lofton, I want to go over something with you that's very important. As far as any testimony involving a homicide, somebody was actually shot at in New Haven, that's not any area that you can talk about. You can talk about the fact that you—what you saw, but that's it. Is that clear?"

We now turn to the relevant legal principles and our standard of review for claims that the court improperly admitted uncharged misconduct evidence. "Evidence of a defendant's uncharged misconduct is inadmissible to prove that the defendant committed the charged crime or to show the predisposition of the defendant to commit the charged crime. . . . Exceptions to this rule have been recognized, however, to render misconduct evidence admissible if, for example, the evidence is offered to prove intent, identity, malice, motive, a system of criminal activity or the elements of a crime. . . . To determine whether evidence of prior misconduct falls within an exception to the general rule prohibiting its admission, we have adopted a two-pronged analysis. . . . First, the evidence must be relevant and material to at least one of the circumstances encompassed by the exceptions. Second, the probative value of such evidence must outweigh the prejudicial effect of the other crime evidence. . . . Since the admission of uncharged misconduct evidence is a decision within the discretion of the trial court, we will draw every reasonable presumption in favor of the trial court's ruling. . . . We will reverse a trial court's decision only when it has abused its discretion or an injustice has occurred." (Internal quotation marks omitted.) *State* v. *Torres*, 168 Conn. App. 611, 619–20, 148 A.3d 238 (2016), cert. granted on other grounds, 325 Conn. 919, A.3d (2017); see also *State* v. *Pena*, 301 Conn. 669, 673–74, 22 A.3d 611 (2011); Conn. Code Evid. (2009) § 4-5 (b).[18]

In the present case, the court determined that the evidence from the New Haven shooting was probative of the defendant's "means" to commit the Waterbury

[18] Section 4-5 (b) of the 2009 edition of the Connecticut Code of Evidence provides in relevant part: "Evidence of other crimes, wrongs or acts of a person is admissible for purposes other than those specified in subsection (a) such as to prove intent, identity, malice, motive, common plan or scheme, absence of mistake or accident, knowledge, a system of criminal activity, or an element of the crime, or to corroborate crucial prosecution testimony."

shooting. "Evidence indicating that an accused possessed an article with which the particular crime charged may have been accomplished is generally relevant to show that the accused had the means to commit the crime. . . . The state does not have to connect a weapon directly to the defendant and the crime. It is necessary only that the weapon be suitable for the commission of the offense." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *Franklin*, 162 Conn. App. 78, 96, 129 A.3d 770 (2015), cert. denied, 321 Conn. 905, 138 A.3d 281 (2016); see also *State* v. *Torres*, supra, 168 Conn. App. 620. In his brief to this court, the defendant focuses his appellate claim on the prejudice prong.[19]

"Although relevant, evidence may be excluded by the trial court if the court determines that the prejudicial effect of the evidence outweighs its probative value. . . . Of course, [a]ll adverse evidence is damaging to one's case, but it is inadmissible only if it creates undue prejudice so that it threatens an injustice were it to be admitted. . . . The test for determining whether evidence is unduly prejudicial is not whether it is damaging to the defendant but whether it will improperly arouse the emotions of the jur[ors]. . . . The trial court . . . must determine whether the adverse impact of the challenged evidence outweighs its probative value. . . . Finally, [t]he trial court's discretionary determination

[19] To the extent that the defendant summarily claims that there was no probative value to the fact that Lofton observed the defendant discharging the firearm, and all that was necessary was that he "saw the defendant with a silver handgun and that [Lofton] heard gunshots," we disagree. The discharge of the gun by the defendant on July 9, 2011, directly connected the defendant to the Waterbury shooting and showed that he had the means to commit those crimes. See *State* v. *Blango*, 103 Conn. App. 100, 110, 927 A.2d 964, cert. denied, 284 Conn. 919, 933 A.2d 721 (2007); see also *State* v. *Stevenson*, 53 Conn. App. 551, 571–72, 733 A.2d 253, cert. denied, 250 Conn. 917, 734 A.2d 990 (1999); *State* v. *Sivri*, 46 Conn. App. 578, 584, 700 A.2d 96, cert. denied, 243 Conn. 938, 702 A.2d 644 (1997).

that the probative value of evidence is not outweighed by its prejudicial effect will not be disturbed on appeal unless a clear abuse of discretion is shown. . . . [B]ecause of the difficulties inherent in this balancing process . . . every reasonable presumption should be given in favor of the trial court's ruling. . . . Reversal is required only [when] an abuse of discretion is manifest or [when] injustice appears to have been done." (Internal quotation marks omitted.) *State* v. *Torres*, supra, 168 Conn. App. 623–24; see also *State* v. *Rosario*, 99 Conn. App. 92, 104, 912 A.2d 1064, cert. denied, 281 Conn. 925, 918 A.2d 276 (2007).

The defendant argues that the uncharged misconduct evidence, specifically, that Lofton's testimony that he observed the defendant discharge a firearm,[20] aroused the emotions, hostility or sympathy of the members of the jury.[21] He further maintains that this evidence exceeded what was necessary to link the two crime scenes and made him, in the eyes of the jurors, "a person who acted violently, harmed or threatened to harm people and called into question his character." Finally, the defendant asserts that the admission into evidence of a photograph of the New Haven crime scene

[20] The defendant appears to agree that the admission into evidence of the collection of the bullets and casings from the New Haven crime scene and the matching of those items found in Waterbury the night before did not constitute an abuse of discretion.

[21] "Our Supreme Court has identified four factors relevant to determining whether the admission of otherwise probative evidence is unduly prejudicial. These are: (1) where the facts offered may unduly arouse the [jurors'] emotions, hostility or sympathy, (2) where the proof and answering evidence it provokes may create a side issue that will unduly distract the jury from the main issues, (3) where the evidence offered and the counterproof will consume an undue amount of time, and (4) where the defendant, having no reasonable ground to anticipate the evidence, is unfairly surprised and unprepared to meet it. . . . *State* v. *Hill*, 307 Conn. 689, 698, 59 A.3d 196 (2013)." (Internal quotation marks omitted.) *State* v. *Toro*, 172 Conn. App. 810, 816, A.3d (2017). The defendant's appellate argument pertains only to the first factor regarding the issue of undue prejudice; therefore, we confine our analysis and discussion accordingly.

that contained police tape was too prejudicial because the jury then knew of his conviction of crimes from that shooting.

The defendant was charged, inter alia, with shooting the victim during an attempted robbery. Given the details of the Waterbury crimes, evidence that he discharged a firearm behind a brick building would not unduly arouse the emotions of the jurors. See *State* v. *Estrella J.C.*, 169 Conn. App. 56, 99, 148 A.3d 594 (2016). The possession of a firearm likely would not cause an improper emotional response from the jury in a case where the defendant was charged, inter alia, with murder. See *State* v. *Collins*, supra, 299 Conn. 587–88; *State* v. *Torres*, supra, 168 Conn. App. 626; see generally *State* v. *Smith*, 313 Conn. 325, 342–43, 96 A.3d 1238 (2014) (prejudicial effect minimized by limited testimony to " 'bare bones' " account of misconduct); *State* v. *Morales*, 164 Conn. App. 143, 181, 136 A.3d 278 (when prior acts of misconduct were substantially less shocking than crimes charged, Appellate Court consistently has declined to conclude admission of evidence was unduly prejudicial), cert. denied, 321 Conn. 916, 136 A.3d 1275 (2016). Moreover, the court considered the written motions and briefs of the parties, as well as extensive oral argument, and prevented the jury from hearing the most inflammatory details of the New Haven incident. See *State* v. *Torres*, supra, 625; *State* v. *Kantorowski*, 144 Conn. App. 477, 489–92, 72 A.3d 1228 (care used by trial court in sanitizing uncharged misconduct evidence militates against finding abuse of discretion), cert. denied, 310 Conn. 924, 77 A.3d 141 (2013). The court also directly instructed Lofton to refrain from mentioning the homicide that had occurred in New Haven involving the defendant and permitted leading questions to help the witnesses avoid mentioning the more inflammatory details of the New Haven events. See *State* v. *Collins*, supra, 589 (care taken by trial court

to devise measures to reduce any prejudicial impact militates against finding abuse of discretion). We further conclude that the presence of police tape in the photograph from the New Haven crime provided minimal prejudicial impact, as there was ample testimony that the police investigated that location following a report of gunshots fired. Finally, the court provided the jurors with a limiting instruction directing them to refrain from considering the police tape. See *State* v. *Gonzalez*, 167 Conn. App. 298, 310, 142 A.3d 1227, cert. denied, 323 Conn. 929, 149 A.3d 500 (2016); see also *State* v. *Collins*, supra, 590. Any prejudice was outweighed by the probative value of the evidence that helped identify the defendant as a shooter in Waterbury on July 8, 2011. See, e.g., *State* v. *Gonsalves*, 137 Conn. App. 237, 247–49, 47 A.3d 923, cert. denied, 307 Conn. 912, 53 A.3d 998 (2012). Affording due deference to the ruling of the trial court, we conclude that it did not abuse its discretion in determining that the probative value of the uncharged misconduct evidence outweighed its prejudicial impact.

III

The defendant's final claim is that his right to a fair trial was violated as a result of prosecutorial impropriety. Specifically, he argues that the prosecutor made several mistakes regarding the evidence during his closing arguments to the jury, and that as a result, he was denied his due process right to a fair trial. The state counters that none of the claimed mistakes constituted prosecutorial impropriety and, even if this court were to conclude otherwise, the defendant failed to establish that he had been denied a fair trial. We conclude that the defendant's right to a fair trial was not violated in this case.

The legal principles regarding a claim of prosecutorial impropriety are well established. "In analyzing claims

of prosecutorial impropriety, we engage in a two step process. . . . First, we must determine whether any impropriety in fact occurred; second, we must examine whether that impropriety, or the cumulative effect of multiple improprieties, deprived the defendant of his due process right to a fair trial. . . . To determine whether the defendant was deprived of his due process right to a fair trial, we must determine whether the sum total of [the prosecutor's] improprieties rendered the defendant's [trial] fundamentally unfair . . . . The question of whether the defendant has been prejudiced by prosecutorial [impropriety], therefore, depends on whether there is a reasonable likelihood that the jury's verdict would have been different absent the sum total of the improprieties. . . . Accordingly, it is not the prosecutorial improprieties themselves but, rather, the nature and extent of the prejudice resulting therefrom that determines whether a defendant is entitled to a new trial. . . .

"To determine whether any improper conduct by the [prosecutor] violated the defendant's fair trial rights is predicated on the factors set forth in *State* v. *Williams* [204 Conn. 523, 540, 529 A.2d 653 (1987)], with due consideration of whether that [impropriety] was objected to at trial. . . . These factors include the extent to which the [impropriety] was invited by defense conduct or argument . . . the severity of the [impropriety] . . . the frequency of the [impropriety] . . . the centrality of the [impropriety] to the critical issues in the case . . . the strength of the curative measures adopted . . . and the strength of the state's case." (Citations omitted; internal quotation marks omitted.) *State* v. *Rios*, 171 Conn. App. 1, 51–52, 156 A.3d 18, cert. denied, 325 Conn. 914, 159 A.3d 232 (2017); see also *State* v. *Jones*, 320 Conn. 22, 34–35, 128 A.3d 431 (2015). The defendant bears the burden of demonstrating both that the comments were improper and

that they were so egregious as to constitute a denial of due process. *State* v. *Payne*, 303 Conn. 538, 562–63, 34 A.3d 370 (2012).

Additionally, "[i]t is well settled that the prosecutor, as a public official seeking impartial justice on behalf of the people of this state, has a heightened duty to avoid argument [or questioning] that strays from the evidence or diverts the jury's attention from the facts of the case. . . . Nonetheless, in evaluating claims of impropriety during summation, we recognize that the privilege of counsel in addressing the jury should not be too closely narrowed or unduly hampered . . . . Thus, as the state's advocate, a prosecutor may argue the state's case forcefully, [provided the argument is] fair and based upon the facts in evidence and the reasonable inferences to be drawn therefrom. . . . Moreover, [i]t does not follow . . . that every use of rhetorical language or device [by the prosecutor] is improper. . . . The occasional use of rhetorical devices is simply fair argument." (Citations omitted; internal quotation marks omitted.) *State* v. *Bennett*, 324 Conn. 744, 778, 155 A.3d 188 (2017).

Finally, we note that although the defendant objected to only one comment by the prosecutor, we will review his claims of prosecutorial misconduct. "It is well established law . . . that a defendant who fails to preserve claims of prosecutorial [impropriety] need not seek to prevail under the specific requirements of *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), and, similarly, it is unnecessary for a reviewing court to apply the four-pronged *Golding* test. . . . Our Supreme Court has explained that the defendant's failure to object at trial to . . . the [occurrence] that he now raises as [an instance] of prosecutorial impropriety, though relevant to our inquiry, is not fatal to review of his [claim]. . . . This does not mean, however, that the absence of an objection at trial does not play a

significant role in the determination of whether the challenged statements were, in fact, improper. . . . To the contrary, we continue to adhere to the well established maxim that defense counsel's failure to object to the prosecutor's argument when it was made suggests that defense counsel did not believe that it was [improper] in light of the record of the case at the time." (Internal quotation marks omitted.) *State* v. *Fernandez*, 169 Conn. App. 855, 867–68, 153 A.3d 53 (2016). Guided by these principles, we consider each of the defendant's claims of prosecutorial impropriety in turn.

A

The defendant first argues that an impropriety occurred when the prosecutor misstated to the jury during closing arguments that Maringola had testified that two people exited from the Acura, shot at the victim, walked closer to the T-Rex and fired a second volley of gunshots at the victim. We conclude that even if the challenged statement constituted an impropriety, the defendant failed to meet his burden of showing that it violated his right to due process.

As part of his preliminary remarks to the jury during closing argument, the prosecutor noted that if he said something about the facts of the case that was different from what a member of the jury remembered, then "your memory prevails, not what I have said." During the course of his presentation, the prosecutor argued the following to the jury: "Now, you heard testimony from Adam Maringola, remember Adam Maringola, he was in the home on Hanover . . . he was cleaning the house, he was preparing to move in. At that point, he heard the T-Rex, T-Rex drives down Hanover Street, caught his attention, he looked out the window. Saw it pull into the driveway at the end of Hanover and the T intersection with Boyden Street. He saw a number of people get out of the car, not exactly sure how many.

But he saw two of them exit the black Acura and walk toward that T-Rex, parked in the driveway. At that time, he sees the T-Rex back out, sees the two guys shoot. As he testified, he's shooting at the left side of the car, same side as [the victim] was struck with [a] number of bullets. *The bike crashes. He saw two people walk up to the bike*, he heard somebody say to [the victim], get out of the bike. He then heard [the victim] say, I can't. More shots." (Emphasis added.)

Maringola, the first witness of the trial, testified that he had observed two or three individuals exit the Acura while the T-Rex was in the driveway. He then saw that "two people [were] walking toward the bike." When the T-Rex started to back out of the driveway, the two individuals began shooting. The T-Rex crashed and came to a stop, and the passenger jumped out and ran away. The two men from the Acura shot at the passenger. Maringola then stated that, at this point, someone went up to the T-Rex, but he was not sure whether it was just one of the individuals from the Acura or both, and instructed the driver of the T-Rex to "get out." Finally, the person who had ordered the victim to "get out" shot the victim multiple times. During cross-examination, however, Maringola agreed with defense counsel's statement that it was "two people that walked up to the bike . . . ." A review of the colloquy between Maringola and defense counsel leads to the conclusion that Maringola was referencing a time frame from when the two individuals exited the Acura, but before they started shooting for the first time.

We have recognized that "[p]rosecutorial [impropriety] of a constitutional magnitude can occur in the course of closing arguments. . . . [B]ecause closing arguments often have a rough and tumble quality about them, some leeway must be afforded to the advocates in offering arguments to the jury in final argument. [I]n addressing the jury, [c]ounsel must be allowed a

generous latitude in argument, as the limits of legitimate argument and fair comment cannot be determined precisely by rule and line, and something must be allowed for the zeal of counsel in the heat of argument." (Internal quotation marks omitted.) *State* v. *Williams*, 172 Conn. App. 820, 834, A.3d , cert. denied, 326 Conn. 913, A.3d (2017); see also *State* v. *Bennett*, supra, 324 Conn. 778; *State* v. *Williams*, 102 Conn. App. 168, 193–94, 926 A.2d 7, cert. denied, 284 Conn. 906, 931 A.2d 267 (2007).

This latitude does not, however, permit a prosecutor to state, comment upon, or suggest an inference from facts not in evidence or present matters that the jury has no right to consider. *State* v. *Otto*, supra, 305 Conn. 76–77; *State* v. *Patterson*, 170 Conn. App. 768, 789, 156 A.3d 66, cert. denied, 325 Conn. 910, 158 A.3d 320 (2017); see also *State* v. *Ross*, 151 Conn. App. 687, 697–98, 95 A.3d 1208 (when prosecutor suggests fact not in evidence, there is risk that jury may conclude that he had independent knowledge of facts that could not be presented to jury), cert. denied, 314 Conn. 926, 101 A.3d 271, 272 (2014).

In the present case, the prosecutor incorrectly argued to the jury that Maringola had testified that two men approached the T-Rex after it crashed following the initial volley of gunshots. A review of his testimony reveals that Maringola did not make such a statement, either during direct examination or cross-examination. Although this mistake does not appear to have been made intentionally, the prosecutor did not include any type of qualifier with respect to Maringola's testimony. See, e.g., *State* v. *Rios*, supra, 171 Conn. App. 59 (use of phrase " 'something like that' " made it clear prosecutor was not attempting to mislead jury into believing those were precise words of defendant and mitigated impact of imprecision of words used); cf. *State* v. *Patterson*, supra, 170 Conn. App. 793 (prosecutor did not request

that jury make reasonable inference but mischaracterized identification testimony of witness); *State* v. *Sargent*, 87 Conn. App. 24, 39–40, 864 A.2d 20 (improper for prosecutor to convey that he was recounting actual testimony of witness and then mischaracterize it during closing argument), cert. denied, 273 Conn. 912, 870 A.2d 1082 (2005).

Assuming, without deciding, that the prosecutor's comment that two men approaching the T-Rex after it had crashed constituted prosecutorial impropriety, we nevertheless conclude that this comment did not deprive the defendant of his right to a fair trial. This conclusion is based on our consideration of the *Williams* factors. The defendant did not invite the challenged comment and thus the first factor weighs in his favor. The second factor, the severity of the impropriety, weighs in favor of the state because the defendant failed to object at the time of the comment. "[W]e consider it highly significant that defense counsel failed to object to any of the improper remarks, request curative instructions, or move for a mistrial. Defense counsel, therefore, presumably [did] not view the alleged impropriety as prejudicial enough to seriously jeopardize the defendant's right to a fair trial. . . . Given the defendant's failure to object, only instances of grossly egregious [impropriety] will be severe enough to mandate reversal." (Internal quotation marks omitted.) *State* v. *Patterson*, supra, 170 Conn. App. 797–98. Further, this relatively minor misstatement by the prosecutor does not rise to the level of a grossly egregious impropriety. Id., 798.

The third factor, the frequency of the comment, also weighs in favor of the state. The prosecutor's comment regarding Maringola's testimony was a small part of his summation of the evidence against the defendant and did not constitute the main theme that consistently was emphasized during closing argument. We also iterate

that counsel is afforded generous latitude during closing argument. See *State* v. *Williams*, supra, 172 Conn. App. 834. The fourth factor, whether the impropriety related to a critical issue in the case, also favors the state. While a significant issue during the trial was whether the defendant was one of the individuals who exited the Acura and shot at the T-Rex, the question of whether one or both approached the T-Rex after it had crashed was not significant to that determination. Once the jury had determined that the defendant was one of the two persons from the Acura and participated in the shooting, it had resolved the question of identity and the specifics of who approached the T-Rex after the crash was negligible.

The fifth factor, whether the court provided a curative instruction, favors the state. A request to disregard the incorrect statement of the prosecutor was not made by the defendant, and therefore the court did not provide such an instruction. It did, however, instruct the members of the jury that they were the "sole judges of the facts" and that they were to "recollect and weigh the evidence, and form [their] own conclusions as to what the ultimate facts are." The court also stated that jury's recollection of the facts prevailed because it was the exclusive trier of fact. The sixth factor, the strength of the state's case, also weighs in favor of the state. A great deal of circumstantial evidence placed the defendant at the scene of the crime, linked him to one of the firearms used and provided consciousness of guilt. The testimony of Habib, which the jury was free to credit despite his status as a jailhouse informant, directly identified the defendant as one of the shooters.

After a consideration of the *Williams* factors, we conclude that the prosecutor's statement regarding two men approaching the T-Rex after it had crashed, even if improper, did not deny the defendant of his due process right to a fair trial.

B

The defendant next argues that an impropriety occurred when the prosecutor misstated Habib's testimony regarding the defendant's inculpatory statements in the New Haven Correctional Center. We again conclude that the defendant failed to establish that his right to due process was violated.

The following additional facts are necessary for our discussion. During his closing argument, the prosecutor stated: "[O]nly two people have the guns. How do we know it's the defendant? His own words. Eight months, nine months later when he was in jail, he told Mr. Habib, *I only took the fool's chain.* Two people walked up that bike, two people had guns, two people walked back to the car, he had to be one of them, he took the chain; that's what he said. . . . Now, you'll find in the charge that the defendant's charged as a principal and an accessory to murder. The principal's a person who actually commits the act; accessory is one who aids or helps another person in that act. Again, you're gonna say, how do we know he's the shooter? *Again, by his own words. . . . We also know by his own words that he killed* [*the victim*]. *He stated to Joshua Habib that he killed* [*the victim*]." (Emphasis added.)

The prosecutor used similar language during his closing argument addressing the charge of felony murder. "Once again, we know the defendant was in possession of the gun at—on [July 8] because . . . two people walked out of that car with guns, two people walked up to the bike, two people shot . . . . *His own words, I took the fool's chain.* How would he take the fool's chain if he didn't walk up to that bike? It has to be one of the two people. And again, if he is, there are only two people shooting, he's one of the two people shooting." (Emphasis added.)

The defendant also challenges the remarks made near the conclusion of the closing argument where the prosecutor stated: "We also know that the defendant killed [the victim] because he told Mr. Habib—he told Mr. Habib that a person that he was with when he killed a guy talked to the police and gave a statement." Finally, the defendant points to the following statement during the prosecutor's rebuttal argument: "Now, let's talk about [Habib] for a few minutes. He [testified]—this guy right here told him the reason he got . . . arrested—let me change that—somebody he was with, when he killed the guy in Waterbury, he got arrested down South."

The defendant has raised two distinct claims of prosecutorial impropriety with respect to these excerpts from the closing arguments. First, he contends that the prosecutor improperly interpreted Habib's testimony as to contain a direct admission by the defendant that he shot the victim in Waterbury. As we set forth in part I A 1 of this opinion, Habib testified that the defendant had stated that "*he* got out of the car and shot him, and they were attempting or he—intentions was to rob him for the [T-Rex] . . . . His intentions were to rob the—the victim of the [T-Rex] he was riding and whatever else he may have had on him, but they ultimately just ended up taking his chain . . . ." The prosecutor's arguments to the jury that the defendant had directly admitted to shooting the victim and taking the chain were based on evidence. Therefore, the comments made by the prosecutor that Habib's testimony included a direct admission by the defendant were not improper. See *State* v. *Taft*, supra, 306 Conn. 767.

The defendant's second claim of prosecutorial impropriety with respect to the excerpts cited is that the prosecutor improperly argued that the defendant directly had admitted to taking "the fool's chain." We note that the phrase, "the fool's chain," was not part of the evidence in this case; no person testified that

the defendant had used that phrase. Further, contrary to the prosecutor's argument, Habib did not testify that the defendant had used the pronoun "I" rather than "they" with respect to describing who had taken the victim's chain. Therefore, for the reasons stated in part III A, we will assume, without deciding, that portion of the prosecutor's argument to the jury constituted an impropriety and proceed to the *Williams* factors.

As for the first *Williams* factor, we conclude that the comments regarding the chain were not invited, and therefore this factor weighs in favor of the defendant. The second factor weighs in favor of the state, as it was not severe. The defendant did not object, and the prosecutor's comments did not rise to the level of grossly egregious impropriety. See *State* v. *Patterson*, supra, 170 Conn. App. 798. The third factor, the frequency of the comments, favors the state. The fourth factor, whether the comment went to a central issue, also favors the state. These comments at issue constitute cumulative evidence as to the issue of identity. Finally, the fifth and sixth factors weigh in favor of the state for the reasons set forth in part III A of this opinion. Accordingly, we conclude that the defendant has failed to establish that his right to due process was violated as a result of any misstatements as to Habib's testimony.

C

The defendant finally argues that the prosecutor's misstatement during closing argument that the defendant had Isis Hargrove's phone constituted prosecutorial impropriety. Specifically, he contends that this statement was an improper comment on facts not in evidence. The state counters that this comment was a fair argument because it was based on a reasonable inference from the facts presented at the trial. We agree with the state.

During his rebuttal argument to the jury, the prosecutor stated: "Now, Shaina Moye—excuse me—she said—she testified that this defendant the entire night driving all the way from New Haven to Waterbury [had] Isis Hargrove's phone . . . . All the way up, all the way driving around Waterbury. Now, you remember 12:17 a.m. on July 8th, all three phones, Shaina Moye's, Earl Simpson's and Isis Hargrove's hit off the Waterbury tower for the first time. From that point until about 1:32 a.m., there are eighteen telephone calls from Shaina Moye's phone and Isis Hargrove's phone. They're not sitting next to each other in the front seat of the car calling each other, are they? No. He had Isis Hargrove's phone . . . ." At this point, defense counsel objected on the ground that there was no evidence that anyone had that phone. The prosecutor responded that his comments were based on Moye's testimony. The court allowed the argument as a comment on the evidence. The prosecutor then continued: "He had her phone. And the calls are going back and forth to the two cars; eighteen phone calls in that time frame."

Moye testified that she was a friend of Hargrove, who drove a black Acura in July, 2011. On July 7, 2011, Moye went to Waterbury to celebrate the defendant's birthday. Moye, accompanied by another woman, drove her tan Chevrolet Malibu to a gas station to meet up with the defendant, Simpson, Hargrove and another man. The three women, driving in the Malibu, followed the men, driving the Acura, to Waterbury. After picking up a friend of the defendant, the group went to a nightclub. When the nightclub closed, the three women went to a fast food restaurant in the Malibu, and she saw the four men leave in the Acura. Moye stated that Hargrove called the defendant, and Moye overheard the defendant state "we just did some hot shit." The Acura then arrived at the restaurant. Hargrove and the defendant switched cars, ending up in the Acura and Malibu

respectively. Both cars then left the restaurant, even though the women had ordered and paid for their food, but not yet received it. Moye followed Hargrove back to New Haven. During cross-examination, Moye stated that Hargrove had been using her phone that night.

The state also presented the testimony of Norman Ray Clark, a custodian of records employed by Sprint Nextel. He stated that there were sixteen phone calls between Moye's phone and Hargrove's phone between 11:54 p.m. on July 7, 2011, and 2:06 a.m. on July 8, 2011, and that cell tower information placed Hargrove's phone in Waterbury for nearly all of these calls.

The state presented evidence, therefore, that Hargrove spoke with the defendant during the time of the Waterbury shooting, and shortly thereafter. Additionally, there was evidence that Hargrove used Moye's phone, and thus it was likely that the defendant used Hargrove's phone. This inference is supported by Moye's testimony that she overhead the conversation between the defendant and Hargrove while Hargrove used Moye's phone, and the phone records detailing the phone calls between Hargrove's phone and Moye's phone during the relevant time periods. Cell phone towers confirmed that both of these phones were in the same area at the relevant time supports this scenario. In short, the prosecutor's argument that the defendant had used Hargrove's phone was based on the evidence and therefore did not constitute prosecutorial impropriety. See *State* v. *Taft*, supra, 306 Conn. 767.

The judgment is affirmed.

In this opinion the other judges concurred.

VILLAGE MORTGAGE COMPANY *v.* JAMES VENEZIANO
(AC 38824)

Alvord, Mullins and Beach, Js.

Syllabus

The plaintiff corporation brought this action against the defendant, who previously was a founding member, shareholder, officer and director of the plaintiff, seeking an injunction to preclude the defendant from accessing the plaintiff's premises and money damages for the defendant's alleged misappropriation of corporate funds through conversion, statutory theft, and embezzlement from January, 2004 through June, 2014. The defendant filed a counterclaim, which claimed, in relevant part, that the funds alleged to have been taken by him were funds owed to him for back pay, as well as funds he had invested in the plaintiff. The defendant also claimed, by way of special defense, that the plaintiff's causes of action for conversion, statutory theft, and embezzlement were barred by the applicable three year statute of limitations (§ 52-577). Following a trial to the court, the court rendered judgment in part for the plaintiff on the complaint and for the plaintiff on the defendant's counterclaim, from which the defendant appealed and the plaintiff cross appealed to this court. *Held*:

1. The trial court's factual findings rejecting the amount of claimed contributions made by the defendant to the plaintiff and finding that the advances and withdrawals made by the defendant were unauthorized were supported by the testimony and exhibits in the record and were not clearly erroneous: although the defendant contended that the trial court mistakenly relied on a forensic accountant's report in concluding that the defendant had misappropriated funds and in determining the amount of those funds, the trial court found the forensic accountant's report credible, and this court deferred to the trial court's credibility determinations; furthermore, the trial court also found the report of the plaintiff's chief financial officer accurate and reliable, and relied heavily on the chief financial officer's report and testimony at trial in reaching its determinations concerning the defendant's misappropriation of the plaintiff's funds, and the defendant did not raise a claim on appeal concerning the court's reliance on that report.
2. The defendant's challenges to certain of the trial court's discovery rulings were not reviewable, the defendant having failed to meet his burden of providing this court with an adequate record from which the alleged claims of error could be reviewed, and having failed to brief one of his claims adequately; moreover, although the defendant claimed that the trial court, in denying his motion for discovery of information, improperly accepted the representations of the plaintiff's counsel concerning

compliance and made credibility determinations without a hearing, the court expressly stated that if the defendant disagreed with the plaintiff's representation, he should file a motion to compel to bring the matter properly before the court, which he failed to do, and, therefore, the defendant was not deprived of an opportunity to seek compliance and he presented no evidence demonstrating that he was harmed by the court's ruling.

3. This court declined to review the defendant's claims that the trial court improperly failed to conclude that the plaintiff intentionally spoliated evidence or engaged in discovery misconduct, the defendant having failed to raise either claim before the trial court or in his posttrial brief.

4. The trial court properly concluded that the three year statute of limitations under § 52-577 was not tolled, pursuant to statute (§ 52-595), by the defendant's fraudulent concealment of his misconduct, and that the plaintiff, therefore, was precluded from recovering damages that accrued prior to October, 2009, which was three years before the commencement of this action; although the plaintiff claimed that it was unaware of the defendant's misappropriations until an investigation was done in 2012 and that, prior to 2012, the defendant had exclusive control over the plaintiff's finances and used that control to manipulate the accounting records to conceal his activities, the trial court found that there were other employees in the plaintiff's financial department who were inputting entries at the request of the defendant, that, since 2004, the employees were aware of the defendant's misappropriations, which were transparent, open and notorious, and, thus, that the knowledge of the bookkeepers and other financial employees of the defendant's activities could be imputed to the plaintiff, and the plaintiff cited no legal authority for the proposition that knowledge of a corporation can only be imputed through its board of directors.

Argued April 12—officially released July 25, 2017

Procedural History

Action for, inter alia, an injunction precluding the defendant from accessing the plaintiff's premises, and for other relief, brought to the Superior Court in the judicial district of Hartford and transferred to the judicial district of Litchfield, where the defendant filed a counterclaim; thereafter, the court, *Pickard*, *J.*, sustained the plaintiff's objections to the defendant's request for production; subsequently, the court, *J. Moore*, *J.*, denied the defendant's motion for order; thereafter, the court, *J. Moore*, *J.*, denied in part the

defendant's motions to compel and for sanctions; subsequently, the matter was tried to the court, *J. Moore*, *J.*; thereafter, the court, *J. Moore*, *J.*, granted the plaintiff's motion for a temporary injunction; subsequently, the court, *J. Moore*, *J.*, rendered judgment in part for the plaintiff on the complaint and for the plaintiff on the counterclaim; thereafter, the court, *J. Moore*, *J.*, denied the plaintiff's motion for reconsideration and issued an amended memorandum of decision, and the defendant appealed and the plaintiff cross appealed to this court. *Affirmed*.

Gregory T. Nolan, with whom, on the brief, was *Patsy M. Renzullo*, for the appellant-appellee (defendant).

Richard P. Weinstein, with whom, on the brief, was *Sarah Black Lingenheld*, for the appellee-appellant (plaintiff).

Opinion

ALVORD, J. The defendant, James Veneziano, appeals from the judgment of the trial court rendered in favor of the plaintiff, Village Mortgage Company (company), after a trial to the court, awarding the plaintiff $2,080,185.09 in damages for the defendant's misappropriation of corporate funds through conversion, statutory theft, and embezzlement. On appeal, the defendant claims that (1) the court's factual findings regarding statutory theft were clearly erroneous, (2) the court's discovery rulings on October 27, 2014, December 9, 2014, and January 16, 2015, "constitute reversible error," and (3) the court improperly failed to conclude that the plaintiff intentionally spoliated evidence or engaged in discovery misconduct. The plaintiff cross appeals from the judgment, claiming that the court improperly ruled in favor of the defendant on his statute of limitations special defense and barred its recovery for damages that occurred prior to October 16, 2009.

Specifically, the plaintiff argues that the court improperly failed to conclude that the defendant's fraudulent concealment of his misconduct tolled the applicable statute of limitations. We affirm the judgment of the trial court.

The following facts and procedural history are relevant to the defendant's appeal and the plaintiff's cross appeal. The plaintiff is a closely held stock corporation engaged in the mortgage origination business for residential properties. The defendant was a founding member, shareholder, officer and director of the plaintiff, which was incorporated on July 1, 1998. He has a bachelor's degree in business science and extensive experience in banking. Because of his financial services background, he directed, supervised, and controlled all of the financial aspects of the plaintiff from its inception until his retirement in mid to late 2010. The defendant had served as the plaintiff's vice president and treasurer, and he continued to assert his influence over financial matters until his removal from the board of directors in 2012. The plaintiff's cofounder, Laurel Caliendo, initially was the corporate secretary and subsequently became the plaintiff's president in 2000. She handled the processing, closing, funding, delivery, and servicing of the loans, as well as the selling of the loans in the secondary market.

At least as early as 2004, the defendant and Caliendo withdrew moneys from the plaintiff's corporate funds. These purported advances and loans were taken without approval from the board of directors. Sometime in 2012, following the defendant's retirement and continued involvement in the plaintiff's financial matters, the plaintiff promoted Justin Girolimon to the position of chief financial officer. Girolimon had worked for the plaintiff sporadically while he was in high school and college. Beginning in 2009, until he was named the chief

financial officer, Girolimon had reported to the defendant in the plaintiff's accounting and financial department. Girolimon had expressed concerns in 2010 about certain journal entries that the defendant had directed him to make. Sometime in 2012, after the defendant left the company, Girolimon performed a detailed investigation of the defendant's withdrawals from corporate funds. According to the plaintiff, it first became aware of the defendant's misappropriations at the time of Girolimon's 2012 investigation. The plaintiff filed the complaint in the present action on October 16, 2012.

The plaintiff's two count complaint sought injunctive relief[1] and damages for conversion, statutory theft, and embezzlement. The defendant filed an answer with four special defenses and a ten count counterclaim. The gravamen of the defendant's defenses and claims was that the funds alleged to have been taken by him were funds owed to him for back pay and funds he had invested in the company. The defendant also claimed that the plaintiff's cause of action was barred by the applicable three year statute of limitations, General Statutes § 52-577.[2]

During a twelve day trial, the court heard testimony from several witnesses and admitted 113 exhibits. The exhibits included, inter alia, a report by Richard Finkel, a forensic accountant; the plaintiff's yearly audited financial statements; copies of bank checks and withdrawal slips; and the defendant's personal financial statements. Following trial, the parties submitted extensive posttrial briefs summarizing their respective positions. On December 23, 2015, the court issued a

[1] The court denied the injunctive relief requested in count one of the complaint, and the plaintiff has not challenged that determination in its cross appeal.

[2] The plaintiff does not dispute that § 52-577 is the applicable statute of limitations. Section 52-577 provides: "No action founded upon a tort shall be brought but within three years from the date of the act or omission complained of."

memorandum of decision in which it rendered judgment for the plaintiff on the second count of its complaint and on the defendant's ten count counterclaim. The court amended its memorandum of decision on December 31, 2015. The plaintiff filed a motion for reconsideration on January 7, 2016, which it amended on January 12, 2016. On January 27, 2016, the court issued a second amended memorandum of decision, ninety-four pages in length, in which it vacated all prior memoranda of decision. The court also issued a separate memorandum of decision on January 27, 2016, addressed to the plaintiff's motion for reconsideration.

In its comprehensive memorandum of decision, the court meticulously evaluated the evidence with respect to each of the parties' claims. With respect to the issues on appeal and cross appeal, the court made the following relevant findings and conclusions: (1) the defendant owed fiduciary duties to the plaintiff; (2) the defendant "offered virtually no resistance to the allegations" of the plaintiff's complaint; (3) the defendant claimed that the plaintiff improperly withheld documents that would have proven the financial investments he had made in the company, but the court gave "no credit" to that argument;[3] (4) Caliendo testified credibly that she had

[3] At trial, the defendant testified that all of his records, including the original general ledgers, were kept at the company and that the plaintiff failed to produce them when requested. During closing arguments, the defendant's counsel stated: "[I]sn't it convenient . . . that the records that would exonerate [the defendant] or at least show moneys that he put into the corporation are gone? Lots of documents that are in this—in the plaintiff's exhibits do have original ledger fingerprints. There are bits and pieces that come in here and there. But, unfortunately, the things that we need, the things that [the defendant] needs are gone. Water damage is what we heard, misplaced, couldn't verify. Isn't it convenient?"

The trial court responded that it understood that there had been discovery issues that had been "thoroughly argued" and ruled upon by various judges during the pendency of the action. The defendant's counsel stated that he had not been involved with this case at that point in time. He further stated that he would like to file a discovery motion addressed to "discovery violations," but he realized it was a problem because the trial had concluded. The court inquired: "I guess the point I wanted to make is there—there are,

acknowledged her inappropriate withdrawal of corporate funds after Girolimon's investigation and that she had entered into an agreement with the board of directors for the repayment of those funds; (5) "the defendant's credibility was impeached multiple times throughout the trial and in regard to almost every issue in this case"; (6) "the record is rife with examples of the defendant trying to categorize the [plaintiff's] financial records in dishonest fashion so as to mislead the directors, shareholders, or outside auditors"; (7) the defendant had the ultimate responsibility for the characterization of transactions and accounting entries, and he was responsible for working with the auditors and reviewing the plaintiff's audited financial statements; (8) except for one deposit made in 1998, the defendant failed to prove his claimed investments in the company; (9) the plaintiff's claim that it was unaware of the defendant's misappropriations until Girolimon's investigation in 2012 was not credible; (10) Girolimon credibly explained, in his testimony and in his written investigative report, how the defendant misappropriated the plaintiff's funds and the amount that he had misappropriated; (11) because the defendant lacked computer ability, the plaintiff's bookkeepers and other financial employees input the defendant's handwritten notes into the QuickBooks system, and they had actual knowledge of the defendant's inappropriate advances and withdrawals of company funds, beginning in 2004; (12) prior to 2004, when the plaintiff began to employ the QuickBooks system, the plaintiff's accounting records were handwritten; (13) the plaintiff submitted pre-2004 audited financial statements at trial that provided a baseline for its analysis, and none of those

as of right now, no written discovery motions pending?" The defendant's counsel confirmed there were no pending discovery motions, and the court stated: "So the fact of the matter is, at the present time, [there are] no pending discovery actions. And I guess, to—to make that argument in our final argument, is sort of unsupported by the—by the record at the present time."

statements showed any amount due from the plaintiff to the defendant; (14) Girolimon's written investigative report, which was admitted as a full exhibit, most accurately detailed the defendant's misappropriations from 2004 through 2014; (15) the defendant provided no credible evidence to contradict the conclusions in the reports submitted by Finkel and Girolimon; (16) the evidence "incontrovertibly established" that the defendant breached his fiduciary duty to the plaintiff "by engaging in self-dealing by taking [the plaintiff's] funds for his own personal use at his sole discretion without any regard to [the plaintiff] or its shareholders"; (17) the defendant did not produce any evidence that would establish fair dealing in those transactions; (18) the plaintiff sustained its burden of proving that the defendant committed conversion, statutory theft and embezzlement; (19) with respect to the defendant's special defense regarding the statute of limitations, § 52-577 was not tolled by the fraudulent concealment doctrine as claimed by the plaintiff; (20) the knowledge of the plaintiff's bookkeepers and other financial employees, with respect to the defendant's misappropriations, was imputed to the plaintiff, thereby limiting its recovery of damages to a three year period prior to the commencement of this action; (21) pursuant to General Statutes § 52-564,[4] the court trebled the damages that occurred subsequent to October 16, 2009; and (22) the defendant provided "no credible evidence" to support the allegations in his ten count counterclaim. Accordingly, the court rendered judgment in favor of the plaintiff with respect to its claims of conversion, statutory theft and embezzlement, and against the defendant on his ten count counterclaim. The court awarded the plaintiff $2,080,185.09 in damages.

[4] General Statutes § 52-564 provides: "Any person who steals any property of another, or knowingly receives and conceals stolen property, shall pay the owner treble his damages."

In the court's memorandum of decision on the plaintiff's motion for reconsideration, the court responded to the plaintiff's request to reconsider its determination that the doctrine of fraudulent concealment did not operate to toll the statute of limitations. After citing the fraudulent concealment statute; General Statutes § 52-595;[5] and applicable case law, the court acknowledged that it had found numerous examples of the defendant "trying to camouflage, conceal, and even cover up inappropriate withdrawals of company funds." Nevertheless, the court concluded that the doctrine of fraudulent concealment did not apply under the circumstances of this case: "Under any burden of proof . . . and even if the burden were to be shifted to the defendant to disprove fraudulent concealment [as argued by the plaintiff], the court finds that the defendant openly and notoriously took company money, and therefore, could not have fraudulently concealed his wrongdoing." The court recounted the testimony of the plaintiff's two former bookkeepers, one employed from 2003 to 2005, and the other employed from August, 2007, through January, 2009, who testified as to the inappropriate entries made at the defendant's insistence and his request for company checks to purchase personal items. The court also noted that "the defendant relied upon others in the plaintiff's financial department to input the defendant's handwritten ledger sheets and financial notes into the QuickBooks system," beginning in 2004, and continuing thereafter. Consequently, the court imputed this knowledge of the bookkeepers and other employees in the financial department to the plaintiff and limited its recovery to damages for the

[5] General Statutes § 52-595 provides: "If any person, liable to an action by another, fraudulently conceals from him the existence of the cause of such action, such cause of action shall be deemed to accrue against such person so liable therefor at the time when the person entitled to sue thereon first discovers its existence."

defendant's misconduct that occurred after October 16, 2009. This appeal and cross appeal followed.

I

DEFENDANT'S APPEAL

In his appeal, the defendant claims that (1) the court's factual findings regarding statutory theft were clearly erroneous, (2) the court's discovery rulings on October 27, 2014, December 9, 2014, and January 16, 2015, "constitute reversible error," and (3) the court improperly failed to conclude that the plaintiff intentionally spoliated evidence or engaged in discovery misconduct.

A

Factual Findings

The defendant's first claim is that the court's factual findings, rejecting the amount of claimed contributions made by the defendant to the company and finding that the advances and withdrawals made by him were unauthorized, were clearly erroneous. The defendant argues that these erroneous factual findings led to the court's improper conclusion that the defendant committed statutory theft.

In particular, the defendant argues that the court mistakenly relied on Finkel's report in concluding that the defendant misappropriated funds and in determining the amount of those funds. The defendant claims that Finkel's report was "slanted" and "defective." He also argues that the court did not properly interpret the plaintiff's audited financial statements, failed to consider transactions dating back to the plaintiff's corporate formation, and failed to examine the plaintiff's standard practices with respect to payments of salaries and capital transactions involving corporate officers. We are not persuaded.

In a case tried before the court, the trial judge is the sole arbiter of the credibility of witnesses and the weight to be afforded to specific testimony. *R.T. Vanderbilt Co.* v. *Hartford Accident & Indemnity Co.*, 171 Conn. App. 61, 166, 156 A.3d 539 (2017). "[When] 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. . . . In other words, to the extent that the trial court has made findings of fact, our review is limited to deciding whether those findings were clearly erroneous. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . In making this determination, every reasonable presumption must be given in favor of the trial court's ruling." (Internal quotation marks omitted.) *BTS, USA, Inc.* v. *Executive Perspectives, LLC*, 166 Conn. App. 474, 493–94, 142 A.3d 342, cert. denied, 323 Conn. 919, 150 A.3d 1149 (2016).

"Where there is conflicting evidence . . . we do not retry the facts or pass upon the credibility of the witnesses. . . . The probative force of conflicting evidence is for the trier to determine. . . . It is well established that a reviewing court is not in the position to make credibility determinations. . . . This court does not retry the case or evaluate the credibility of the witnesses. . . . Rather, we must defer to the [trier of fact's] assessment of the credibility of the witnesses based on its firsthand observation of their conduct, demeanor and attitude." (Internal quotation marks omitted.) *Jones* v. *Dept. of Children & Families*, 172 Conn. App. 14, 33, 158 A.3d 356 (2017). "[T]he trial court

is privileged to adopt whatever testimony [it] reasonably believes to be credible." (Internal quotation marks omitted.) *Powers* v. *Olson*, 252 Conn. 98, 105, 742 A.2d 799 (2000). Thus, while we review the court's underlying factual determinations under the clearly erroneous standard, our standard of review requires us to defer to the court's evaluation of the credibility of the parties and witnesses. See *Emerick* v. *Emerick*, 170 Conn. App. 368, 379, 154 A.3d 1069 (2017).

In the present case, the court's challenged factual findings are supported by the testimony and exhibits in the record, and the court's explanation of its credibility determinations suffices under the deferential standard of review that we accord such determinations. Although the defendant characterizes Finkel's report as "slanted" and "defective," the court found Finkel's testimony at trial to be "credible" and that "his calculations were scientifically based and objectively verifiable." Significantly, however, the court found Girolimon's report more "accurate" and "reliable," and it relied heavily on Girolimon's report and testimony at trial in reaching its determinations as to how the defendant misappropriated the plaintiff's funds and the amount of the funds that were misappropriated. The defendant's appellate brief criticizes Finkel's report in several respects, yet he does not even mention the court's reliance on Girolimon's report. The defendant has provided no persuasive support for his argument that the court erred in its reliance on the plaintiff's financial reports and audited financial statements or that it misinterpreted those reports and statements. As stated numerous times in the court's ninety-four page memorandum of decision, the defendant presented little or no documentary evidence with respect to his claims, and the court found his testimony not credible. For all of these reasons, the defendant's first claim fails.

B

Discovery Rulings

The defendant next claims that discovery rulings made by the court on October 27, 2014, December 9, 2014, and January 16, 2015, "constitute reversible error." He argues that he filed timely requests for the production of the plaintiff's handwritten records from 1998 to 2004, and copies of the general ledger account due to corporate officers, but that the plaintiff failed to produce those documents and the court failed to require compliance. The defendant maintains that the requested documents "contain material facts that would have made a difference in the outcome of the case," and that they would have provided "supporting documentation" for his claims.

With respect to the October 27, 2014 ruling, the defendant claims that the court, *Pickard*, *J.*, erroneously issued an order sustaining the plaintiff's objections to the defendant's requests for production. A review of the trial court file reveals that Judge Pickard did issue an order on October 27, 2014, which provided: "Order: Sustained. All objections are sustained." There is no further explanation of the court's ruling. Further, the defendant has provided no transcript of any court proceeding that addresses the particular request for production at issue and the objections raised to that request, or an elucidation of the court's decision. This court, as a reviewing court, is left with nothing to review.

"It is well settled that [t]he granting or denial of a discovery request rests in the sound discretion of the court. . . . A court's discovery related orders are subject to reversal only if such an order constitutes an abuse of that discretion. . . . [I]t is only in rare instances that the trial court's decision will be disturbed." (Citations omitted; internal quotation marks

omitted.) *Deutsche Bank National Trust Co.* v. *Bertrand*, 140 Conn. App. 646, 653, 59 A.3d 864, cert. denied, 309 Conn. 905, 68 A.3d 661 (2013).

As the appellant, the defendant has the burden of providing this court with a record from which this court can review any alleged claims of error. See Practice Book § 61-10. "It is not an appropriate function of this court, when presented with an inadequate record, to speculate as to the reasoning of the trial court or to presume error from a silent record." *Atelier Constantin Popescu, LLC* v. *JC Corp.*, 134 Conn. App. 731, 758, 49 A.3d 1003 (2012). Accordingly, we decline to address this claim.

With respect to the December 9, 2014 ruling, the defendant claims that the court, *J. Moore, J.*, improperly denied his "Motion for Discovery of Information" that he filed on December 1, 2014. The plaintiff filed a reply to the defendant's motion on December 5, 2014, in which it stated that there already had been compliance, as previously ordered by the court. Judge Moore issued the following order on December 9, 2014: "Order: Denied. [The] plaintiff indicates that it has complied with this request. If [the] defendant disagrees, [the] defendant must properly present a motion to compel." The defendant argues that this ruling was improper because the court failed to hold an evidentiary hearing and thereby "violated the holding of *Magana* v. *Wells Fargo Bank, N.A.*, 164 Conn. App. 729, 138 A.3d 966 (2016)." This claim is without merit.

Although the defendant argues that the court accepted the representations of plaintiff's counsel with respect to compliance and made a credibility determination without a hearing, we disagree with the defendant's interpretation of the court's order. The court expressly stated that if the defendant disagreed with the plaintiff's representation, he should file a motion to compel to

bring the matter properly before the court. The defendant was not deprived of an opportunity to seek compliance, and he has presented no evidence demonstrating that he was harmed by this ruling. "The burden is on the appellant to prove harmful error." (Internal quotation marks omitted.) *Deutsche Bank National Trust Co.* v. *Bertrand*, supra, 140 Conn. App. 653–54.

With respect to the January 16, 2015 rulings by Judge Moore, the defendant claims that he filed a motion to compel and a motion for sanctions pursuant to the court's December 9, 2014 ruling. The plaintiff filed an objection to the motions and, on January 16, 2015, the court denied the motion for sanctions and denied the motion to compel, except for requiring the plaintiff to produce a designated disc. The defendant claims that the rulings are improper, but, except for setting forth this procedural history, he provides no analysis as to why these rulings were erroneous. "It is well settled that [w]e are not required to review claims that are inadequately briefed. . . . We consistently have held that [a]nalysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . [F]or this court judiciously and efficiently to consider claims of error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs." (Internal quotation marks omitted.) *State* v. *Raffone*, 163 Conn. App. 410, 417 n.6, 136 A.3d 647 (2016).

Further, we have no transcript or other documentation that discloses the court's reasons for its rulings. Again, without a record demonstrating that the court abused its discretion, we are left to speculate as to possible error. It is not our role to guess at possibilities, and we will presume that the court acted properly. See *McCarthy* v. *Cadlerock Properties Joint Venture, L.P.*, 132 Conn. App. 110, 118, 30 A.3d 753 (2011). Accordingly, we decline to review this claim.

C

Spoliation of Evidence and Discovery Misconduct

The defendant's final claim on appeal is that the court improperly failed to conclude that the plaintiff intentionally spoliated evidence or engaged in discovery misconduct. Specifically, the defendant's discovery misconduct claim is based on his allegations that he filed discovery requests at the appropriate time, that he was diligent in pursuing those requests, that some of the documents requested do exist, and that the plaintiff intentionally destroyed some of those documents. The defendant's claim of spoliation of evidence is based on the same allegations.

It is not necessary to set forth the legal principles governing the claims of discovery misconduct or spoliation of evidence for the reason that neither claim was raised before the trial court. Although the defendant's counsel commented "isn't it convenient" that certain records were not available; see footnote 3 of this opinion; there was no argument before the court that the requested documents were intentionally destroyed or that the plaintiff had engaged in discovery misconduct. The defendant's posttrial brief, which is fifty pages in length, does not allege that the plaintiff's conduct constituted discovery misconduct or that it intentionally spoliated evidence. There is no analysis whatsoever with respect to those particular issues that the defendant now raises on appeal.

"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. . . .' Indeed, 'it is the appellant's responsibility to present such a claim clearly to the trial court so that the trial court may consider it and, if it is meritorious,

take appropriate action. That is the basis for the requirement that ordinarily [the appellant] must raise in the trial court the issues that he intends to raise on appeal. . . . For us [t]o review [a] claim, which has been articulated for the first time on appeal and not before the trial court, would result in a trial by ambuscade of the trial judge.' " *Jarvis* v. *Lieder*, 117 Conn. App. 129, 140–41, 978 A.2d 106 (2009). Thus, we will not address the defendant's claims of discovery misconduct and intentional spoliation of evidence.

II

PLAINTIFF'S CROSS APPEAL

In its cross appeal, the plaintiff claims that the court improperly failed to conclude that the defendant's fraudulent concealment of his misconduct operated to toll the three year statute of limitations for tort actions. The plaintiff argues that the court erroneously limited its recovery to the three year period prior to the commencement of this action. In particular, the plaintiff claims that it was improper to impute the knowledge of the plaintiff's bookkeepers and other financial employees to the corporate plaintiff.[6]

"The question of whether a party's claim is barred by the statute of limitations is a question of law, which this court reviews de novo. . . . The factual findings that underpin that question of law, however, will not

[6] Although Caliendo, a corporate officer, clearly was aware of the defendant's misconduct prior to 2009, the trial court did not determine whether her knowledge should be imputed to the company. The plaintiff had argued that her interest was adverse to the plaintiff at that time because she, too, was making withdrawals from corporate funds for personal use. "The general rule is that knowledge of an agent will not ordinarily be imputed to his principal where the agent is acting adversely to the latter's interest." *Mutual Assurance Co.* v. *Norwich Savings Society*, 128 Conn. 510, 513, 24 A.2d 477 (1942). Instead, the court concluded that the knowledge of the plaintiff's bookkeepers and other financial employees could be imputed to the company.

be disturbed unless shown to be clearly erroneous." (Citation omitted; internal quotation marks omitted.) *Jarvis* v. *Lieder*, supra, 117 Conn. App. 146. Because the plaintiff claims that the statute of limitations was tolled by the defendant's fraudulent concealment of his misconduct, we look to § 52-595, the fraudulent concealment statute, and the case law interpreting that statute.

Section 52-595 provides that "[i]f any person, liable to an action by another, fraudulently conceals from him the existence of the cause of such action, such cause of action shall be deemed to accrue against such person so liable therefor at the time when the person entitled to sue thereon first discovers its existence." Our Supreme Court has stated that "to toll a statute of limitations by way of our fraudulent concealment statute, a plaintiff must present evidence that a defendant: (1) had actual awareness, rather than imputed knowledge, of the facts necessary to establish the [plaintiff's] cause of action; (2) intentionally concealed these facts from the [plaintiff]; and (3) concealed the facts for the purpose of obtaining delay on the [plaintiff's] part in filing a complaint on their cause of action." (Internal quotation marks omitted.) *Iacurci* v. *Sax*, 313 Conn. 786, 799–800, 99 A.3d 1145 (2014).

"The purposes of statutes of limitation include finality, repose and avoidance of stale claims and stale evidence. . . . These statutes represent a legislative judgment about the balance of equities in a situation involving a tardy assertion of otherwise valid rights: [t]he theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." (Internal quotation marks omitted.) Id., 806–807.

In the present case, the plaintiff seeks to recover damages for the defendant's misconduct from January, 2004, the time when the plaintiff began using the QuickBooks system, through June 15, 2014. The plaintiff did not commence this action until October 19, 2012. Unless the three year limitation period of § 52-577 is tolled, the plaintiff would be precluded from recovering damages that accrued prior to October, 2009.

The plaintiff claims that it was unaware of the defendant's misappropriations until Girolimon conducted his investigation in 2012. Prior to 2012, the plaintiff argues that the defendant had exclusive control over the plaintiff's finances and used that control to manipulate the accounting records to conceal his activities. According to the plaintiff, the knowledge of its bookkeepers could not be imputed to the company because the board of directors was not apprised of the defendant's misconduct until 2012.

In addressing the plaintiff's tolling claim, the court made several determinations in both memoranda of decision filed on January 27, 2016. In applying the relevant statutes and case law to the evidence presented at trial, the court made the following factual findings and legal conclusions: (1) the plaintiff's claim that it was unaware of the defendant's misappropriations until Girolimon's investigation in 2012 was not credible; (2) because the defendant lacked computer ability, the plaintiff's bookkeepers and other employees input the defendant's handwritten notes into the QuickBooks system, and they had actual knowledge of the defendant's inappropriate advances and withdrawals of company funds, beginning in 2004; (3) the knowledge of the plaintiff's bookkeepers and other financial employees, with respect to the defendant's misappropriations, could be imputed to the plaintiff, thereby limiting its recovery of damages to a three year period prior to the commencement of this action; (4) the defendant "openly and

notoriously" took company money; (5) the defendant "transparently treated company funds as his own," and testified that when he "need[ed] some of [his] moneys, [he] would withdraw" from those funds; (6) the defendant's attitude demonstrated that he was not trying to fraudulently conceal his intentions or "bury a secret"; (7) two of the plaintiff's bookkeepers had knowledge of the defendant's misuse of company funds long before Girolimon's investigation; (8) Linda Kerr, a bookkeeper employed by the plaintiff from 2003 to 2005, testified that the defendant would publicly, in front of other employees, ask her to give him company checks to buy and sell coins at large coin shows; (9) the plaintiff's business did not include the purchase and sale of coins; (10) Alesia Warner, the plaintiff's bookkeeper from August, 2007, through January, 2009, took issue with certain bookkeeping entries that the defendant instructed her to make, including advances to corporate officers; (11) Warner was so concerned about those entries that she refused to sign financials for the plaintiff; (12) beginning in 2004, the defendant relied on others in the plaintiff's financial department to input his handwritten ledger sheets and financial notes into the QuickBooks system, and those entries are reflected in Girolimon's report; and (13) Girolimon's report reflects that those employees input the defendant's inappropriate withdrawals, including, inter alia, charges pertaining to personal credit cards, coin purchases, personal automobile expenses, and commissions.[7]

For these reasons, the court found: "In reviewing the nature and extent of these entries, the inescapable conclusion is that, while financial employees of the company were placing these entries onto QuickBooks, they knew that the defendant was taking unauthorized withdrawals from the company, treating, as he put it,

[7] The defendant, in his position at the company, was not entitled to collect any commissions.

the company's funds as 'my moneys.' " Accordingly, the court concluded: "Under our law and the facts of the present case, the court finds that knowledge of the bookkeepers and other financial employees of the defendant's defalcations is imputed to the plaintiff corporation."

The plaintiff concedes "that it is not disputing the trial court's factual determinations that [the] plaintiff's bookkeepers were aware that [the] defendant was taking corporate funds for his own personal use. Instead, [the] plaintiff disputes that such knowledge may be imputed to the corporate plaintiff." The plaintiff overlooks the court's factual finding that there were other employees in the plaintiff's financial department who were inputting entries at the request of the defendant. Further, other significant findings include the facts that the employees were aware of the defendant's misappropriations since 2004, and that the defendant's activities were "transparent" and "open and notorious."

Although the plaintiff emphasizes that the board of directors was not aware of the defendant's misappropriations prior to 2012, it cites no legal authority for the proposition that knowledge of a corporation can only be imputed through its board of directors.[8] The plaintiff's position is too restrictive to accommodate the facts of this case. Moreover, there is case law rejecting the claim

[8] Although no Connecticut appellate authority is directly on point, our Supreme Court has held that the knowledge of an agent who sold an insurance policy to the insured could be imputed to the insurer: "When an agent acting within the scope of his authority obtains knowledge of a fact relevant to the transaction in which he is engaged, ordinarily that knowledge is imputed to his principal." *Reardon* v. *Mutual Life Ins. Co.*, 138 Conn. 510, 516, 86 A.2d 570 (1952). Also, in *E. Udolf, Inc.* v. *Aetna Casualty & Surety Co.*, 214 Conn. 741, 573 A.2d 1211 (1990), our Supreme Court held that the knowledge of a store manager and bookkeeper of an employee's prior misappropriations of corporate funds could be imputed to the plaintiff corporation for purposes of certain employee dishonesty insurance policies. Id., 748-50.

of fraudulent concealment in situations where the "intensely public nature of [the] process" precludes an evidentiary finding of an intent to conceal; *Bound Brook Assn.* v. *Norwalk*, 198 Conn. 660, 669, 504 A.2d 1047, cert. denied, 479 U.S. 819, 107 S. Ct. 81, 93 L. Ed. 2d 36 (1986); and where expressed concerns would direct a plaintiff of ordinary prudence to make reasonable efforts to discover information leading to the discovery of a cause of action. *Mountaindale Condominium Assn., Inc.* v. *Zappone*, 59 Conn. App. 311, 322, 327, 757 A.2d 608, cert. denied, 254 Conn. 947, 762 A.2d 903 (2000).

For all of the foregoing reasons, we conclude that, under the circumstances of this case, the trial court properly concluded that the three year statute of limitations was not tolled by the doctrine of fraudulent concealment.

The judgment is affirmed.

In this opinion the other judges concurred.

CAROLYNE Y. HYNES *v.* SHARON M. JONES
(AC 38630)

Sheldon, Beach and Flynn, Js.*

Syllabus

The plaintiff, the administratrix of her decedent husband's estate, appealed to this court from the judgment of the Superior Court after it dismissed her appeal from the decree of the Norwalk-Wilton Probate Court entered in connection with a payment made to her for the benefit of the decedent's and the plaintiff's minor child through a federally sponsored victim compensation fund. The decedent had died intestate in the September 11, 2001 terrorist attack in New York. At the time of the decedent's death, he and the plaintiff resided in Norwalk. After the plaintiff received payments from the fund for herself and for the child, she and the child relocated to a town in a different probate district but did not seek to

* The listing of judges reflects their seniority status on this court as of the date of oral argument.

transfer the probate proceedings there from the Norwalk-Wilton Probate Court. The Probate Court thereafter appointed the plaintiff as the guardian of the child's estate but did not allow her to use any of the child's award from the compensation fund for the child's support. The plaintiff did not appeal from that ruling but subsequently moved to dismiss the guardianship proceedings on the ground that the court lacked subject matter jurisdiction pursuant to statute (§ 45a-629 [a]) because the child no longer resided in that probate district when the proceedings began and because the child's award was paid to the plaintiff in the plaintiff's capacity as a representative payee. The Probate Court denied the plaintiff's motion to dismiss, concluding that it had subject matter jurisdiction over the guardianship proceedings and because the award from the compensation fund was intended to be part of the decedent's estate. The court further concluded that it had jurisdiction over the decedent's estate because the decedent was domiciled in Norwalk at the time of his death and the child's share of the award was part of that estate. In dismissing the plaintiff's appeal to the Superior Court, that court determined that, under § 45a-629 (a), the Norwalk-Wilton Probate Court had jurisdiction to appoint the plaintiff as the guardian of the child's estate because the child was a resident of Norwalk when she first became entitled to the award. The court further determined that the child's relocation to another probate district did not deprive the Norwalk-Wilton Probate Court of continuing jurisdiction over the child's estate because the plaintiff could have sought to transfer the proceedings but did not do so. The court also concluded that payment of the award to the plaintiff in her capacity as a representative payee did not exempt the award from the statutory protection afforded to the property of minors. On appeal to this court, the plaintiff claimed, inter alia, that the Superior Court incorrectly concluded that the Probate Court had jurisdiction under § 45a-629 (a) to appoint a guardian of the child's estate. *Held*:

1. The Superior Court correctly concluded that the Probate Court had jurisdiction to appoint a guardian of the child's estate pursuant to § 45a-629 (a) as part of its jurisdiction over the administration of the decedent's intestate estate; the statutes (§§ 45a-303 [a] [1], 45a-98 [a] [1] and [3], and 45a-132 [a] [1]) governing Probate Court jurisdiction and the authority of the Probate Court to determine property rights and to appoint guardians for minors who may have an interest in the probate proceedings provided the Probate Court with jurisdiction to appoint a guardian to protect the child's interests, the distribution of money from the compensation fund to the child, who was a beneficiary thereunder, justified the Probate Court's decision to appoint a guardian of the child's estate, and, because the decedent's estate was in the Norwalk-Wilton probate district, it had jurisdiction over that estate and an obligation to see that what was awarded to the child as the beneficiary was rightfully distributed to her under the laws of intestacy.

2. The plaintiff could not prevail on her claim that, because only a probate court in the district in which the minor resides has jurisdiction to appoint a guardian for that minor's estate, and because the child did not reside in the Norwalk-Wilton probate district, the Norwalk-Wilton Probate Court lacked jurisdiction to appoint a guardian under § 45a-629: the award from the compensation fund for the benefit of the child was a form of property to which the child was entitled, the child was a resident of the Norwalk-Wilton probate district when her entitlement to that award occurred, the plaintiff's duty to apply for a guardianship became mandatory at the time of that occurrence, and the Probate Court in which the guardian was originally appointed retains jurisdiction to protect a minor child's interests unless and until the guardian files a motion to transfer the proceedings to another district and the transferring court finds that it is in the best interest of the child and orders the transfer; moreover, the award from the compensation fund to the plaintiff in her capacity as a representative payee did not permit her to bypass the statutory protections afforded to the child's property, and there was no indication that those protections were preempted by federal law.

Argued March 6—officially released July 25, 2017

Procedural History

Appeal from the order of the Probate Court for the district of Norwalk-Wilton denying the plaintiff's motion to dismiss the application to appoint a guardian for the estate of her minor child, brought to the Superior Court in the judicial district of Stamford-Norwalk and tried to the court, *Hon. David R. Tobin*, judge trial referee; judgment dismissing the appeal, from which the plaintiff appealed to this court. *Affirmed.*

Michael P. Kaelin, with whom, on the brief, was *William N. Wright*, for the appellant (plaintiff).

Opinion

FLYNN, J. Following the two devastating terrorist attacks on Washington and New York and a third thwarted by air passengers who died over Pennsylvania on September 11, 2001, Congress enacted the September 11th Victim Compensation Fund of 2001 (fund) as part of the Air Transportation Safety and System Stabilization Act[1] to indemnify the surviving families of those

[1] See 49 U.S.C. § 40101.

who died or were injured in the air and on the ground that day. The appeal before us from a judgment of the Superior Court dismissing the appeal of the plaintiff, Carolyne Y. Hynes, from a decree of the Norwalk Probate Court,[2] arises out of a separate payment of $1,271,940.12 made from the fund to the plaintiff as "representative payee" for the benefit of her daughter, Olivia T. Hynes. Olivia is a minor child, who was born after her father, Thomas Hynes, a business executive, was killed in the attack on the World Trade Center in New York. At issue is whether the Probate Court for the district of Norwalk had jurisdiction to appoint the plaintiff as guardian of Olivia's estate and to appoint the defendant, Sharon M. Jones, as Olivia's successor guardian ad litem under the authority granted to the Probate Court under the General Statutes, despite the fact that Olivia ceased to reside in the District of Norwalk at the time of the appointment. A second issue is whether the Probate Court lacked jurisdiction to institute the guardianship proceedings because the $1,271,940.12 was later paid directly to Olivia's mother from the fund as "representative payee." We first conclude that because Thomas Hynes was domiciled in Norwalk at the time he died intestate, our General Statutes gave the Norwalk Probate Court authority to supervise the settlement of his estate, determine its distribution, and protect the interests of his minor heir. Pursuant to General Statutes §§ 45a-303 (a),[3] 45a-98,[4]

[2] The Norwalk Probate Court has long served the towns of Norwalk and Wilton. In 2011, the name of that court was changed to the Norwalk-Wilton Probate Court. For purposes of clarity, we refer to that court as the Norwalk Probate Court throughout this opinion.

[3] General Statutes § 45a-303 (a) (1) provides: "When any person domiciled in this state dies intestate, the court of probate in the district in which the deceased was domiciled at his death shall have jurisdiction to grant letters of administration."

[4] General Statutes § 45a-98 (a) provides in relevant part: "Probate Courts in their respective districts shall have the power to (1) grant administration of intestate estates of persons who have died domiciled in their districts . . . (3) except as provided in section 45a-98a or as limited by an applicable

and 45a-438,[5] there were grounds to justify the Probate Court's exercise of jurisdiction as part of its supervision of the administration and distribution of Thomas Hynes' estate, and the Probate Court's and Superior Court's denials of the plaintiff's motion to dismiss. We further conclude that General Statutes §§ 45a-629 (a),[6] 45a-437,[7] and 45a-631[8] authorized appointment of a guardian because Olivia was entitled to share one half of any award of damages resulting from her father's death, and Olivia was domiciled in Norwalk at the time she became entitled to an award under the fund. Finally, we conclude that the plaintiff's later decision to receive Olivia's award in 2004 as a representative payee did not serve to exempt the $1,271,940.12 that the fund paid on behalf of Olivia from Connecticut's statutory protections for minors' property. We therefore conclude that

statute of limitations, determine title or rights of possession and use in and to any real, tangible or intangible property that constitutes, or may constitute, all or part of . . . any decedent's estate, or any estate under control of a guardian or conservator, which . . . estate is otherwise subject to the jurisdiction of the Probate Court, including the rights and obligations of any beneficiary of the . . . estate . . . ."

[5] General Statutes § 45a-438 (a) provides in relevant part: "After distribution has been made of the intestate estate to the surviving spouse . . . the residue of the real and personal estate shall be distributed equally, according to its value at the time of distribution, among the children, including children born after the death of the decedent . . . ."

[6] General Statutes § 45a-629 (a) provides in relevant part: "When a minor is entitled to property, the court of probate for the district in which the minor resides may assign a time and place for a hearing on the appointment of a guardian of the estate of the minor. . . ."

[7] General Statutes § 45a-437 (a) provides in relevant part: "If there is no will . . . the portion of the intestate estate of the decedent . . . which the surviving spouse shall take is . . . (3) If there are surviving issue of the decedent all of whom are also issue of the surviving spouse, the first one hundred thousand dollars plus one-half of the balance of the intestate estate absolutely . . . ."

[8] General Statutes § 45a-631 provides in relevant part: "(a) A parent of a minor, guardian of the person of a minor or spouse of a minor shall not receive or use any property belonging to the minor in an amount exceeding ten thousand dollars in value unless appointed guardian of the estate of the minor . . . ."

the Norwalk Probate Court had such jurisdiction and affirm the judgment of the Superior Court acting as the Probate Court on appeal from probate.

The following procedural history, factual findings from the Norwalk Probate Court proceeding, findings made by the Superior Court, and undisputed facts inform our review. The plaintiff's husband, Thomas Hynes, was killed in the September 11, 2001 terrorist attacks on the World Trade Center in New York. At the time of Thomas' death, he and the plaintiff resided together in Norwalk, a city located in the probate district of Norwalk. Their daughter, Olivia, was born a few months later on March 28, 2002. Thomas died intestate. On April 24, 2003, the plaintiff filed an application with the Probate Court for the District of Norwalk to be appointed administrator of Thomas' estate. Obtaining appointment of an administrator of Thomas' estate was a prerequisite to filing a claim with the fund. See 49 U.S.C. § 405 (c) (2) (C). The Probate Court granted the plaintiff's application, and appointed Attorney Brock T. Dubin as guardian ad litem for Olivia, who served without fee until he resigned in September, 2008. After the plaintiff was appointed administrator of Thomas' estate, she filed a claim for compensation with the fund. By letter dated June 3, 2004, Special Master Kenneth R. Feinberg[9] stated that the plaintiff's claim had been approved for a total award of $2,425,321.70, with the plaintiff as the "beneficiary" of $1,153,381.58, and Olivia as the "beneficiary" of the remaining $1,271,940.12. Feinberg's letter stated that Olivia's share of the award would be paid to the plaintiff as Olivia's "representative payee," and indicated to the plaintiff that, as representative payee, "you are obliged—like a trustee—to ensure

[9] The fund required the United States attorney general to appoint a special master to promulgate regulations to implement the provisions of the fund; see 49 U.S.C. § 404; and to determine claimants' eligibility for compensation under the fund. See 49 U.S.C. § 405. Kenneth Feinberg was appointed the special master.

that funds are used in the minor['s] best interest. You assume full responsibility for ensuring that the award[s] paid to you as representative payee are used for the minor['s] current needs or, if not currently needed, are saved for his or her future needs. This includes a duty to prudently invest funds, maintain separate accounts for [Olivia], and maintain complete records. In addition, upon reaching [eighteen] years of age . . . [Olivia is] entitled to receive the award paid to you as representative payee. Thus, at such time, you must distribute the award to [Olivia] unless [she] otherwise willingly consent[s]." Olivia's funds were wired to the plaintiff's personal bank account.

In April, 2005, the plaintiff and Olivia relocated to Weston, a town within the probate district of Westport. The plaintiff did not seek to transfer the probate proceedings from the Norwalk Probate Court. In its decree denying the plaintiff's motion to dismiss the guardianship proceedings, the Probate Court found that, in late 2006, the plaintiff filed a final accounting with the Norwalk Probate Court showing the fund award, but that when it came to distributing to Olivia her share of the proceeds, the plaintiff "balked at the statutory requirement of the guardian of the estate of a minor or the suggestion that the fund proceeds go into a trust for the benefit of the minor." The Probate Court further found that the plaintiff "remain[ed] steadfast in her contention that the money awarded to [Olivia] was to be used at the [plaintiff's] discretion, contending that it was given to her individually and/or as representative payee for [Olivia], but in either event, subject neither to the jurisdiction of this court nor the statutes of this state." The Probate Court further found that, "[a]cting in accordance with [this] belief, [the plaintiff] placed all of the proceeds from the fund in one account, in direct violation of the federal mandate, which calls for

representative payees to 'prudently invest funds, maintain separate accounts, and maintain complete records.' " The Probate Court further found that "[f]rom this co-mingled account, the [plaintiff] withdrew money to purchase a home for approximately $884,000 and spent an additional $150,000 in renovations."

On July 31, 2008, the Norwalk Probate Court appointed the defendant as Olivia's successor guardian ad litem in the estate administration proceedings. The Probate Court found that, in 2009, "at the court's insistence, the [plaintiff] placed the funds intended for [Olivia] in a separate account, after which the court was able to observe that approximately $385,000 of [Olivia's] funds had been expended in her first seven years. Prudently, the court ordered the [plaintiff] to account." While the Probate Court was able to make certain findings as to where some of the monies went, it went on to find that "[a] more detailed analysis of how this $385,000 was spent remains doubtful, as the [plaintiff] refused, neglected or otherwise failed to keep or produce any accounting records. Nevertheless, the sums before us establish that not only had the money been co-mingled, but that it was being spent at an alarming rate and for purposes most of which are the [plaintiff's] obligations. Further aggravating the issue were the thousands of dollars apparently being lost on exorbitant management fees and market losses. These factors require the court to act before the remaining principal quickly disappears."

On June 9, 2010, the plaintiff filed an application to be appointed guardian of the estate for Olivia, which the Norwalk Probate Court granted. After granting the application, however, the Probate Court refused to allow the plaintiff to utilize Olivia's funds to pay for certain expenses. The Probate Court reasoned that, while the expenses benefited Olivia, her assets should not be used for her support because the plaintiff was

already legally obligated to support her. The plaintiff took issue with the Probate Court's reasoning that none of Olivia's award from the fund could be used for her support, but did not appeal from that decree.

Although General Statutes § 45a-186 (a) permits appeal to Superior Court from any "order, denial or decree" of a court of probate, the plaintiff took no appeal from that ruling of the Probate Court, which might have resolved the issue of whether the fund award to Olivia could have properly been used for the child's support. However, even if it were determined that it could be so utilized, on appeal it might not have resolved the issue of whether the Probate Court had jurisdiction to monitor these expenditures to ensure that the child's award was not used for expenditures that misused or misspent the funds. The plaintiff's position was that Olivia's award from the fund specifically provided that the award could be used for the child's current needs and that she did not need to deplete her personal funds to satisfy the current needs of her child, and that the Probate Court had no continuing jurisdiction to require her to account for how the funds were expended.

Instead, on August 21, 2013, the plaintiff moved to dismiss the guardianship proceedings, asserting that the Norwalk Probate Court lacked subject matter jurisdiction over the guardianship proceedings under § 45a-629 (a) because Olivia no longer resided in that district when the proceedings began. Alternatively, the plaintiff argued that no Connecticut Probate Court had jurisdiction to institute guardianship proceedings because Olivia's share of the fund award was paid to the plaintiff as Olivia's "representative payee," placing the funds "beyond our state's control or supervision." It is clear from the record provided to us that the plaintiff moved to dismiss her own appointment as guardian of Olivia's estate. However, if some of the plaintiff's contentions were accepted, it is also clear that the Norwalk Probate

Court also would lack authority to appoint a guardian ad litem.

The Probate Court found the issues at hand to be whether (1) the court "lacks subject matter jurisdiction over the guardianship proceeding under . . . General Statutes § 45a-629 because [Olivia] no longer resides in the district," and (2) whether "a guardianship is not appropriate in any Connecticut Probate Court because the payment from the fund was to the [plaintiff] as the [Olivia's] 'representative payee,' placing it beyond our state's control or supervision."

In the Probate Court proceeding, the defendant objected to the motion to dismiss, argued that the court has jurisdiction, and that Connecticut statutes such as § 45a-629 are directed to venue rather than jurisdiction. She further argued that nothing in the federal statute creating the fund was intended to preempt state law.

The Norwalk Probate Court denied the plaintiff's motion to dismiss in a decree dated June 3, 2014. Rather than addressing the plaintiff's statutory argument regarding § 45a-629 (a), the Norwalk Probate Court determined that it had subject matter jurisdiction over the guardianship proceedings because an award by the fund was intended to be a substitute for a wrongful death claim and was therefore part of Thomas' estate. The Norwalk Probate Court reasoned that it had jurisdiction over Thomas' estate because Thomas was domiciled in Norwalk at the time of his death on September 11, 2001, and Olivia's share in the award was part of that estate. Therefore, noting that General Statutes § 45a-631 provides that minors who receive property in excess of $10,000 "must have a guardian of the estate appointed," the Norwalk Probate Court concluded that it had jurisdiction over the guardianship proceedings.

The plaintiff then took an appeal to the Superior Court. Because no transcription record was made in

the Probate Court proceedings, the matter was heard de novo by the court, *Hon. David R. Tobin*, judge trial referee, on September 24, 2015, pursuant to § 45a-186 (a). Although the defendant guardian ad litem personally appeared in the Superior Court proceeding, her counsel did not, and the plaintiff's counsel represented to the court that neither the defendant nor her counsel now objected to dismissal for lack of jurisdiction because of what the plaintiff's counsel termed a "private agreement" made to set up a trust for Olivia and pay the guardian's and her counsel's fees.

The Superior Court dismissed the appeal in a memorandum of decision filed November 6, 2015, albeit on different grounds from that of the Norwalk Probate Court. Construing the plain text of § 45a-629 (a), along with other relevant statutes, the court determined that jurisdiction to appoint a guardian of the estate of a minor is conferred upon the Probate Court for the district in which the minor resides at the time the minor first becomes entitled to property, rather than at the time the application for guardianship is filed. Thus, the Superior Court concluded that the Norwalk Probate Court had jurisdiction because Olivia was a resident of Norwalk when she first became entitled to the award in June, 2004. Additionally, the Superior Court held that Olivia's subsequent move to Weston did not deprive the Norwalk Probate Court of continuing jurisdiction over her estate because the plaintiff could have moved to transfer the proceedings to the Westport Probate District pursuant to General Statutes § 45a-599, but declined to do so. Finally, the court ruled that the plaintiff's election to have Special Master Feinberg make payment to the plaintiff directly as representative payee did not serve to exempt the award from the statutory protection afforded to the property of minors. This appeal followed.

On appeal, the plaintiff claims that the Superior Court's conclusion that the Norwalk Probate Court had jurisdiction to appoint a guardian of the estate for Olivia was based upon an improper construction of § 45a-629 (a). Specifically, the plaintiff argues that, under the plain text of § 45a-629 (a), jurisdiction is conferred upon the Probate Court for the district in which the minor resides at the time the application for guardianship is filed, not at the time the minor becomes entitled to property. Alternatively, the plaintiff argues that Olivia was not "entitled" to the funds when she resided in Norwalk because she could not access the funds until she reached eighteen years of age. The plaintiff's brief does not address the reasoning underlying the Probate Court's decision.

The defendant filed no brief in this court and did not appear, either by herself or through counsel, for oral argument. On March 8, 2017, this court issued the following order: "The plaintiff's appeal to the Appellate Court was heard on March 6, 2017. The defendant Sharon Jones and her counsel Attorney Grant P. Haskell have appeared in this appeal pursuant to Practice Book § 62-8. The defendant did not file a brief or participate in oral argument. The defendant is hereby ordered, sua sponte, to file in writing with the clerk of the Appellate Court, a concise statement of her position regarding the pending appeal by no later than March 23, 2017. The statement should indicate whether she opposes the plaintiff's position, concurs with it, or takes no position on behalf of her ward and herself." On March 26, 2017, the defendant's counsel filed the following response with the clerk of the Appellate Court: "In response to the order of the [c]ourt of March 8, 2017, in the above-referenced appeal, I write as counsel to defendant Jones to inform the [c]ourt that defendant and her ward take no position in this appeal."

At the outset, we note that this appeal raises two claims of error. The first challenges the jurisdiction of the Norwalk Probate Court and the Superior Court hearing the case de novo. The second challenges the court's award of the defendant guardian ad litem's fees and the fees she incurred for legal counsel. The plaintiff's brief does not address its appeal of the fees awarded and we therefore deem that challenge to the fees awarded abandoned. See *Lareau* v. *Burrows*, 90 Conn. App. 779, 780, 881 A.2d 411 (2005).

As explained subsequently in this opinion, we disagree that the Norwalk Probate Court lacked subject matter jurisdiction to appoint a guardian of Olivia's estate to protect her interests. First, we agree with the Norwalk Probate Court that an award under the fund is a substitute for a wrongful death claim and, thus, was part of Thomas' estate. Because Thomas died while domiciled in Norwalk, the Norwalk Probate Court had jurisdiction to appoint a guardian ad litem to protect Olivia's interests in Thomas' estate, including the award from the fund. Moreover, we agree with the Superior Court and reject the statutory argument advanced by the plaintiff. We conclude that § 45a-629 (a) conferred jurisdiction on the Norwalk Probate Court because Olivia became entitled to property while she was domiciled in that district.

I

We begin by addressing the Probate Court's reasoning that because Thomas died while domiciled in Norwalk, the Norwalk Probate Court had jurisdiction to appoint a guardian of Olivia's estate as part of its jurisdiction over the administration of Thomas' intestate estate.

We first set forth our standard of review. "An appeal from a Probate Court to the Superior Court is not an ordinary civil action. . . . When entertaining an appeal from an order or decree of a Probate Court, the Superior

Court takes the place of and sits as the court of probate. . . . In ruling on a probate appeal, the Superior Court exercises the powers, not of a constitutional court of general or common law jurisdiction, but of a Probate Court." (Internal quotation marks omitted.) *Silverstein* v. *Laschever*, 113 Conn. App. 404, 409, 970 A.2d 123 (2009). Where, as in the present case, no record was made of the probate proceedings, the Superior Court was required to undertake a de novo review of the Probate Court's decision. See *Andrews* v. *Gorby*, 237 Conn. 12, 15–16, 675 A.2d 449 (1996); General Statutes § 45a-186 (a).

Although our case law is replete with citations as to the review standard of the Superior Court sitting de novo on an appeal from probate, we find no exposition of the standard to be employed by the appellate tribunal hearing an appeal from probate as opposed to any other case decided by the Superior Court. Accordingly we treat our scope of review as we would with any other Superior Court proceeding. Where the court has made factual findings, we defer to it unless those findings are clearly erroneous. However, in matters of law such as the jurisdictional challenge made here, our review is plenary. See *In re Michaela Lee R.*, 253 Conn. 570, 583, 756 A.2d 214 (2000).

Because our review is plenary, we look to whether the General Assembly conferred authority on the Probate Court to appoint the plaintiff as guardian of the estate of Olivia and to appoint the defendant as guardian ad litem. Although the plaintiff has not briefed the question of the court's authority arising out of its clear statutory charge to preside over Thomas Hynes' estate settlement and duty to protect minor children entitled under the laws of intestacy to share in the proceeds of his estate, these statutes underpinned the Norwalk Probate Court's denial of the plaintiff's motion to dismiss. They

are independent grounds supporting the Superior Court's conclusion that jurisdiction did exist.

We first observe that probate courts "are strictly statutory tribunals. . . . As such, they have only such powers as are either expressly or impliedly conferred upon them by statute. . . . Ordinarily, therefore, whether a Probate Court has jurisdiction to enter a given order depends upon the interpretation of a statute." (Citations omitted.) *Potter* v. *Alcorn*, 140 Conn. 96, 100, 99 A.2d 97 (1953).

Probate courts in this state are provided with broad authority over the administration of intestate estates, including the authority to appoint guardians of the estate to protect minors' interests. Section 45a-303 (a) (1) provides that "[w]hen any person domiciled in this state dies intestate, the court of probate in the district in which the deceased was domiciled at his death shall have jurisdiction to grant letters of administration." Section 45a-98 sets forth the general jurisdictional powers of the Probate Court. Section 45a-98 (a) (1) gives the court jurisdictional power to grant administration of intestate estates of those who die domiciled in their districts. Section 45a-98 (a) (3) gives the Probate Court power to "determine title or rights of possession and use in and to any real or tangible, or intangible property that constitutes, or may constitute, all or part of . . . any decedent's estate, or any estate under control of a guardian or conservator, which . . . estate is otherwise subject to the jurisdiction of the Probate Court, including the rights and obligations of any beneficiary of the . . . estate . . . ." General Statutes § 45a-132 (a) (1) provides that, subject to exceptions that are not relevant here, "in any proceeding before a court of probate . . . the judge . . . may appoint a guardian ad litem for any minor . . . if it appears to the judge . . . that one or more persons . . . have or may have

an interest in the proceedings, and that one or more of them are minors . . . at the time of the proceeding."

These statutes provided the Norwalk Probate Court with jurisdiction to appoint a guardian of the estate to protect Olivia's interests. Under the laws of intestacy where there is both a surviving spouse and a surviving child of that marriage, § 45a-437 (3) provides that the surviving spouse shall take the first $100,000 plus one half of the intestate estate absolutely. Section 45a-438 (a) provides that, in that same intestate situation, after distribution to the surviving spouse, the residue of the real and personal estate shall be distributed equally among the children of the deceased. Olivia was Thomas' only child. Section 45a-631 (a) provides in relevant part that "[a] parent of a minor, guardian of the person of a minor . . . shall not receive or use any property belonging to the minor in an amount exceeding ten thousand dollars in value unless appointed guardian of the estate of a minor . . . ." The distribution of $1,271,940.12 from the fund to Olivia, whom Special Master Feinberg termed a "beneficiary" in his letter of distribution, justified the Probate Court's decision to appoint a guardian of the estate for Olivia. The Probate Court found that when the plaintiff filed her first accounting, on September 14, 2006, she sought to distribute the entire award, plus other sums, "exclusively to herself alone, with nothing to be distributed to the minor," although $1,271,940.12 of that sum was separately awarded to her daughter as "beneficiary" under the fund. The Probate Court found that that distribution scheme would result in a distribution "contrary to law" that the court could not allow. That accounting was not approved, was withdrawn, and resulted in an amended inventory and accounting indicating that the minor was awarded $1,271,940.12 from the fund, which was approved. We agree with the conclusion of the Probate Court that Thomas' estate was in the Norwalk probate

district and that the Norwalk Probate Court had jurisdiction over that estate and an obligation to see that what was awarded to Olivia as beneficiary, a minor child who was a statutorily protected person, was rightfully distributed to her as beneficiary under the laws of intestacy. Accordingly, the Norwalk Probate Court had subject matter jurisdiction over the guardianship proceedings.

II

Although our analysis in part I of this opinion resolves the issue of whether the Norwalk Probate Court had jurisdiction, we next address the plaintiff's claim that, under § 45a-629, only the Probate Court for the district in which the minor resides may appoint a guardian of the minor's estate. The plaintiff contends that Olivia did not reside within the Norwalk probate district at the time the guardianship was created by the Norwalk Probate Court but instead resided in Weston in the Westport probate district. She further contends that because probate courts are courts of limited jurisdiction rather than general jurisdiction, a Probate Court has no authority under § 45a-629 to appoint a guardian for a minor who does not reside in that district. Section 45a-629 (a) provides in relevant part: "When a minor is entitled to property, the court of probate for the district in which the minor resides may assign a time and place for a hearing on the appointment of a guardian of the estate of the minor . . . ."

In its memorandum of decision, the Superior Court held that "[w]hen Olivia became entitled to her award from the [fund], she resided in Norwalk, and the court accordingly finds that the Probate Court in Norwalk had jurisdiction over [the plaintiff's] application to be appointed Olivia's guardian, and in the absence of an application to transfer the guardianship to the probate district in which Olivia now resides, retains jurisdiction

over the guardianship." Our assessment of the propriety of this ruling implicates a question of statutory construction over which our review is plenary. See *In re Bachand*, 306 Conn. 37, 41–42, 49 A.3d 166 (2012).

The question hinges in part on whether the award to Olivia constituted property and if so, when Olivia became "entitled to property." Section 45a-629 (a) provides in relevant part: "When a minor is entitled to property, the court of probate for the district in which the minor resides may assign a time and place for a hearing on the appointment of a guardian of the estate of the minor . . . ." As a child of Thomas Hynes, who died intestate, Olivia was an heir at law of Thomas.

The court decided that the award to Olivia is property. Citing *Lopiano* v. *Lopiano*, 247 Conn. 356, 364–65, 752 A.2d 1000 (1998), the Superior Court adopted the broad definition of property found in Black's Law Dictionary (6th Ed. 1990). In *Lopiano*, our Supreme Court held that a personal injury award in favor of one spouse was "property" subject to equitable distribution in a divorce case pursuant to General Statutes § 46b-81. Id., 362, 371. Because neither § 46b-81 nor any other closely related statute defines property or identifies the types of property subject to equitable distribution, the court looked to the "common understanding expressed in the law and in dictionaries." Id., 364. The *Lopiano* court then noted that Black's Law Dictionary defines property as the term "commonly used to denote everything which is the subject of ownership, corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal; everything that has an exchangeable value or which goes to make up wealth or estate." (Internal quotation marks omitted.) Id., 365. The *Lopiano* court then noted that General Statutes § 52-278a (e), the attachment statute, defines property to mean "any present or future interest in real or personal property . . . ." (Internal quotation marks omitted.) Id. Both

§§ 45a-629 (a) and 45a-631 are at issue here. The first requires appointment of a guardian of the estate of a minor "when a minor is entitled to property." The second provides that a parent of a minor "shall not receive or use any property belonging to the minor in an amount exceeding ten thousand dollars in value unless appointed guardian of the estate of the minor . . . ." As in *Lopiano*, neither of these two statutes defines property, and therefore use of the broad dictionary definition is appropriate here. Under that broad definition, the Superior Court properly determined that the $1,271,940.12 payment made from the fund for the benefit of Olivia was property.

We next analyze whether the award for Olivia's loss was a form of property to which she was "entitled," thereby requiring appointment of a guardian of her estate pursuant to § 45a-629. We conclude, as did the court, that it was property to which she was entitled.

When Thomas Hynes died intestate as a result of airliners being crashed into the twin towers of the World Trade Center, he possessed[10] a right to bring a wrongful death action against the airlines operating those airplanes, which could be commenced by his administrator, as he died without a will. Under § 45a-437, which governs intestacy, since Thomas left the plaintiff as surviving spouse and Olivia, who was the child of Thomas and the plaintiff, born after his untimely death, Olivia was entitled to one half of the intestate estate after the first $100,000 was distributed to her mother, the plaintiff, Thomas' surviving spouse. Olivia's entitlement to that portion vested at the time of her birth.

[10] "[T]he statutory right of action [for wrongful death] belongs, in effect, to the decedent, and to the decedent alone, and damages are recoverable for the death . . . as for one of the consequences of the wrong inflicted upon the decedent." (Internal quotation marks omitted.) *Foran* v. *Carangelo*, 153 Conn. 356, 360, 216 A.2d 638 (1966).

The Superior Court found that, at the time of that entitlement, she resided in Norwalk. That entitlement included her right to share proceeds of any wrongful death action against an airline or that right's statutory alternative, namely, the federally sponsored victim compensation fund. The statutory right of action under General Statutes § 52-555 for wrongful death belongs, in effect, to the decedent, and damages are recoverable for the death as one of the consequences of the wrong inflicted on the decedent. The cause of action is a continuance of a right of action that the decedent could have asserted if he had lived and to which the death may be added as an element of damages. *Foran* v. *Carangelo*, 153 Conn. 356, 360, 216 A.2d 638 (1966). The right of action comes to a personal representative by survival. *Floyd* v. *Fruit Industries, Inc.*, 144 Conn. 659, 668, 136 A.2d 918 (1957). The creation of a special victim's fund by the United States government, funded by taxpayers, provides an alternative to bringing such a wrongful death action.[11] In the case of an individual killed in the attacks, the fund permits only their personal representative to file a claim on his behalf. 49 U.S.C. § 405 (c) (2) (C). In Connecticut, that personal representative is an executor or administrator of the estate of the decedent. The plaintiff applied to the fund after being duly appointed as administrator of her late husband's estate on her application to the Norwalk Probate Court. That the entitlement had not ripened into a fixed amount at the time of Olivia's entitlement did not diminish her right. As our Supreme Court noted in *Lopiano*, in viewing how other statutes governing distinct procedures defined property, the attachment statute, § 52-278a (e), defines property to mean "any present or future interest in . . . personal property . . . ." (Internal quotation

[11] Individuals eligible for compensation under the fund are entitled to an award only if they waive their right to file a civil action against the airlines or other defendants. 49 U.S.C. § 405 (c) (3) (B).

marks omitted.) *Lopiano* v. *Lopiano*, supra, 247 Conn. 365. Olivia was entitled to share in the proceeds of any wrongful death action arising out of her father's death, and her right could be asserted on her behalf when she was born, whether that right was a wrongful death action or a claim made to the fund provided by Congress.

We therefore reject the plaintiff's contention that the requirement of § 45a-629 (a) that residence within the probate district was a precondition to appointment of a guardian did not relate to her entitlement to her property right in the proceeds of a wrongful death action or its alternative, an application to the fund, and conclude that the Superior Court properly determined that she was a resident of Norwalk when that entitlement to property occurred.

The Superior Court properly determined that the plaintiff's duty to apply for a guardianship became mandatory "when . . . the minor child first becomes [en]titled to property." (Internal quotation marks omitted.) The court held that the plaintiff's "obligation to make application to the Probate Court began when Olivia became entitled to her award in June, 2004, while still residing in Norwalk, and continued until she filed her application on June 9, 2010, six years later."

The only purpose for the appointment of a guardian pursuant to § 45a-629 (a) is for protection of the property interests of a minor. That duty is triggered at the point when a minor acquires a property right to be protected. As an heir at law, the ward in this case acquired the right to bring a wrongful death action as soon as she was born after her father's death. She became entitled under the laws of intestacy, more particularly, to share in one half of the proceeds of any such wrongful death action brought against the airlines. That legal standing was also a necessary precondition

to filing a claim with the victim compensation fund. The statutory purpose of the fund is "to provide full compensation to any individual (or relatives of a deceased individual) who was physically injured or killed as a result of the terrorist-related aircraft crashes of September 11, 2001, or the rescue and recovery efforts during the immediate aftermath of such crashes." 49 U.S.C. § 40101.

The plaintiff further argues that, even if the Norwalk Probate Court originally had jurisdiction, it could be divested of that jurisdiction once Olivia moved into a town located in the probate district of Westport. We are not persuaded. The plaintiff cites no authority for that proposition. To the contrary, § 45a-599 provides in relevant part: "When any minor for whom a guardian has been appointed becomes a resident of any town in the state in a probate district other than the one in which a guardian was appointed, such court in that district may, upon motion of any person deemed by the court to have sufficient interest in the welfare of the respondent . . . transfer the file to the probate district in which the minor under guardianship resides at the time of the application, provided the transfer is in the best interest of the minor. . . . When the transfer is made, the court of probate in which the minor under guardianship resides at the time of transfer shall thereupon assume jurisdiction over the guardianship and all further accounts shall be filed with such court." That section leads us to conclude that our statutory scheme is not one in which a vacuum is created every time a minor child subject to a guardianship of her estate moves to a new district. Rather, § 45a-599 recognizes that, unless and until the guardian, or other person the court deems to have a sufficient interest in the welfare of the child, files a motion to transfer the proceedings to another district, and the transferring Probate Court finds that it is in the best interest of the minor and

orders the transfer, the probate district in which the guardianship was originally appointed retains jurisdiction to protect that child's interests. The plaintiff never moved to transfer the guardianship proceedings. As the Superior Court found, it was up to the plaintiff to move to change the venue to Westport for future proceedings if she believed that was appropriate. The court would then decide if the venue change was in the minor's best interest. The plaintiff was in the best position to know when Olivia changed her residence from Norwalk.

In interpreting statutes, we presume that the legislature did not intend an absurd result. See *In re Bachand*, supra, 306 Conn. 42. The obvious purpose of the enactment of § 45a-629 is to give minor children protections in their property during their period of minority. Changes of address that have the consequence of moving from one probate district to another should not elutriate those protections by suspension of any Probate Court supervision after the move when no motion has been made and granted to change the venue to a court district serving the new address. The plaintiff argues that the court should in effect put a gloss on the statute to require that the residency in the district exist at the time of making the appointment, as is expressly required by General Statutes § 45a-648 (a),[12] regulating the appointment of involuntary representatives. However, as the Superior Court pointed out, § 45a-629 (a) contains no similar restriction tying the residency required to the date of application for the guardianship. The involuntary representation enabling statute has as its purpose the protection of the interests

[12] General Statutes § 45a-648 (a) provides: "An application for involuntary representation may be filed by any person alleging that a respondent is incapable of managing his or her affairs or incapable of caring for himself or herself and stating the reasons for the alleged incapability. The application shall be filed in the Probate Court in the district in which the respondent resides, is domiciled or is located *at the time of the filing of the application*." (Emphasis added.)

of persons who have reached their majority but are no longer competent to handle their own affairs. The legislature has enacted a specific requirement that the application for involuntary representation, for someone no longer capable, be made in the probate district in which he or she resides at the time of application. Section 45a-629 (a) concerns minors who are, in the eyes of the law, infants and lack legal status to conduct their own affairs at any time from birth through their entire period of minority, but have entitlement to an interest in property and whose entitlement triggers the need for protection of their property entitlement. Each statute is consistent in its rationale, and each statute requires that the operative petition concerning a ward be made in the district in which he or she resides when the ward's rights first require the ward's protection. In the case of a person deemed incapable and needing the law's protection, § 45a-648 (a) requires that the petition be filed in the probate district in which he or she resides at the time he or she is no longer capable of handling his or her affairs. In a case of the minor who lacks legal status to handle his or her own affairs, and needs the law's protection of his or her property, the law requires that a petition for guardianship be filed in the district in which the child lives at the time he or she becomes entitled to property.

We next address the plaintiff's second contention that, because Special Master Feinberg paid the $1,271,940.12 allocable to Olivia's claim to her as representative payee, no guardianship or Probate Court supervision of the minor's estate was necessary. We reject the plaintiff's contention that she could somehow bypass the statutory protections afforded to a minor's property in the state of Connecticut by electing to recover payment of Olivia's award as a representative payee. As the court stated in its memorandum of decision, there is no indication that federal law in any way

preempted Connecticut laws for the protection of minors.

Olivia was no less entitled to funds paid for her benefit simply because her mother elected to have them paid to her as representative payee. We reject the plaintiff's contention that payment of Olivia's award to the plaintiff as representative payee avoided creation of any entitlement or property interest in Olivia. The $1,271,940.12 paid to the plaintiff as a representative payee for Olivia was related to Olivia's loss of her father and the damages that she as his child suffered. This award was in lieu of pursuit of a wrongful death action in which the child under the laws of intestacy would have received one half of any resulting damages. To conclude that the child has no property interest or entitlement in and to this award, which merits statutory protection for minors, is without any authority under our law. This argument would, if accepted, defeat the whole purpose for our statutory protections of minors' property. That statutory purpose is to discourage misuse or misappropriation of such assets of minors, and to protect such assets so that they are safeguarded for that day when a minor child reaches her majority and is then entitled at age eighteen to use and direct expenditure and investment of such assets herself.[13] The plaintiff points to no provision of federal law or regulation that would preempt Connecticut's laws for the protection of minors. Special Master Feinberg's precatory language indicating the adoption of this representative payee language, designed to mollify those who wished

[13] We do not decide the substantial issue of whether the traditional Connecticut common-law rule that a parent must first use his or her own resources for the support of a child must bow to the purpose of the Victim Compensation Fund to provide full compensation for relatives of the deceased and Special Master Feinberg's letter to the plaintiff enclosing the award indicating intent to provide monies for the support of the minor and that monies not needed for that purpose were to be saved. These issues are not before the court in this appeal.

an alternative to avoid supervision of New York's surrogate's courts, not tied to federal statute or regulations officially adopted under its authority, cannot abrogate Connecticut law.[14]

The judgment is affirmed.

In this opinion the other judges concurred.

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[14] See Final Report of the Special Master for the September 11th Victim Compensation Fund of 2001, p. 60.