QUINTINO DININO, JR. *v.* FEDERAL EXPRESS CORPORATION ET AL.
(AC 38798)

Alvord, Prescott and Pellegrino, Js.

Syllabus

The plaintiff, who sustained personal injuries while at work, sought to recover damages for wilful misconduct by the defendant F Co., his employer, and for negligence by the defendant H, his coworker. The plaintiff's injuries resulted when he fell into a gap between the truck that he was unloading, which had been parked by H, and the loading dock. F Co. and H each filed motions for summary judgment based on the exclusivity provision of the Workers' Compensation Act (§ 31-293a), which provides that the act is the exclusive remedy for injured employees and that no civil action may be brought against an employer or coworker. The trial court granted the motions for summary judgment in favor of each defendant, and the plaintiff appealed to this court. On appeal, the plaintiff claims that the trial court improperly granted summary judgment when it concluded that there were no genuine issues of material fact regarding the applicability of two exceptions to the act's exclusivity provision: the motor vehicle exception if the action is based on a coworker's negligence in the operation of a motor vehicle, and the substantial certainty exception for an employer's intentional tort. *Held*:

1. Contrary to the plaintiff's claim that H's improper parking of the truck negligently caused the plaintiff's injuries, the trial court properly concluded that there was no genuine issue of material fact regarding the applicability of the motor vehicle exception to the exclusivity provision of the act, which allows an injured employee to bring an action against a coworker if the action is based on the fellow employee's negligence in the operation of a motor vehicle: at the time of the plaintiff's injury, H was not operating the truck within the meaning of § 31-293a because he had parked and exited the truck before the plaintiff began unloading it and the truck remained parked during the unloading process, the relevant inquiry being whether the plaintiff's injury occurred as a result of H's movement of the vehicle or a circumstance resulting from its movement, and the fact that the engine may have been running when

the plaintiff was injured was not sufficient to trigger the exception; furthermore, the truck was not performing the function of an ordinary vehicle when the plaintiff's accident occurred, in that it was parked and being used as a storage facility for the containers that needed to be unloaded.

2. The trial court properly concluded that there was no genuine issue of material fact regarding the applicability of the substantial certainty exception to the exclusivity provision of the act, which requires the showing that the defendant intentionally created a dangerous condition that made the plaintiff's injuries substantially certain to occur, and therefore, properly granted summary judgment in favor of F Co.: the plaintiff did not offer facts that tended to demonstrate that other F Co. employees had been injured in a similar manner at the loading dock or that suggested that F Co. knew of any such injuries, nor did the plaintiff offer any evidence that showed F Co. was aware of the potential hazard created by the gap between the truck and the loading dock on the night of the accident; furthermore, even if F Co. had modified the loading dock by eliminating certain safety precautions as alleged by the plaintiff, any such intentional, wilful, or reckless safety violations by an employer do not rise to the level of intent required under the substantial certainty standard.

Argued April 24—officially released September 12, 2017

Procedural History

Action to recover damages for, inter alia, the named defendant's wilful misconduct and the defendant Ernest Hawkins' negligence, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Miller*, *J.*, granted the motion to intervene as a plaintiff filed by the named defendant; thereafter, the court, *Hon. Constance L. Epstein*, judge trial referee, granted the motion for summary judgment filed by the defendant Ernest Hawkins and rendered judgment thereon; subsequently, the court, *Peck*, *J.*, granted the named defendant's motion for summary judgment and rendered judgment thereon, from which the named plaintiff appealed to this court. *Affirmed.*

Dana M. Hrelic, with whom was *Kimberly A. Knox*, and, on the brief, *James J. Walker*, for the appellants (named plaintiff).

Brian Tetreault, with whom, on the brief, was *Cristin E. Sheehan*, for the appellee (named defendant).

Laura Pascale Zaino, with whom, on the brief, were *Kevin M. Roche*, *Rachel J. Fain*, and *Logan A. Forsey*, for the appellee (defendant Ernest Hawkins).

Opinion

PRESCOTT, J. It is well established that the Workers' Compensation Act, General Statutes § 31-275 et seq. (act), provides the exclusive remedy for most workers injured in the course of their employment. This appeal arises out of an action by the plaintiff, Quintino DiNino, Jr., in which he alleges that his employer, Federal Express Corporation (FedEx) and his coworker, Ernest Hawkins, are liable for injuries that he suffered in a work related accident. The plaintiff appeals from the trial court's granting of two separate motions for summary judgment in favor of each defendant. On appeal, the plaintiff claims that the trial court improperly rendered summary judgment because it erroneously concluded that there were no genuine issues of material fact regarding the applicability of two recognized exceptions to the exclusivity provision of the act. We disagree and, accordingly, affirm the judgment of the trial court.

The record, viewed in the light most favorable to the plaintiff as the nonmoving party, reveals the following facts. At the time of the incident, the plaintiff was employed as a material handler by FedEx. During the course of the plaintiff's employment with FedEx, he was tasked with unloading heavy containers from the back of delivery trucks onto loading docks. The trucks were equipped with airlift roller conveyor systems meant to facilitate the transfer of the containers. The airlift roller conveyor systems made it impossible for the trucks to back up flush to the loading docks, which left a gap between the edge of the loading docks and the rear of the trucks.

On July 18, 2011, the plaintiff was working at FedEx's loading dock in East Granby, when the last delivery truck of the night pulled into the loading dock. Hawkins, the driver of the truck in question, was returning from a trip during which he picked up materials. Hawkins parked the vehicle just short of the loading dock, leaving a larger than normal gap between the dock and the truck. The plaintiff noticed his supervisor spread his hands apart and shake his head upon noticing Hawkins' improper parking of the delivery truck, signaling that the gap was too large. The plaintiff, who was tasked with unloading that particular delivery truck, did not express concern regarding the size of the gap to any of his coworkers, and no steps were taken by the plaintiff's supervisor or Hawkins to reposition the truck.

Shortly thereafter, while moving a container off the truck, the plaintiff fell into the gap between the truck and the loading dock. The container subsequently rolled onto and crushed the plaintiff's right leg, fracturing his tibia and fibula. The plaintiff also suffered an extensive degloving of the soft tissue in his lower right leg, requiring skin flap replacement and skin grafting. The plaintiff subsequently received workers' compensation benefits under the act for his injuries.

The plaintiff commenced the present action on April 8, 2013. The operative complaint contained two counts. In the first count, the plaintiff alleged that FedEx had been "warned of the significant safety hazard presented by the open gaps/spaces by its own agents, servants, and/or employees," but nevertheless "consciously and deliberately chose not to utilize dock boards, dock plates, dock levelers or any other appropriate safety devices to eliminate the significant safety hazard presented by the open gaps/spaces between the truck trailers and the loading dock." The plaintiff also alleged that FedEx's failure to follow proper safety guidelines

constituted a violation of the standards of the Occupational Safety and Health Act (OSHA), 29 CFR 1910.22 (c), and that FedEx's "actions and/or omissions created a substantial certainty that the plaintiff would be injured . . . ."

In the second count, the plaintiff alleged that Hawkins "failed to properly position his truck in the loading dock by stopping the truck too far away from the edge of the loading dock and thereby leaving an unsafe space or gap between the rear of the truck and the loading dock . . . ." The plaintiff also alleged that Hawkins "failed to warn the material handlers, including the plaintiff, that he had stopped the truck farther away from the loading dock than was normal" and that the plaintiff's injuries were a direct and proximate result of defendant Hawkins' negligent operation of the delivery truck.

On February 18, 2015, FedEx filed a motion for summary judgment and accompanying memorandum of law, in which it asserted, inter alia, that it is immune from liability pursuant to the exclusivity provision of the act. FedEx also denied that it intentionally had created a dangerous condition that made the plaintiff's injuries substantially certain to occur, which, if established by the plaintiff, would constitute an exception to the exclusivity provision.

On March 2, 2015, Hawkins filed a separate motion for summary judgment. In his accompanying memorandum of law, Hawkins asserted that the plaintiff's claims against him were similarly barred by the exclusivity provision of the act and, further, that the plaintiff's injuries did not arise out of Hawkins' negligent operation of a motor vehicle so as to fall within the recognized motor vehicle exception to the exclusivity provision.

The plaintiff filed an objection and accompanying memorandum of law in response to FedEx's motion for

summary judgment, in which he argued that his injuries were a "substantially certain result" of FedEx's various "bad choices" regarding proper safety procedure, and, therefore, fell within a recognized exception to the exclusivity provision. The plaintiff also filed an objection and accompanying memorandum of law in response to Hawkins' motion for summary judgment, arguing that Hawkins had been operating the delivery truck when the plaintiff was injured and, therefore, could be held liable for his negligence.

On August 17, 2015, the court, *Hon. Constance L. Epstein*, judge trial referee, heard oral argument on Hawkins' motion for summary judgment. The court issued a memorandum of decision on December 18, 2015, granting Hawkins' motion and holding, as a matter of law, that the plaintiff's injuries were not caused by Hawkins' negligent operation of the delivery truck because the truck's ignition had been turned off and the truck remained immobile when the incident occurred. The court, therefore, concluded that the exclusivity provision barred the plaintiff's claim against Hawkins.

FedEx's motion for summary judgment was heard on September 8, 2015. The court, *Peck, J.*, issued a memorandum of decision on December 30, 2015, granting summary judgment in favor of FedEx. The court concluded that the plaintiff had not raised a genuine issue of material fact regarding whether FedEx had intentionally created unsafe working conditions that made the plaintiff's injuries substantially certain to occur. Specifically, the court concluded that the plaintiff had failed to provide evidence, other than conclusory statements, that he had fallen into the gap previously; witnessed any of his coworkers suffer an injury after falling in the gap; or complained to his supervisor that the width of the gap was unsafe. The

court further held that noncompliance with OSHA standards does not give rise to employer liability in Connecticut. Thus, the court held that the exclusivity provision barred the plaintiff's action against FedEx.

The plaintiff filed the present appeal, challenging both trial court judgments. Additional facts and procedural history will be set forth as necessary.

We begin by identifying the applicable standard of review. "The standards governing our review of a trial court's decision to grant a motion for summary judgment are well established. Practice Book [§ 17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . . A material fact . . . [is] a fact which will make a difference in the result of the case. . . . Finally, the scope of our review of the trial court's decision to grant the plaintiff's motion for summary judgment is plenary." (Internal quotation marks omitted.) *DiPietro* v. *Farmington Sports Arena, LLC*, 306 Conn. 107, 115–16, 49 A.3d 951 (2012).

Pursuant to the act, a party injured in the course of his employment is entitled to benefits and compensation regardless of fault, and such compensation shall be the exclusive remedy of the injured employee, with no civil

action available against an employer. General Statutes § 31-284. General Statutes § 31-293a further provides that no civil action may be brought against an allegedly negligent coworker, by extension. These are commonly referred to as the exclusivity provisions of the act.

The rationale underlying the exclusivity provision is as follows: "The purpose of the [act] . . . is to provide compensation for injuries arising out of and in the course of employment, regardless of fault. . . . Under the statute, the employee surrenders his right to bring a common law action against the employer, thereby limiting the employer's liability to the statutory amount. . . . In return, the employee is compensated for his or her losses without having to prove liability. . . . In a word, these statutes compromise an employee's right to a common law tort action for work related injuries in return for *relatively quick* and certain compensation. . . . The intention of the framers of the act was to establish *a speedy*, effective and inexpensive method for determining claims for compensation." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Doe* v. *Yale University*, 252 Conn. 641, 672, 748 A.2d 834 (2000).

There are, however, certain exceptions to the exclusivity provision. Two, in particular, are at issue in this case. The first is a statutory exception set out in § 31-293a, commonly referred to as the "motor vehicle exception." Specifically, § 31-293a allows an injured employee to bring an action against a coworker if the action is "based on the fellow employee's negligence in the *operation* of a motor vehicle as defined in section 14-1." (Emphasis added.)

The second exception at issue in this case is the "substantial certainty" exception. In *Jett* v. *Dunlap*, 179 Conn. 215, 425 A.2d 1263 (1979), our Supreme Court recognized an exception to the exclusivity provision

for intentional torts of an employer. Id., 219. Subsequently, in *Suarez* v. *Dickmont Plastics Corp.*, 229 Conn. 99, 639 A.2d 507 (1994) (*Suarez I*), and *Suarez* v. *Dickmont Plastics Corp.*, 242 Conn. 255, 698 A.2d 838 (1997) (*Suarez II*), the court expanded the intentional tort exception to the exclusivity provision to include circumstances in which "either . . . the employer *actually intended* to injure the plaintiff (actual intent standard) or . . . the employer intentionally created a dangerous condition that made the plaintiff's injuries *substantially certain* to occur (substantial certainty standard)." (Emphasis added.) *Suarez II*, supra, 257–58. Having set out the two relevant exceptions to the exclusivity provision, we now turn to the plaintiff's specific claims on appeal.

I

The plaintiff's first claim on appeal is that the court improperly determined, as a matter of law, that the motor vehicle exception to the exclusivity provision of the act did not apply and that the plaintiff's action against Hawkins, therefore, was barred. In support of his claim, the plaintiff argues that Hawkins' improper parking of the vehicle raises a genuine issue of material fact regarding whether the plaintiff's injuries were based on Hawkins' negligent operation of the delivery truck. Hawkins maintains that he was not operating the truck within the meaning of § 31-293a, because the truck was in park and remained immobile during the incident. We agree with Hawkins.

The term "operation" is not defined by the act. Thus, we must turn to relevant precedent for guidance. Our courts have interpreted the meaning of "operation" in the context of the act, as well as with respect to the doctrine of sovereign immunity. We begin by addressing the case law analyzing the act.

In *Davey* v. *Pepperidge Farms, Inc.*, 180 Conn. 469, 429 A.2d 943 (1980), our Supreme Court stated, in addressing the motor vehicle exception, that "[w]hile it is true that 'operation' is not defined in General Statutes § 14-1,[1] the cases clearly indicate that operation as it refers to a motor vehicle relates to the driving or movement of the vehicle itself or a circumstance resulting from the movement of the vehicle." (Footnote added.) Id., 472 n.1.

A few years later, in *Dias* v. *Adams*, 189 Conn. 354, 456 A.2d 309 (1983), it examined the legislative history of § 31-293a and stated that our legislature intended to limit the scope of the exception by "distinguish[ing] simple negligence on the job from negligence in the operation of a motor vehicle. . . . Particular occupations may subject some employees to a greater degree of exposure to that risk. The *nature* of the risk remains unchanged, however . . . ." (Emphasis added; footnote omitted; internal quotation marks omitted.) Id., 359. Our Supreme Court, therefore, concluded in *Dias* that its "decision to construe the term 'operation of a motor vehicle' in § 31-293a [to] *not* includ[e] activities unrelated to movement of the vehicle comports with this policy of the legislature." (Emphasis added.) Id., 360. Consequently, the court held that a backhoe was not in operation when the shovel on the backhoe dropped suddenly and struck the decedent. Id., 358.

In *Kegel* v. *McNeely*, 2 Conn. App. 174, 476 A.2d 641 (1984), this court held that if a coworker is "not engaged at the time of the fellow employee's injury in any activity related to driving or moving a vehicle or related to a circumstance resulting from the movement of a vehicle, the lawsuit does not fall within the exception of General Statutes § 31-293a." Id., 178. There, the plaintiff's decedent and the defendant were coworkers tasked with

[1] General Statutes § 14-1 (54) defines "motor vehicle" for purposes of the act.

moving and stacking floating docks. Id., 176. At the time of the accident, the defendant was operating a truck cab. Id. Attached to the rear of the truck was a crane, operated separately by a third coworker, and the decedent's job was to load and unload floating docks from a sling suspended by the boom of the crane. Id. The accident occurred after a fourth employee, acting as a ground guide, directed the defendant to back the truck into position. Id., 177. The defendant moved the truck, stopped it at the location indicated, turned the engine off, and remained in the cab with his foot on the break. Id. After the defendant stopped the vehicle, the boom of the crane came into contact with overhead wires. Id., 176. The decedent, who was holding the metal sling attached to the crane cable at the time, was immediately electrocuted upon contact. Id., 176–77.

On appeal from the trial court's directed verdict[2] for the defendant, this court concluded that the truck portion of the assembly had not been in operation when the accident occurred, because "[a]t the time of the decedent's injury, the truck, with its ignition having been turned off, could not function to move the truck itself nor did it function or move so as to change the position of the crane or its boom."[3] Id., 178. This court further concluded that "the only evidence relative to

[2] In his reply brief, the plaintiff in the present case notes that the plaintiff in *Kegel* survived the summary judgment phase and proceeded to trial. In light of the development of the law since *Kegel*, however, it is clear to us that the plaintiff in the present case has failed to raise a genuine issue of fact concerning whether defendant Hawkins was operating a motor vehicle within the meaning of § 31-293a.

[3] Kegel involved General Statutes (Rev. to 1981) § 31-293a. The legislature amended § 31-293a to specify that contractors' "mobile equipment such as bulldozers, powershovels, rollers, graders or scrapers, farm machinery, *cranes* . . ." did not fall under the motor vehicle exception to the exclusivity provision of the act. (Emphasis added.) This court's analysis in *Kegel*, however, is still persuasive because the issue in that case concerned movement of the truck portion of the assembly, which was operated by a separate employee, rather than the movement of the crane.

whether the defendant was operating a motor vehicle was that the truck was *immobile* at the time, with its motor off." (Emphasis added.) Id.

In *Kiriaka* v. *Alterwitz*, 7 Conn. App. 575, 509 A.2d 560, cert. denied, 201 Conn. 804, 513 A.2d 698 (1986), this court similarly concluded that the plaintiff could not maintain a cause of action against his coworker under the motor vehicle exception to the exclusivity provision. There, the plaintiff and defendant worked for a furniture company. Id., 576. The day of the accident, the defendant was driving his employer's furniture van, with the plaintiff as the passenger. Id. The defendant pulled the van over on the side of the highway and parked the vehicle, leaving its flashers on. Id. The defendant remained in the parked van as the plaintiff attempted to cross the highway. Id. The plaintiff subsequently was struck by a passing car and injured. Id.

In affirming the trial court's granting of summary judgment for the defendant, this court concluded that the plaintiff's injuries were "unconnected and unrelated to [the defendant's] control, direction and movement" of the van. Id., 580. Because the plaintiff "proceeded, on his own, unrelated to the operation of the [van], to cross the highway," his injuries were "removed from [the defendant's] prior movement or operation of the vehicle." Id., 579.

More recently, in *Rodriguez* v. *Clark*, 162 Conn. App. 785, 788, 133 A.3d 510, cert. denied, 320 Conn. 926, 133 A.3d 879 (2016), this court held that the motor vehicle exception to the exclusivity provision did not apply in an action brought by a police officer against his coworker, for allegedly negligently operating a police cruiser. At the time of the incident, the plaintiff was in the process of arresting various individuals involved in an altercation. Id., 786. The defendant police officer arrived on the scene to provide backup, and parked his

police cruiser, leaving the motor on and a window open for his trained K9 police dog. Id. The dog subsequently exited the cruiser via the open window and bit the plaintiff on his leg. Id. Much like the court in *Kiriaka*, this court agreed with the trial court's conclusion that the plaintiff's injuries were removed from the defendant's prior operation of the vehicle, because they were not causally related to the control, direction, and movement of the motor vehicle. Id.

The case before us is similar to *Kegel*, *Kiriaka*, and *Rodriguez*. In all four cases, the vehicle in question was immobile when the accident occurred. Here, the delivery truck was parked for minutes before the plaintiff began unloading it, and it remained parked during the unloading process. Furthermore, unlike the defendants in *Kegel* and *Kiriaka*, Hawkins exited the vehicle before the accident occurred, making him even more removed from its operation. We do not agree with the plaintiff that the proximity of the rear of the truck to the loading platform was enough to establish a causal relationship between Hawkins' operation of the truck and his injury sufficient to trigger the motor vehicle exception.

The plaintiff suggests in challenging the court's factual findings that there is a dispute as to whether the engine of the delivery truck was off when the incident occurred. This does not, however, raise a genuine issue of material fact that would defeat the granting of summary judgment. The law makes clear that the simple fact that the engine was on when the injury occurred is not sufficient to trigger the motor vehicle exception. In *Kegel*, *Kiriaka*, and *Rodriguez*, the engine was running when each plaintiff was injured, yet this court held that none of the defendants had been operating their respective vehicles. Instead, the relevant inquiry is whether the injury occurred as a result of Hawkins'

movement of the vehicle or a circumstance resulting from its movement, which is simply not the case here.

We next address our court's interpretation of the term "operating" in the context of a statutory waiver of the doctrine of sovereign immunity, because the plaintiff relies on cases decided in that context. General Statutes § 52-556 provides that "[a]ny person injured in person or property through the negligence of any state official or employee *when operating a motor vehicle* owned and insured by the state against personal injuries or property damage shall have a right of action against the state to recover damages for such injury." (Emphasis added.) The plaintiff argues that this court's interpretation of the phrase "when operating a motor vehicle" in *Allison* v. *Manetta*, 84 Conn. App. 535, 854 A.2d 84, cert. denied, 271 Conn. 931, 859 A.2d 582 (2004) (*Allison I*), a case regarding sovereign immunity, supports his cause of action against Hawkins.[4] We disagree.

In *Allison I*, the driver of a transportation truck was proceeding along his designated route, looking for highway maintenance problems, when he came across water rushing out of a driveway. Id., 541. He pulled his truck over so he could dig a ditch to keep the water from flowing onto the road and parked his vehicle next to the driveway on the road. Id. As the plaintiff was traveling on the road, she was hit by a tractor trailer coming from the opposite direction trying to maneuver around the truck. Id., 536–37. The plaintiff brought an action against, inter alia, the state and the truck driver. Id. The defendants filed a joint motion to dismiss the claims on the basis that the statutory waiver did not apply because the parked truck was not being operated within the meaning of § 52-556 when the plaintiff was

[4] We note that the wording of the statutory waiver of sovereign immunity is not identical to that of the motor vehicle exception to the exclusivity provision. The phrase "operation of a motor vehicle" and "when operating a motor vehicle," however, are sufficiently similar to warrant comparison.

injured. Id., 537. The trial court agreed and granted the defendants' motion to dismiss. Id. The plaintiff appealed.

On appeal, this court held that a motor vehicle is being operated within the context of § 52-556 when "there is a setting in motion of the operative machinery of the vehicle, or there is movement of the vehicle, or there is a circumstance resulting from that movement or *an activity incident to the movement of the vehicle from one place to another*." (Emphasis in original; internal quotation marks omitted.) Id., 540–41. This court further stated: "On this set of facts, we conclude, as a matter of law, that [the defendant] was operating the truck within the meaning of § 52-556. He had parked the truck as an activity incident to moving it from one place to another along his designated maintenance route to fulfill his responsibilities for the department. There was, consequently, a temporal congruence between the operation of the truck and the plaintiff's injury." Id., 541–42. Accordingly, this court reversed the trial court's dismissal of the action, and remanded the case for further proceedings. Id., 542.

Here, the plaintiff argues that, under *Allison I*, Hawkins' improper parking of the delivery truck constitutes operation of a motor vehicle. The reach of *Allison I*, however, has been limited by subsequent decisions.

In *Rodriguez* v. *State*, 155 Conn. App. 462, 110 A.3d 467, cert. granted, 316 Conn. 96, 113 A.3d 71 (2015), this court again considered the meaning of the phrase "when operating a motor vehicle" within the context of § 52-556. The plaintiffs' claims in that case arose out of an accident involving multiple vehicles. On the day of the plaintiff's motor vehicle accident, a state service patrol operator was monitoring the highway. Id., 466–67. His job was to remedy unsafe driving conditions. Id., 467. At some point during his route, the patrol operator

came across debris in the road and pulled over, thereby obstructing the right lane of the highway. Id., 470. Shortly thereafter, three vehicles that had slowed approaching the debris were struck from behind by a tractor trailer. Id. A passenger in one of the cars hit by the truck was killed, and a driver of another car was badly injured. Id. The administratrix of the decedent's estate and the injured passenger each brought a personal injury action against the tractor trailer owner, its driver, the state, and the service patrol officer. Id., 466–68. A jury returned verdicts in favor of both of the plaintiffs, and the state appealed from the trial court's denial of its motions to set aside each verdict, arguing that the court had improperly instructed the jury on the scope of the state's sovereign immunity. Id., 472–73.

On appeal, this court held that the jury instructions used by the trial court constituted reversible error. Id., 490. In so doing, the court analyzed our Supreme Court's decision in *Allison* v. *Manetta*, 284 Conn. 389, 933 A.2d 1197 (2007) (*Allison II*). After this court decided *Allison I*, it had remanded the case for trial, and the plaintiff prevailed. Id., 395. The defendants appealed, and our Supreme Court transferred the appeal to itself. In *Allison II*, the state argued that the trial court should have instructed the jury that a state vehicle parked for the purposes of serving as a warning device or protective barrier was not parked "incident to travel," and thus was not being "operated" pursuant to § 52-556 Id., 399–400, citing with approval *Rivera* v. *Fox*, 20 Conn. App. 619, 624, 569 A.2d 1137, cert. denied, 215 Conn. 808, 576 A.2d 538 (1990) (holding that truck being used as warning signal to alert drivers of accident was not being operated within meaning of § 52-556). Our Supreme Court agreed, and remanded the case for a new trial. *Allison II*, supra, 400–402. Although *Allison II* did not expressly overturn this court's decision in *Allison I*, it limited its applicability considerably.

In light of our Supreme Court's decision in *Allison II*, and our decision in *Rivera*, this court concluded in *Rodriguez* that a motor vehicle is parked incident to travel only if it is parked in a convenient or ordinarily appropriate place, rather than parked for the purpose of being used as a warning device or protective barrier. *Rodriguez* v. *State*, supra, 155 Conn. App. 480. This court further concluded that the motor vehicle exception to sovereign immunity does not apply even if the state employee was *negligent* in choosing a location to park the vehicle for the purpose of using it as a warning device. Id., 481.

Thus, even if we were to ignore the fact that, in *Allison I*, this court interpreted a waiver of sovereign immunity rather than an exception to the exclusivity provision of the act, and that the language of the two statues is not identical, the holding of *Allison I* subsequently has been limited and does not control here. In *Allison I*, the defendant temporarily parked his vehicle in the middle of his designated route. In the present case, Hawkins parked the delivery truck at the *conclusion* of his run. Furthermore, Hawkins did not park the truck in a convenient or ordinary place to park, such as a parking lot—he parked it at a loading dock. Finally, as Hawkins correctly points out, the truck was not performing the function of an ordinary motor vehicle while it was parked at the loading dock. Rather, it was serving as a storage facility for the containers that needed to be unloaded. The function that the vehicle is serving at the time of the injury is significant, because this court concluded in *Rodriguez* and *Rivera* that the state's trucks were not being operated within the meaning of the waiver to sovereign immunity while they were being used as warning devices. Here, the delivery truck was similarly not performing the function of an ordinary vehicle when the plaintiff's injury occurred.

The plaintiff therefore has failed to raise a genuine issue of material fact regarding whether his injury was based on Hawkins' negligent operation of the delivery truck. Neither line of cases interpreting the meaning of "operation" counsels us to adopt the exceedingly broad definition that the plaintiff suggests. Thus, we affirm the judgment of the trial court granting Hawkins' motion for summary judgment.

II

The plaintiff's second claim on appeal is that the court improperly granted FedEx's motion for summary judgment by concluding that there was no genuine issue of material fact regarding whether FedEx had intentionally created a dangerous working condition that made the plaintiff's injuries substantially certain to occur. The plaintiff makes a number of arguments in support of his claim, including that the cargo unloading process was inherently dangerous. Specifically, the plaintiff argues that the dock upon which he was working, dock six, was unsafe. The plaintiff further argues that FedEx knowingly and deliberately subjected him to these dangerous and unsafe conditions, as evidenced by deposition testimony of the plaintiff's coworkers that the plaintiff believes tends to show that other FedEx employees had been injured by falling into the gap between the loading dock and the back of the delivery truck. We disagree.

In support of his argument that the working conditions were inherently unsafe or dangerous, the plaintiff cites the differences between dock six and other loading docks in the facility. Specifically, the plaintiff argues that dock six was inherently dangerous because, unlike some of the other docks, dock six did not have an "extension bar," the purpose of which is to bridge the gap between the dock and the back of the truck. Without

an extension bar, the dock's edge consisted of rollers, rather than stable flooring.

The plaintiff submitted an affidavit from his expert witness in opposition to FedEx's motion for summary judgment, in which his expert opined that the configuration of dock six was unsafe in three ways: "First, it did not allow for a truck to be backed up flush against the leading edge of the loading dock, as that would result in contact and binding of the horizontal steel rollers at the leading edge of the dock. . . . Second, it eliminates a safe walking surface area that workers can step on while transitioning from the rear of the truck to the loading dock, and replaces that safe walking surface area with a steel roller that cannot be stepped upon safely as that would actually cause the worker's foot to be spun back into the gap . . . . And finally, it greatly increases the danger zone that workers must negotiate while transitioning from the rear of the truck onto the loading dock . . . ." The plaintiff's expert further concluded that FedEx must have modified or removed the dock extension bar from dock six, as the dock did not appear to conform to the original manufacturer's design.

The plaintiff also cites deposition testimony of his coworkers regarding other workplace injuries in support of his argument that FedEx knew that the cargo unloading process was inherently dangerous. The plaintiff cites the deposition of coworker LeAnne Theilman, who testified that another coworker, Kathy Welch, stepped on a roller and fell "luckily on the deck, not down in between," because had she fallen in the gap, "she would have been killed." That incident, however, occurred while Welch was pulling a can off a dolly on the deck—not as a result of her falling into a gap between an unloading dock and a delivery truck. The plaintiff also cites the testimony of FedEx employee

Michael Smith, who stated that he once saw a coworker's foot slip and go into the gap. There was no testimony that she was injured in this incident. The plaintiff also references testimony of coworker Kevin Kelley, who said that his supervisor told him of another incident involving a FedEx employee's foot falling into the gap. Kelley could also not recall whether his supervisor told him that the employee had been injured.

Since *Suarez I* and *Suarez II*, our Supreme Court has clarified the limited scope of the substantial certainty exception. In *Sullivan* v. *Lake Compounce Theme Park, Inc.*, 277 Conn. 113, 889 A.2d 810 (2006), our Supreme Court concluded that, "[a]lthough it is less demanding than the actual intent standard, the substantial certainty standard is, nonetheless, an intentional tort claim requiring an appropriate showing of intent . . . . To satisfy a substantial certainty standard, a plaintiff must show more than that a defendant exhibited a lackadaisical or even cavalier attitude toward worker safety . . . . Rather, a plaintiff must demonstrate that his employer *believed* that its conduct was substantially certain to cause the employee harm." (Citations omitted; emphasis in original; internal quotation marks omitted.) Id., 118. In other words, "[t]he substantial certainty test provides for the intent to injure exception to be *strictly construed* and still allows for a plaintiff to maintain a cause of action against an employer where the evidence is sufficient to support an inference . . . the employer deliberately instructed an employee to injure himself." (Emphasis added; internal quotation marks omitted.) *Suarez I*, supra, 229 Conn. 109–110, quoting *Gulden* v. *Crown Zellerbach Corp.*, 890 F.2d 195, 197 (9th Cir. 1989).

Furthermore, this court has consistently held that "[a] wrongful failure to act to prevent injury is not

the equivalent of an intention to cause injury. . . . An [employer's] intentional, wilful or reckless violation of safety standards established pursuant to federal and state laws . . . is not enough to extend the intentional tort exception . . . . The employer must believe the injury was substantially certain to occur." (Citations omitted; internal quotation marks omitted.) *Morocco* v. *Rex Lumber Co.*, 72 Conn. App. 516, 527–28, 805 A.2d 168 (2002); see also *Sorban* v. *Sterling Engineering Corp.*, 79 Conn. App. 444, 457–58, 830 A.2d 372, cert. denied, 266 Conn. 925, 835 A.2d 473 (2003) (holding failure to teach employees proper safety procedure does not trigger substantial certainty exception). Our Supreme Court has declined to extend the substantial certainty exception even to injuries "resulting from intentional, or wilful, or reckless violations by the employer of safety standards established pursuant to federal and state laws, such as OSHA." (Internal quotation marks omitted.) *Mingachos* v. *CBS, Inc.*, 196 Conn. 91, 100, 491 A.2d 368 (1985).

The intent requirement of the substantial certainty exception is, therefore, "distinguishable from reckless behavior. . . . High foreseeability or strong probability are insufficient to establish [the requisite level of] intent. . . . Although such intent may be proven circumstantially, what must be established is that the employer knew that the injury was substantially certain to follow the employer's deliberate course of action. . . . To hold otherwise would undermine the statutory scheme and purpose of the workers' compensation law and usurp legislative prerogative." (Citations omitted.) *Martinez* v. *Southington Metal Fabricating Co.*, 101 Conn. App. 796, 801, 924 A.2d 150, cert. denied, 284 Conn. 930, 934 A.2d 246 (2007). Having established the limited scope of the substantial certainty standard, we now turn to the plaintiff's claim.

The plaintiff's recounting of his coworkers' deposition testimony fails to raise a genuine issue of material fact regarding whether FedEx believed the plaintiff's injury was substantially certain to occur. The plaintiff has offered no facts that would tend to demonstrate that other FedEx employees had been injured in a similar manner at dock six. In fact, the plaintiff does not cite, nor did any of his coworkers testify to, even one other incident in which a FedEx employee was actually *injured* after falling into the gap between the loading dock and delivery truck. Only two of the three above-mentioned incidents involved an employee slipping into the gap between a loading dock and delivery truck specifically, and in at least one of those instances, the employee was left unharmed. The third incident, referenced by Kelley, also fails to raise a genuine issue of material fact, because Kelley did not know whether the employee in question was injured. Thus, the plaintiff has not proffered any evidence that suggests that FedEx knew of any prior injuries occurring as a result of the gap at dock six, and certainly not with such frequency that it raised a genuine issue of material fact regarding whether FedEx knew that the plaintiff's injury was substantially certain to occur.

Furthermore, the plaintiff has not offered any evidence that tends to show that FedEx was aware of the potential hazard created by the gap between the truck and the loading dock on the night of the accident. Neither the plaintiff nor his coworker voiced any concerns to their supervisor, Michael Smith, regarding the gap, even though the plaintiff maintains that the gap was much larger than normal. Moreover, the plaintiff did not ask Hawkins to reposition the truck, although he had seen drivers do so in the past. Such facts, therefore, tend to demonstrate that neither the plaintiff nor FedEx understood that it was substantially certain that the plaintiff would be injured.

Additionally, the plaintiff's argument that FedEx purposely removed from dock six a factory designed safety feature—specifically, an extension bar that bridges the gap between the loading dock and the back of the delivery truck—similarly fails to raise a genuine issue of material fact regarding whether FedEx believed the plaintiff's injury was substantially certain to occur. The plaintiff and his expert, a mechanical engineer named Brian O'Donel, concluded that FedEx must have modified dock six, because it appeared to the plaintiff's expert that the dock differed from the manufacturer's design. Even if we were to accept the plaintiff's conclusion that FedEx purposely eliminated certain safety precautions, however, this court held in *Morocco*, supra, 72 Conn. App. 527, that "*intentional*, wilful or reckless" safety violations by the employer do not rise to the level of intent required under the substantial certainty standard. (Emphasis added; internal quotation marks omitted.) In fact, our Supreme Court has expressly declined to apply the substantial certainty exception to cases in which the plaintiff alleges its employer violated OSHA safety standards. *Mingachos* v. *CBS, Inc.*, supra, 196 Conn. 100.

Our conclusion is buttressed by decisions of this court in cases raising similar claims. One such case is *Sorban* v. *Sterling Engineering Corp.*, supra, 79 Conn. App. 444. There, the plaintiff worked as a machine operator, and informed his supervisor that the lathe he was working on was malfunctioning. Id., 446. The supervisor took no action other than to tell the plaintiff to "be careful" and the tool crashed into material on a rotating table, throwing a piece of material and hitting the plaintiff in the arm, causing a severe laceration and other injuries. Id. The trial court granted the defendant employer's motion for summary judgment. Id., 447. On appeal, we concluded that "there [was] no evidence that the defendant's actions were committed with the

purpose of causing injury," even though the defendant failed to repair the lathe, provide adequate blocks and shield guards, and alert employees to a policy regarding use of the rotating table. Id., 457. We therefore held that "[a]lthough the defendant's failure [to act] may constitute negligence, gross negligence or even recklessness, those allegations fail to meet the high threshold of substantial certainty . . . . The combination of factors demonstrated a failure to act; however, such a failure is not the equivalent of an intention to cause injury." Id., 457–58; see also *Martinez* v. *Southington Metal Fabricating Co.*, supra, 101 Conn. App. 807 (holding substantial certainty exception did not apply where plaintiff inserted hand into machine and machine was subsequently turned on due to miscommunication with coworker because fact that plaintiff's employer knew machine was potentially dangerous did not constitute requisite level of intent required under exception).

The plaintiff argues that his case is distinguishable from *Sorban* because the malfunction of the machine in *Sorban* was a single isolated event, rather than a "regularly occurring dangerous condition such as a gap in the floor." Here, however, the plaintiff himself admitted that the gap between the loading dock and the delivery truck was larger than usual on the night he was injured—in fact, more than double the regular distance. The larger than normal gap complained of by the plaintiff is, therefore, more analogous to the onetime malfunctioning machine at issue in *Sorban* than a "regularly occurring dangerous condition" as characterized by the plaintiff. For this reason and the others discussed herein, summary judgment was properly granted in favor of defendant FedEx.

The judgments are affirmed.

In this opinion the other judges concurred.

LUONGO CONSTRUCTION AND DEVELOPMENT, LLC *v.* JAMES MACFARLANE (AC 38185)

DiPentima, C. J., and Lavine and Flynn, Js.

Syllabus

The plaintiff construction company, L Co., sought to recover damages from the defendant, M, for, inter alia, breach of a contract for the construction of a modular home. Thereafter, M filed a counterclaim against L Co. and L, who was in charge of the construction, alleging, inter alia, breach of contract, breach of the New Home Construction Contractors Act (§ 20-417a et seq.), and violation of the Connecticut Unfair Trade Practices Act (CUTPA) (§ 42-110a et seq.). Following a trial to the court, judgment was rendered for M on the complaint and in part on his counterclaim, from which L Co. and L appealed to this court. They claimed, inter alia, that the trial court improperly denied two motions they had filed to dismiss M's counterclaim, which were based on the prior pending action doctrine, given that a separate action was pending in New Haven that involved the same parties. *Held*:

1. The trial court properly denied the motions to dismiss M's counterclaim: this court would not presume error in the trial court's one sentence order denying the first motion to dismiss, which was filed by both L Co. and L, as the court was not required to issue a memorandum of decision setting forth its reasoning as to each claim of law raised in the motion, and because L Co. and L failed to seek an articulation of the order, they failed to provide this court with an adequate record on which to review their claim that the trial court failed to apply the proper analytical framework, and this court would not presume error by the trial court where L Co. and L failed to satisfy their burden of demonstrating that the trial court's ruling was factually or legally untenable; moreover, the trial court properly denied the second motion to dismiss filed by L Co., in which L Co. alleged, on the basis of the prior pending action doctrine, that M's counterclaim should be dismissed because M had a full opportunity to litigate the claims raised therein in the New Haven action but chose not to do so prior to the withdrawal of the New Haven action, this court having concluded previously that once a second action has been withdrawn, there is no action pending to implicate the prior pending action doctrine.

2. The trial court properly denied the motion for summary judgment filed by L Co., in which L Co. alleged that M's counterclaim violated the prior pending action doctrine, and also raised the defenses of waiver and equitable estoppel: the trial court having stated that it had considered

the arguments of the parties and concluded that genuine issues of material fact existed that precluded the rendering of summary judgment, the assertion by L Co. and L that the court failed to consider their claim regarding the prior pending action doctrine was unavailing; furthermore, because the parties moving for summary judgment, L Co. and L, did not satisfy their burden of establishing that no genuine issue of material fact existed with respect to the issues of waiver and estoppel, M, as the nonmoving party, had no obligation to submit evidence establishing the existence of such an issue, and our Supreme Court having determined previously that a denial of a motion for summary judgment is not appealable when a full trial on the merits produces a verdict against the moving party, there was no reason to depart from that general rule under the circumstances of this case, where, after hearing all of the evidence, the trial court rejected the claims of waiver and estoppel raised by L Co.

3. The trial court did not abuse its discretion in awarding punitive damages to M pursuant to CUTPA; the record supported that court's determination that L Co. had failed to follow the specifications of the modular home manufacturer and performed the crucial work of setting the foundation and beams in a shockingly poor manner, which resulted in a number of defects and problems with the house, and that such conduct, coupled with the failure of L Co. to comply with the requirements of the statute (§ 20-417d) governing new home construction contractors, constituted reckless conduct, which justified an award of punitive damages under CUTPA.

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

Argued April 17—officially released September 12, 2017

Procedural History

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of Middlesex, where the court, *Aurigemma*, *J.*, granted the plaintiff's application for a prejudgment remedy; thereafter, the court, *Holzberg*, *J.*, granted the defendant's motion to dismiss the prejudgment remedy; subsequently, the court, *Morgan*, *J.*, denied the defendant's motion to dismiss; thereafter, the court, *Aurigemma*, *J.*, sustained the defendant's objection to the plaintiff's application for a prejudgment remedy; subsequently, the court, *Marcus*, *J.*, granted the defendant's motion to cite in Michael Luongo as a counterclaim defendant, and the defendant filed a counterclaim; thereafter, the court, *Aurigemma*, *J.*,

denied the motion to dismiss filed by the plaintiff and the counterclaim defendant; subsequently, the court, *Domnarski*, *J.*, denied the motion for summary judgment filed by the plaintiff and the counterclaim defendant, and the plaintiff and the counterclaim defendant appealed to this court, which granted the defendant's motion to dismiss the appeal; thereafter, the court, *Aurigemma*, *J.*, denied the defendant's motions to dismiss; subsequently, the matter was tried to the court, *Aurigemma*, *J.*; judgment for the defendant on the complaint and in part on the counterclaim, from which the plaintiff and the counterclaim defendant appealed to this court. *Affirmed.*

Frank P. Cannatelli, for the appellants (plaintiff and counterclaim defendant).

Vincent T. McManus, Jr., for the appellee (defendant).

Opinion

DiPENTIMA, C. J. The plaintiff, Luongo Construction and Development, LLC (Luongo LLC), and the counterclaim defendant, Michael Luongo (Luongo), appeal from the judgment of the trial court rendered in favor of the defendant and counterclaim plaintiff, James MacFarlane (MacFarlane). On appeal, Luongo LLC and Luongo (Luongo parties) claim that the court improperly (1) denied their motions to dismiss, which were based on the prior pending action doctrine, (2) denied their motion for summary judgment and (3) awarded an excessive amount of punitive damages. We disagree and, accordingly, affirm the judgment of the trial court.

The following facts and procedural history are necessary to understand the history of this case, which the trial court aptly described as "unnecessarily protracted and convoluted." The proceedings originated in the Middlesex judicial district when Luongo LLC filed an application for a prejudgment remedy against MacFarlane.

The court granted the application in the amount of $20,000. The prejudgment attachment was dismissed on June 29, 2012, and Luongo LLC's subsequent efforts to attach MacFarlane's property proved to be unsuccessful.

Luongo LLC commenced the present action and filed an amended complaint on August 13, 2013. It alleged that Luongo LLC and MacFarlane had entered into a contract regarding the construction of a modular home. It further claimed that Luongo LLC had performed its obligations under the contract, including the completion of the items contained on a "punch list . . . ." Luongo LLC contended that MacFarlane had failed to pay the balance of $20,000 owed under the terms of the contract.

Over the course of several months, MacFarlane cited in Luongo as a counterclaim defendant, filed an answer to the amended complaint and brought a counterclaim against the Luongo parties. In his amended counterclaim, MacFarlane alleged breach of contract, a violation of the New Home Construction Contractors Act, General Statutes § 20-417a et seq.,[1] violations of the new

[1] "The New Home Construction Contractors Act, which took effect on October 1, 1999, regulates the activities of new home construction contractors. The act requires a contractor to obtain a certificate of registration from the commissioner of consumer protection (commissioner) before he or she may engage in the business of new home construction or hold himself or herself out as a new home construction contractor . . . . The act also specifies the circumstances under which the commissioner may revoke, suspend or refuse to issue or renew a certificate of registration. . . . Other provisions of the act affirmatively regulate the conduct of new home construction contractors, prohibit new home construction contractors from engaging in certain activities and set forth various requirements as to the format and content of new home construction contracts.

"The act further provides three distinct penalties for a violation of its provisions. First, the act empowers the commissioner to impose a civil penalty on, among others, any person who engages in or practices the work for which a certificate of registration is required by [the act] . . . without having first obtained such a certificate of registration or any person who violates any of the provisions of [the act] . . . . Second, the act provides that any person who violates any provision of subsection (d) of section 20-

home express and implied warranties as set forth in General Statutes §§ 47-117, 47-118 and 47-121, a violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., and a violation of General Statutes § 21-86,[2] and he sought recovery from Luongo, who allegedly was personally in charge of the construction of MacFarlane's home, for negligent and unworkmanlike construction.

Following a two day trial, the court issued a memorandum of decision on June 17, 2015, and found the following facts. On November 24, 2010, MacFarlane agreed to pay Luongo LLC $247,915 in exchange for the "delivery and installation" of a modular home with a three car garage. Luongo LLC contracted to perform the work in a substantially workmanlike manner and

417d shall be guilty of a class A misdemeanor. . . . *Finally, the act provides that a violation of any of its provisions shall be deemed an unfair or deceptive trade practice under subsection (a) of section 42-110b* . . . ." (Citations omitted; emphasis added; footnotes omitted; internal quotation marks omitted.) *D'Angelo Development & Construction Co.* v. *Cordovano*, 278 Conn. 237, 243–45, 897 A.2d 81 (2006).

[2] General Statutes § 21-86 provides: "No person shall sell at retail a new mobile manufactured home or a new modular or prefabricated home in this state without a written manufacturer's warranty to the buyer containing the following terms:

"(1) That such home is free from any substantial defects in materials or workmanship in the structure, plumbing, heating and electrical systems and all appliances and other equipment installed or included therein or thereon by the manufacturer.

"(2) That the seller or manufacturer shall take appropriate corrective action at the site of such home in instances of substantial defects in materials or workmanship which become evident within one year from the date of delivery of such home to the buyer, provided the buyer gives written notice of such defects to the seller, manufacturer or dealer at his business address as soon as such defects become evident. The warranty provided herein shall be in addition to and not in derogation of any other right or privilege which the buyer may have as otherwise provided by law or instrument. The seller or manufacturer shall not require the buyer to waive his rights under this chapter and any waiver shall be deemed contrary to public policy and shall be void and unenforceable. Any action instituted by a buyer for failure of the manufacturer to comply with the provisions of this chapter shall allow the recovery of court costs and reasonable attorney's fees."

in accordance with the drawing and specifications provided.

MacFarlane called Steven Rocco, an expert with thirty-five years experience as an architect and twenty-five years experience as a builder, as a witness. Rocco inspected the property several times, interviewed MacFarlane, examined photographs taken during the construction, and reviewed the "site assembly handbook" provided by the modular home's manufacturer. In Rocco's opinion, the two steel beams which ran end to end down the center line of the basement had been installed in a "haphazard" manner, and this error compromised the rest of the construction of the home. Rocco further testified that because the steel beams ran uphill to the center column, there was "a very visible ridge down the center of the floor, as well as the opposing slopes of the ceiling in the [basement]. Between the high point in the center, and the exaggerated variances [on] the top of the foundation walls, the wood modular boxes above are subject to twists and turns, which causes the plethora of cracks throughout the house." (Emphasis omitted.)

The trial court stated in its memorandum of decision that Rocco "further testified that at the place where the two halves of the modular home meet, the ceiling is visibly sagging and also rotating. [He] further opined that the sagging and rotation of the beams was caused by [Luongo's] failure to bolt the beams or brace them in some other fashion. The torque created by the unbolted beams causes cracks in the house, which will continue to occur unless the beams are bolted." Rocco also indicated that, as a result of the error by Luongo LLC in placing the stairs that connected the cellar and garage, the space to park a vehicle was decreased, and thus, MacFarlane did not receive a three car garage.

Rocco also provided his opinions as to how to remedy the various problems in the home. One option was to

tear down the home and have a new one installed correctly. Rocco noted a less costly alternative, but this option required, among other things, the removal of all appliances, cabinets, wiring and plumbing in the kitchen, as well as refinishing the subfloor and floor. Further, this would require that the home be vacant for thirty days.

The court rejected the claim of the Luongo parties that a check and letter sent by Amy Coppola, who lived with MacFarlane at the time, indicated MacFarlane's satisfaction with the home after the "punch list" had been completed. It further concluded that Luongo LLC had failed to perform its work in accordance with the drawings and specifications provided, as well as in a workmanlike manner. "This court finds that [Luongo LLC] has already been paid far too much for its work and is not entitled to receive its claimed balance of $18,959. Judgment enters on the amended complaint in favor of . . . MacFarlane."

The court then found in favor of MacFarlane on his claim of breach of contract against Luongo LLC as a result of its failure to perform work in a proper, workmanlike manner. It awarded $61,938.43 in damages, which was comprised of the $6072.43 that MacFarlane had paid to repair various items and $55,866, which he will have to spend to repair the defects. The court also awarded consequential damages in the amount of $6000 for room and board costs that MacFarlane will incur during the repairs, as well as $40,000 for the diminution in value of the home even after the repairs have been made. The actual damages, therefore, awarded to MacFarlane totaled $107,938.43. This figure, however, was adjusted by the amount not paid by MacFarlane ($18,959) and the fact that MacFarlane had paid $1200 for blueprints that he never received. The final total of the actual damages awarded for the first count of the counterclaim was $90,179.43.

The court further found that, aside from providing MacFarlane with a copy of Luongo LLC's registration certificate, "[t]here was no evidence that [the Luongo parties] complied with the balance of [General Statutes] § 20-417d. Had they done so, then MacFarlane could have had some opportunity to determine something about the qualifications of [the Luongo parties] and determine whether they had ever constructed/installed a modular home before. The violation of § 20-417d is a violation of CUTPA. The fourth count of the counterclaim alleges a violation of CUTPA."

Relying on precedent from our Supreme Court, namely, *Ulbrich* v. *Groth*, 310 Conn. 375, 78 A.3d 76 (2013), the trial court noted that punitive damages and attorney's fees could be awarded, in the court's discretion, under CUTPA. In considering the propriety of these awards in the present case, the court stated: "Mere negligent workmanship might not justify an award of punitive damages. However, in this case [the Luongo parties] disregarded the modular home manufacturer's instructions and recommended installation methods. . . . The construction of the house described by . . . Rocco as 'shocking' combined with the failure to comply with . . . § 20-417d justify the conclusion that the conduct of Luongo LLC was reckless within the meaning of CUTPA, and that punitive damages should be awarded by the court." The court awarded $15,025 for expert witness fees incurred by MacFarlane, as well as reasonable attorney's fees to be determined at a later date. Additionally, it awarded $150,000 in punitive damages, which, as the court noted, was greater than 1.5 times the actual damages of $90,179.43, but less than double the actual damages.[3]

[3] Punitive damages awarded as a result of a violation of CUTPA focus on deterrence, rather than compensation and often are awarded as a multiple of actual damages. See, e.g., *Bridgeport Harbour Place I, LLC* v. *Ganim*, 131 Conn. App. 99, 144–45, 30 A.3d 703, cert. granted, 303 Conn. 904, 905, 31 A.3d 1178, 1180 (2011) (appeals withdrawn January 26 and 27, 2012).

The court also found that Luongo LLC had breached its express warranty, pursuant to § 47-117, and implied warranty, pursuant to § 47-118, but that MacFarlane failed to demonstrate a violation of § 47-121, which creates a warranty when a certificate of occupancy issues. The court then determined that MacFarlane had abandoned his claim regarding § 21-86. With respect to the sixth count of the counterclaim, the court found that Luongo was personally liable. "In this case, Luongo LLC contracted with MacFarlane, but the negligent and inept conduct of . . . Luongo created the massive defects in the house. There was substantial evidence that Luongo supervised the placing of the beams and most other aspects of the construction on the property." In conclusion, the court rendered judgment in favor of MacFarlane and against the Luongo parties in the amount of $255,204.43 plus subsequently determined attorney's fees.[4] This appeal followed. Additional facts will be set forth as needed.

I

The Luongo parties first claim that the court improperly denied their two motions to dismiss MacFarlane's counterclaim, which were based on the prior pending action doctrine. They appear to claim that the court failed to review its arguments that the counterclaim should be dismissed pursuant to the prior pending action doctrine and that this failure constituted an abuse of discretion.

The following additional facts are necessary for our resolution of this claim. After Luongo LLC filed its application for a prejudgment remedy in Middlesex judicial district, MacFarlane initiated a separate action against Luongo LLC and Apex Homes, the manufacturer of the

[4] On July 27, 2015, the court awarded MacFarlane $47,359 in attorney's fees. The Luongo parties have not challenged the awarding of attorney's fees in the case.

modular home in the New Haven judicial district. In the Middletown case, MacFarlane filed a motion to dismiss on the basis of the prior pending action doctrine. Specifically, he claimed that the New Haven case had been filed first and involved the same parties and issues as the Middletown case. On December 27, 2012, the court, *Morgan*, *J.*, issued a memorandum of decision denying MacFarlane's motion. The court determined that the writ of summons and complaint were served one month earlier in the New Haven action. It further concluded that the New Haven action included a defendant, Apex Homes, Inc., that was not part of the Middletown case and that the claims asserted in each were sufficiently different. Thus, the court exercised its discretion and concluded that the prior pending action doctrine did not warrant the dismissal of the Middletown case.

In the New Haven action, MacFarlane filed a motion to cite in Luongo as a defendant. This motion was filed on December 12, 2013. Luongo LLC objected, and the court considered these matters in the context of the prior pending action doctrine. The court, *Wilson*, *J.*, issued a memorandum of decision on January 17, 2014, noting that MacFarlane's counterclaim in the Middletown action had been served on Luongo on October 30, 2013. As Luongo had not yet been served in the New Haven action, the court determined that the Middletown action had been commenced first. It further determined that the two actions were virtually alike and, therefore, sustained the objection to MacFarlane's motion to cite in Luongo.

We now turn to the two motions to dismiss, filed by the Luongo parties in the Middletown action, that are the subject of this appeal. The Luongo parties filed the first motion to dismiss on December 23, 2013, and sought to have MacFarlane's counterclaim dismissed in its entirety. The Luongo parties argued, inter alia,

that the counterclaim should be dismissed because the New Haven action was pending and it involved the same parties. MacFarlane filed his objection on January 7, 2014, arguing that the two cases were different and that Luongo had not yet been cited into the New Haven case.[5] On February 10, 2014, the court, *Aurigemma, J.*, denied the motion to dismiss with a one sentence order.

On May 12, 2015, approximately three weeks after the trial had concluded, but prior to the release of the court's decision on the merits, Luongo LLC again moved to dismiss MacFarlane's counterclaim on the basis of the prior pending action doctrine. This motion was filed more than one year after the New Haven action had been withdrawn by MacFarlane. It argued that MacFarlane had the opportunity to litigate the matters raised in the counterclaim in the New Haven action, as well as a claim that Judge Wilson's decision constituted the law of the case.[6] MacFarlane opposed this motion, arguing in part that it had been filed untimely. On June 22, 2015, Judge Aurigemma issued an order denying the motion on the ground that it should have been raised before the trial was completed.

As an initial matter, we set forth the relevant legal principles and our standard of review with respect to

[5] We note that as a result of Judge Wilson's subsequent order denying the motion to cite in, Luongo was not added as a party in the New Haven action.

[6] "The law of the case doctrine expresses the practice of judges generally to refuse to reopen what [already] has been decided . . . . New pleadings intended to raise again a question of law which has been already presented on the record and determined adversely to the pleader are not to be favored. . . . [When] a matter has previously been ruled [on] interlocutorily, the court . . . may treat that [prior] decision as the law of the case, if it is of the opinion that the issue was correctly decided, in the absence of some new or overriding circumstance. . . . A judge should hesitate to change his own rulings in a case and should be even more reluctant to overrule those of another judge. . . . Nevertheless, if . . . [a judge] becomes convinced that the view of the law previously applied by his coordinate predecessor was clearly erroneous and would work a manifest injustice if followed, he may apply his own judgment." (Internal quotation marks omitted.) *Brown* v. *Otake*, 164 Conn. App. 686, 702–703, 138 A.3d 951 (2016).

claims regarding the prior pending action doctrine. "[T]he prior pending action doctrine permits the court to dismiss a second case that raises issues currently pending before the court. The pendency of a prior suit of the same character, between the same parties, brought to obtain the same end or object, is, at common law, good cause for abatement. It is so, because there cannot be any reason or necessity for bringing the second, and, therefore, it must be oppressive and vexatious. This is a rule of justice and equity, generally applicable, and always, where the two suits are virtually alike, and in the same jurisdiction. . . . The policy behind the doctrine is to prevent unnecessary litigation that places a burden on crowded court dockets. . . .

"[T]he trial court must determine in the first instance whether the two actions are: (1) exactly alike, i.e., for the same matter, cause and thing, or seeking the same remedy, and in the same jurisdiction; (2) virtually alike, i.e., brought to adjudicate the same underlying rights of the parties, but perhaps seeking different remedies; or (3) insufficiently similar to warrant the doctrine's application. In order to determine whether the actions are virtually alike, we must examine the pleadings . . . to ascertain whether the actions are brought to adjudicate the same underlying rights of the parties. . . . The trial court's conclusion on the similarities between the cases is subject to our plenary review. . . .

"Following that initial determination, the court must proceed to a second step. If the court has concluded that the cases are exactly alike or insufficiently similar, the court has no discretion; in the former situation, it must dismiss the second action, and in the latter, it must allow both cases to proceed. . . . Where actions are virtually, but not exactly alike, however, the trial court exercises discretion in determining whether the circumstances justify dismissal of the second action." (Citation omitted; internal quotation marks omitted.)

MacDermid, Inc. v. *Cookson Group, PLC*, 149 Conn. App. 571, 576–77, 89 A.3d 447, cert. denied, 312 Conn. 914, 93 A.3d 597 (2014); see also *Bayer* v. *Showmotion, Inc.*, 292 Conn. 381, 395–98, 973 A.2d 1229 (2009); *Selimoglu* v. *Phimvongsa*, 119 Conn. App. 645, 650 n.4, 989 A.2d 121, cert. denied, 296 Conn. 902, 991 A.2d 1103 (2010).

Although the prior pending action doctrine properly is raised via a motion to dismiss, "it does not truly implicate subject matter jurisdiction [and] may not, therefore, as is true in the case of classic subject matter jurisdiction, always be raised at any time." (Internal quotation marks omitted.) *Geremia* v. *Geremia*, 159 Conn. App. 751, 762 n.10, 125 A.3d 549 (2015); see also *710 Long Ridge Operating Co. II, LLC* v. *Stebbins*, 153 Conn. App. 288, 293–94, 101 A.3d 292 (2014); *Travelers Casualty & Surety Co. of America* v. *Caridi*, 144 Conn. App. 793, 804 n.9, 73 A.3d 863 (2013).

A

In light of these principles, we first consider the denial of the motion to dismiss filed on December 23, 2013. The Luongo parties argue that the one sentence denial established that Judge Aurigemma failed to perform the "required legal analysis . . . ."[7] In essence,

[7] The Luongo parties also suggested that MacFarlane had a fair opportunity to litigate the claims set forth in the counterclaim in the Middletown case in his action filed in New Haven. In other words, they insinuate that the doctrine of collateral estoppel was intertwined with the claim of the prior pending actions doctrine.

"Under Connecticut law, [c]ollateral estoppel, or issue preclusion, prohibits the relitigation of an issue when that issue was actually litigated and necessarily determined in a prior action. . . . For an issue to be subject to collateral estoppel, it must have been fully and fairly litigated in the first action. It also must have been actually decided and the decision must have been necessary to the judgment. . . . The doctrine of collateral estoppel is based on the public policy that a party should not be able to relitigate a matter which it already has had an opportunity to litigate." (Internal quotation marks omitted.) *Gateway, Kelso & Co.* v. *West Hartford No. 1, LLC*, 126 Conn. App. 578, 583–84, 15 A.3d 635, cert. denied, 300 Conn. 929, 16 A.3d 703 (2011). To the extent that they have advanced a claim of collateral

the Luongo parties ask this court to presume error on the part of Judge Aurigemma. We decline to do so.

At the outset, we note that the Luongo parties failed to seek an articulation of the order denying their December 23, 2013 motion to dismiss. In this instance, the court was not required to issue a memorandum of decision setting forth its reasoning as to each claim of law raised by the parties and the factual basis thereof. See Practice Book §§ 6-1 and 64-1. The Luongo parties, nonetheless, were obligated to provide this court with an adequate record to review their claim pertaining to the denial of the motion to dismiss. See Practice Book § 61-10 (a). Although the court did not state the rationale for its denial of the motion to dismiss, we note that at the time of the filing of this motion, and the court's decision, the parties were not the same in the two actions as a result of the denial of MacFarlane's motion to cite in Luongo in the New Haven case.

The Luongo parties ask that we assume that the court failed to apply the proper analytical framework and "abused [its] discretion in simply not entertaining said motion to dismiss . . . ." This request runs afoul of our established law. "Unless the contrary appears in the record, we will presume that the trial court acted properly and considered applicable legal principles." (Internal quotation marks omitted.) *Rozbicki* v. *Gisselbrecht*, 155 Conn. App. 371, 379, 110 A.3d 458, cert. denied, 317 Conn. 905, 114 A.3d 1221 (2015); see also *Sosin* v. *Sosin*, 300 Conn. 205, 244, 14 A.3d 307 (2011) (in absence of articulation, Supreme Court will presume trial court acted properly). Stated slightly differently, this court does not presume error by the trial court where the party challenging the court's ruling failed to satisfy its burden of demonstrating that it was factually

estoppel, we decline to consider it because it was not raised in the trial court, addressed by the trial court, or briefed adequately.

or legally untenable. *Kindred Nursing Centers East, LLC* v. *Morin*, 125 Conn. App. 165, 174, 7 A.3d 919 (2010). We conclude, therefore, that the court properly denied the December 23, 2013 motion to dismiss the Middletown action, which was based on the prior pending action doctrine.

B

We next consider the claim regarding the motion to dismiss filed by Luongo LLC on May 12, 2015. Luongo LLC argued that MacFarlane's counterclaims should be dismissed on the basis of the prior pending action doctrine because he "had [a] full opportunity to litigate, and chose not do so," in the New Haven action prior to its withdrawal on April 15, 2014. To be clear on the time line of events, this motion was filed after the conclusion of the trial in the Middletown action, but prior to the release of Judge Aurigemma's decision on the merits. MacFarlane filed his objection to the motion to dismiss on June 23, 2015, five days after Judge Aurigemma issued her memorandum of decision on the merits of the Middletown action.

The court denied Luongo LLC's motion to dismiss on June 22, 2015. It concluded that the motion "should have been raised at trial and was filed on May 12, 2015, after the trial was complete." On appeal, Luongo LLC claims that the court "never properly entertained" this motion to dismiss. We conclude that this argument is without merit.

As noted previously, the prior pending action doctrine does not truly implicate the subject matter jurisdiction of the trial court and thus may not be raised at any time. *710 Long Ridge Operating Co. II, LLC* v. *Stebbins*, supra, 153 Conn. App. 294. Additionally, the policy underlying this doctrine is to relieve the burden of unnecessary litigation. *Lodmell* v. *LaFrance*, 154 Conn. App. 329, 333, 107 A.3d 975 (2014), cert. denied,

315 Conn. 921, 107 A.3d 959 (2015). The goal of the doctrine is not served when the second action, i.e., the case filed in New Haven, has been withdrawn and is no longer crowding a busy court docket. See id. Finally, this court has concluded that once a second action has been withdrawn, "there is no action pending to implicate the prior pending action doctrine." *710 Long Ridge Operating Co. II, LLC* v. *Stebbins*, supra, 293 n.7; see also *Kleinman* v. *Chapnick*, 140 Conn. App. 500, 505, 59 A.3d 373 (2013) (doctrine permits court to dismiss second action that raises issues *currently* pending before court); *Stephenson* v. *Shelton*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-09-5009876, 2009 WL 2962131, *1 (August 7, 2009) (same). For these reasons, we conclude that the court properly denied the motion to dismiss filed by Luongo LLC on May 12, 2015.[8]

II

The Luongo parties next claim that the court improperly denied their motion for summary judgment with respect to MacFarlane's counterclaim. Specifically, they argue that the court, *Domnarski*, *J.*, failed to properly analyze and consider the claim regarding the applicability of the prior pending action doctrine and that MacFarlane failed to submit evidence that created a genuine issue of material fact. We are not persuaded.

On April 14, 2014, the Luongo parties filed a motion for summary judgment pursuant to Practice Book § 17-44 et seq. They argued that no genuine issues of material fact existed and that, on the basis of Judge Wilson's opinion in the New Haven action denying the motion to cite in Luongo, MacFarlane's counterclaim in the Middletown action violated the prior pending action

[8] We may affirm a proper result of the trial court for a different reason. *Rafalko* v. *University of New Haven*, 129 Conn. App. 44, 51 n.3, 19 A.3d 215 (2011).

doctrine. Finally, they also raised the defenses of waiver and equitable estoppel.

On June 4, 2014, Judge Domnarski issued an order denying the motion for summary judgment. The court stated: "After careful consideration of the briefs and arguments, the court concludes there are genuine issues of material fact pertaining to both the plaintiff's claims against the defendant and the defendant's claims against the plaintiff. These issues revolve around the actions and statements of both the plaintiff and the defendant pertaining to this construction dispute." On June 24, 2014, Luongo LLC filed a motion to reargue and reconsider, which the court denied on July 3, 2014.

"The standard of review of motions for summary judgment is well settled. Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party moving for summary judgment has the burden of showing the absence of any genuine issue of material fact and that the party is, therefore, entitled to judgment as a matter of law." (Internal quotation marks omitted.) *Abendroth* v. *Moffo*, 156 Conn. App. 727, 730–31, 114 A.3d 1224, cert. denied, 317 Conn. 911, 116 A.3d 309 (2015).

A

On appeal, the Luongo parties again assert that the court failed to perform the proper analysis of the claim regarding MacFarlane's counterclaim and the prior pending action doctrine. Judge Domnarski stated that he had considered the arguments of the parties and concluded that genuine issues of material fact existed,

precluding him from granting the motion for summary judgment. We disagree, therefore, with the bald assertion offered by the Luongo parties that the court did not consider the claim regarding the prior pending action doctrine. As we noted in part I A of this opinion, we do not presume error on the part of the trial court. See, e.g., *Brett Stone Painting & Maintenance, LLC* v. *New England Bank*, 143 Conn. App. 671, 681, 72 A.3d 1121 (2013) ("[i]n Connecticut, our appellate courts do not presume error on the part of the trial court"). Accordingly, we are not persuaded that the court improperly denied the motion for summary judgment filed by Luongo LLC.

B

The Luongo parties also argue that the court improperly denied their motion for summary judgment, which raised the defenses of waiver[9] and estoppel.[10] Specifically, they contend that MacFarlane failed to submit evidence demonstrating the existence of a genuine issue of material fact, and therefore, the court should have granted their motion for summary judgment. We are not persuaded.

[9] "[A] waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. An effective waiver presupposes full knowledge of the right or privilege allegedly [being] waived and some act done designedly or knowingly to relinquish it. . . . Moreover, the waiver must be accomplished with sufficient awareness of the relevant circumstances and likely consequences." (Internal quotation marks omitted.) *Chang* v. *Chang*, 170 Conn. App. 822, 830, 155 A.3d 1272, cert. denied, 325 Conn. 910, 158 A.3d 321 (2017).

[10] "Equitable estoppel is a doctrine that operates in many contexts to bar a party from asserting a right that it otherwise would have but for its own conduct. . . . In its general application, we have recognized that [t]here are two essential elements to an estoppel—the party must do or say something that is intended or calculated to induce another to believe in the existence of certain facts and to act upon that belief, and the other party, influenced thereby, must actually change his position or do some act to his injury which he otherwise would not have done." (Internal quotation marks omitted.) *St. Germain* v. *St. Germain*, 135 Conn. App. 329, 334–35, 41 A.3d 1126 (2012).

In the motion for summary judgment, Luongo LLC argued that Coppola had sent a letter detailing a "punch list" of items that needed to be completed, along with a check for $20,000. This document also requested that Luongo provide a final balance. Luongo LLC also submitted a letter dated August 1, 2011, that informed MacFarlane and Coppola that the final balance owed was $18,959. Luongo LLC also attached an affidavit from Luongo in which he claimed that he had made the repairs indicated on the "punch list," and that MacFarlane had "sign[ed] off" on the repairs. Luongo further indicated that upon completing the requests on the "punch list," he had completed the contract and was entitled to the balance of $18,959. As a result, Luongo claimed that any claims not contained in the "punch list" were waived and that MacFarlane was estopped from pursuing an action.

The Luongo parties assume that the burden of establishing that there was no genuine issue of material fact with respect to waiver and estoppel had been met. They then contend that MacFarlane did not provide any evidence that created a genuine issue of material fact; thus, the Luongo parties were entitled to summary judgment. We reject this argument for two reasons.

First, the court did not determine that the Luongo parties had, in fact, met their burden of demonstrating the absence of a genuine issue of material fact with respect to waiver and estoppel. As stated in the order, the court considered the briefs and arguments of the parties and concluded that genuine issues of material fact remained. Unless and until the Luongo parties, as the parties moving for summary judgment, met their burden of establishing that no genuine issue of material fact existed, MacFarlane, the nonmoving party, had no obligation to submit evidence establishing the existence of such an issue. See, e.g., *Capasso* v. *Christmann*, 163 Conn. App. 248, 257, 135 A.3d 733 (2016); see *also*

Allstate Ins. Co. v. *Barron*, 269 Conn. 394, 405, 848 A.2d 1165 (2004) (when documents submitted in support of motion for summary judgment fail to establish absence of genuine issue of material fact, nonmoving party has no obligation to submit documents establishing existence of such issue); *Mott* v. *Wal-Mart Stores East, LP*, 139 Conn. App. 618, 627, 57 A.3d 391 (2012) (same).

Second, we note that "[o]ur Supreme Court had held that absent exceptional circumstances, a denial of a motion for summary judgment is not appealable where a full trial on the merits produces a verdict against the moving party. . . . The rationale for this rule is that a decision based on evidence presented at trial precludes review of a decision made on less summary judgment evidence." (Citations omitted; internal quotation marks omitted.) *Brown* v. *State Farm Fire & Casualty Co.*, 150 Conn. App. 405, 410, 90 A.3d 1054, cert. denied, 315 Conn. 901, 104 A.3d 106 (2014); see also *Smith* v. *Greenwich*, 278 Conn. 428, 464–65, 899 A.2d 563 (2006); *Greengarden* v. *Kuhn*, 13 Conn. App. 550, 552, 537 A.2d 1043 (1988).

In the memorandum of decision on the merits, after hearing all of the evidence in this case, the court rejected the claims of waiver and estoppel raised by Luongo LLC.[11] Under the circumstances of this case, there is no reason to depart from the general rule that a denial of a motion for summary judgment need not be reviewed following a subsequent trial and decision

[11] Specifically, the court stated: "[Luongo LLC] has argued that this payment and letter from . . . Coppola evidenced MacFarlane's satisfaction with the house. The court does not agree with this characterization. In July, 2011, [MacFarlane] had not yet retained any experts to assess [Luongo LLC's] work and had no idea about the major errors in workmanship which had occurred. He knew the house had cracks, but did not know that due to improper bolting of the ceiling beams, the drywall in the house would continue to crack for years. He knew that there was a huge ridge running through the first floor of his house, but did not know that this was due to the failure to use any effort to make sure that the beams were set level."

on the merits. Accordingly, we conclude that the court properly denied the motion for summary judgment.

III

Finally, the Luongo parties claim that the court improperly awarded punitive damages to MacFarlane. Specifically, they challenge the court's finding of recklessness with respect to the construction of the house. They further argue that absent this reckless conduct, punitive damages were not warranted.[12] We disagree that the court's finding of recklessness was improper, and, therefore, conclude that the court did not abuse its discretion by awarding punitive damages.

In count two of the counterclaim, MacFarlane alleged that Luongo LLC had held itself out as a new home contractor and that the house had not been completed as represented in the plan and specifications. Further, MacFarlane claimed that Luongo had represented that "he would personally supervise the contractors and subcontractors in connection with the construction of the house, yet the finished house contained numerous defects in material and workmanship resulting in leaks, heaving floors, and a [G]erry-rigged heating system, to name a few, all to [MacFarlane's] loss and damage." MacFarlane also claimed that these actions, standing alone and as result of violating §§ 20-417d through 20-417g, constituted a violation of CUTPA.

The court found that the Luongo parties had violated § 20-417d and thus violated CUTPA. It then turned to the issue of punitive damages under CUTPA.[13] "Mere

[12] The Luongo parties do not challenge the amount of punitive damages awarded in the present case.

[13] We note that our Supreme Court has instructed that "CUTPA is, on its face, a remedial statute that broadly prohibits unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. . . . [CUTPA] provides for more robust remedies than those available under analogous common-law causes of action, including punitive damages . . . and attorney's fees and costs, and, in addition to damages or in lieu of damages, injunctive or other equitable relief." (Internal quotation

negligent workmanship might not justify an award of punitive damages. However, in this case [the Luongo parties] disregarded the modular home manufacturer's instructions and recommended installation methods. According to . . . Rocco, those instructions were not complex, but, rather, were consistent with good construction practice. A contractor with the experience and integrity that Luongo, LLC held itself out to be would surely have insured that the beams running through the first floor of the house were straight and would have bolted roof beams so that the walls in the house were not under constant torque, which made the drywall crack. The construction of the house described by . . . Rocco as 'shocking' combined with the failure to comply with . . . § 20-417d justify the conclusion that the conduct . . . was reckless within the meaning of CUTPA, and that punitive damages should be awarded by the court."

Our Supreme Court has stated that "[a]warding punitive damages and attorney's fees under CUTPA is discretionary . . . and the exercise of such discretion will not ordinarily be interfered with on appeal unless the abuse is manifest or injustice appears to have been done. . . . In order to award punitive or exemplary damages, evidence must reveal a reckless indifference to the rights of others or an intentional and wanton violation of those rights. . . . In fact, the flavor of the basic requirement to justify an award of punitive damages is described in terms of wanton and malicious injury, evil motive and violence." (Citation omitted; internal quotation marks omitted.) *Ulbrich* v. *Groth*, supra, 310 Conn. 446; see also *Votto* v. *American Car Rental, Inc.*, 273 Conn. 478, 486, 871 A.2d 981 (2005) (trial court exercises discretion to award punitive damages under CUTPA after finding party acted recklessly);

marks omitted.) *Artie's Auto Body, Inc.* v. *Hartford Fire Ins. Co.*, 317 Conn. 602, 623, 119 A.3d 1139 (2015).

Bridgeport Harbour Place I, LLC v. *Ganim*, 131 Conn. App. 99, 139–40, 30 A.3d 703 (under CUTPA, punitive damages awarded in amounts equal to or multiples of actual damages and are focused on deterrence rather than compensation), cert. granted, 303 Conn. 904, 905, 31 A.3d 1179, 1180 (2011) (appeals withdrawn January 26 and 27, 2012).

Rocco, MacFarlane's expert, noted in his report that the steel beams and lolly columns that supported the home were not installed properly. It would have been "very easy" to check the elevation and the beam's level with a laser transit, and it was "enormously important" to do so; nevertheless, the Luongo parties failed to do so. (Emphasis omitted.) Compounding these errors was the failure to secure the beams and columns to prevent the beams from shifting. Rocco described the construction as "haphazard" and stated that it led to a "domino effect" of problems in the house. Rocco further noted the errors of Luongo LLC to follow the plans leading to the issues with the placement of the cellar stairs, resulting in a smaller usable space in the garage than MacFarlane had bargained for.

These facts support the court's determination that the Luongo parties had failed to follow the specifications of the home manufacturer and performed the "crucial" work of setting the foundation and beams in a "shockingly" poor manner. The attempts to place blame on third parties for the substandard construction work ignores the contractual responsibility of Luongo LLC to provide MacFarlane with a completed modular home with a three car garage. The contract further required that all work was "guaranteed to be as specified and . . . performed in accordance with the drawing and specifications provided . . . [and] completed in a substantial workman-like manner . . . ." (Emphasis omitted.)

On the basis of the record before us, we cannot conclude that the court abused its discretion in awarding punitive damages. A flood of defects cascaded as a result of the "shockingly" poor installation of the beams and columns and failure to follow the specifications and recommended installation methods[14] of the home manufacturer. This conduct, coupled with the failure to comply with the requirements of § 20-417d, led the court to conclude that there had been recklessness within the meaning of CUTPA and thus punitive damages were appropriate. "Punitive damages are awarded when the evidence shows a reckless indifference to the rights of others or an intentional and wanton violation of those rights." (Internal quotation marks omitted.) *Tessmann* v. *Tiger Lee Construction Co.*, 228 Conn. 42, 54–55, 634 A.2d 870 (1993) (no abuse of discretion to award punitive damages under CUTPA where contractors' numerous derelictions included representation that it would do work using its own employees but in fact relied on subcontractors, driveway not constructed to afford easy access to kitchen to accommodate plaintiff's medical condition, driveway leaked water into basement, skylight leaked and contractor refused to correct it, claiming it was merely condensation and poor grading caused water to leak into basement near electrical panel); see also *Ulbrich* v. *Groth*, supra, 310 Conn. 446–47. Accordingly, we disagree that the court abused its discretion in awarding punitive damages under CUTPA.

The judgment is affirmed.

In this opinion LAVINE, J., concurred.

FLYNN, J., concurring in part and dissenting in part. I concur with the majority in affirming all of the judgment

[14] Rocco described the home manufacturer's instructions and recommended installation methods as "not complex" and "consistent with good construction practice."

with the exception of the award of $150,000 in punitive damages against both counterclaim defendants, which the trial court found justified by the counterclaim defendants' reckless conduct. A person acts recklessly with respect to a result when he is aware of and consciously disregards a substantial and unjustifiable risk that such a result will occur. *Ulbrich* v. *Groth*, 310 Conn 375, 447, 78 A.3d 76 (2013). The purpose of an award of punitive damages is to deter a defendant and others from similar conduct, without financially destroying the defendant. Id., 454. The trial court has wide discretion in determining whether to award punitive damages and in determining their amount. However, the record does not support a finding that the counterclaim defendants Luongo Construction and Development LLC or Michael Luongo individually were aware that a substantial risk existed that the unsatisfactory results of construction and losses to the counterclaimant, James MacFarlane, would occur as a result of the manner of construction and the LLC's incomplete compliance with General Statutes § 20-417d. Accordingly, I would reverse that part of the judgment awarding $150,000 in punitive damages.

KIMBERLY KENNESON *v.* CELIA EGGERT ET AL.
(AC 38784)

Keller, Beach and Harper, Js.

Syllabus

The plaintiff sought to recover damages from the defendant attorney, E, and the defendant insurance company, N Co., claiming that E had committed fraud against the plaintiff and that N Co. was vicariously liable for E's actions. The plaintiff previously had brought an action for, inter alia, negligence against A, who was insured by N Co., and another individual, R. A was represented by E on behalf of N Co. in the negligence action and after a trial, a jury awarded the plaintiff damages against both A and R. Pursuant to a settlement agreement in that action, the plaintiff had signed a general release and withdrawal form in exchange for settling the case against A for $67,000. After the plaintiff discovered that she was unable to recover damages from R, she subsequently claimed in a

motion to open the judgment in the negligence action that E had engaged in unfair and deceptive behavior by instructing her to sign the release without explaining what it was and how it could affect the judgment in that action. Specifically, the plaintiff alleged that E had misrepresented to her that she would not get any of the damages awarded to her under the settlement unless she signed the general release and withdrawal. After the trial court in the negligence action denied her motion to open and concluded that there was no evidence that E had coerced the plaintiff into signing the release, the plaintiff commenced the action against E and N Co. alleging fraud. In connection with discovery requests made by the plaintiff, the defendants provided a large number of documents but withheld several e-mails between them, claiming that the e-mails were protected by the attorney-client privilege and the work product doctrine. The trial court denied the plaintiff's motions for an order for compliance, concluding that the documents were protected and that the plaintiff had offered no proof to support a claim of fraud that would permit the attorney-clcient privilege to be pierced. Thereafter, the court granted the defendants' motion for summary judgment and rendered judgment thereon, concluding that the plaintiff was collaterally estopped from asserting her fraud action because the issue had been addressed in the plaintiff's previous negligence action, and the plaintiff appealed to this court. *Held*:

1. The trial court improperly granted the defendants' motion for summary judgment as to the plaintiff's claim for intentional misrepresentation and determined that the claim was precluded by collateral estoppel, as genuine issues of material fact existed as to whether the claim for intentional misrepresentation set forth in the complaint underlying the appeal in the present case was fully and fairly litigated and actually decided at the hearing on the motion to open the negligence action; it was unclear from the record what facts were necessarily determined in the prior action with respect to the precise wording of E's alleged misrepresentation, as although the court in that action found that there was no evidence that the plaintiff had executed the release as a result of coercion, which is different from the issue of intentional misrepresentation, the court did not specifically address whether the plaintiff failed to prove the elements of a claim for fraudulent misrepresentation, and in order for collateral estoppel to bar relitigation, the issue sought to be relitigated must be identical to the one decided in the prior proceeding.
2. The defendants could not prevail on their claim, raised as an alternative ground for affirming the summary judgment, that because the alleged misrepresentation did not relate to a past or existing fact, it was not actionable and, thus, summary judgment was nonetheless proper: there having been no determination by a court of precisely what, if anything, E told the plaintiff at the settlement conference, it was possible that E's alleged misrepresentation could have been construed by the plaintiff as relating to an existing fact by suggesting that the current state of the

law was such that the plaintiff could not receive the amount of the judgment unless she signed the release, and, therefore, a genuine issue of material fact existed that precluded summary judgment; moreover, although the defendants claimed that, given certain inconsistencies in the plaintiff's allegations, her claim against them should be disposed of pursuant to the sham affidavit rule, pursuant to which practice a trial court may disregard an offsetting affidavit in opposition to a motion for summary judgment that contradicts an affiant's prior deposition testimony, any inconsistencies in the plaintiff's allegations bore on her credibility and did not destroy the probative value of the evidence, and even if this court were to accept the very narrow sham affidavit rule, which has yet to be expressly recognized by Connecticut appellate courts, the rule would not have been triggered under the circumstances of this case.

3. The trial court properly determined that no genuine issue of material fact existed as to whether the plaintiff could establish a claim for fraudulent nondisclosure; to establish that E's silence regarding the potential effects of the release and withdrawal constituted fraudulent conduct, the plaintiff had to prove that the parties' relationship imposed a duty on E to explain the potential effects of those documents to the plaintiff, and the trial court found that no such relationship existed in the present case because E was providing legal representation to the plaintiff's adversary, A, and not to the plaintiff, who presented no evidence to counter that fact.

4. The trial court did not abuse its discretion in denying the plaintiff's motions for compliance; contrary to the plaintiff's claim, that court properly determined that certain documents sought by the plaintiff were protected by the attorney-client privilege and the work product doctrine, which were not time limited to the previous tort case as alleged by the plaintiff.

Argued March 9—officially released September 12, 2017

Procedural History

Action to recover damages for fraud, and for other relief, brought to the Superior Court in the judicial district of Waterbury, where the court, *Roraback, J.*, denied the plaintiff's motions for an order for compliance; thereafter, the court granted the defendants' motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Reversed in part*; *further proceedings*.

Kimberly Kenneson, self-represented, the appellant (plaintiff).

Robert D. Laurie, with whom, on the brief, was *Heather L. McCoy*, for the appellees (defendants).

Opinion

BEACH, J. The plaintiff, Kimberly Kenneson, appeals from the trial court's summary judgment rendered in favor of the defendants, Celia Eggert and Nationwide Mutual Fire Insurance Company (Nationwide). On appeal, the plaintiff contends that the court improperly held that (1) the defendants were entitled to summary judgment, and (2) certain communications were not discoverable. We reverse in part the trial court's summary judgment and affirm the court's denial of the plaintiff's motions for an order for compliance with the court's discovery order.

The record reveals the following relevant facts and procedural history. In January, 2007, the plaintiff commenced a civil action against Carl Rosati and Michael Altman for negligence, battery, and recklessness (negligence action).[1] Altman was insured by Nationwide, and Nationwide agreed to provide Altman with a defense. Nationwide arranged for the Law Offices of John Calabrese to represent Altman. Eggert, an attorney with that firm, represented Altman at trial. The plaintiff represented herself at trial and obtained a jury verdict in her favor. The jury awarded the plaintiff damages of $67,556.07 against Altman and $380,037.38 against Rosati. Although he was served with process, Rosati did not appear at trial. After the verdict was accepted by the court, Altman filed a motion to set aside the verdict and a motion for collateral source reduction.

Several weeks later, on July 18, 2011, the plaintiff, Eggert, and a Nationwide claims adjuster appeared in court for a hearing on the motions and a settlement

[1] See *Kenneson* v. *Rosati*, Superior Court, judicial district of Waterbury, Docket No. CV-07-5003827-S (June 13, 2007).

conference. At the settlement conference, Nationwide offered the plaintiff $57,000 to settle the case against Altman, which the plaintiff declined. Nationwide then offered the plaintiff $67,000, which the plaintiff ultimately accepted.

Pursuant to the settlement agreement, the plaintiff signed a general release and a withdrawal form. The release provided, in relevant part, that "[b]y signing this release, [the plaintiff] expressly acknowledges that he/she has read this document with care and that he/she is aware that by signing this document he/she is giving up all rights and claims and causes of action, and any and all rights and claims that he/she may now have or which may arise in the future . . . against [Nationwide and Altman] . . . . Knowing this . . . he/she signs this document voluntarily and freely without duress." The release also stated that "[the plaintiff] further acknowledges that no representation of fact or opinion has been made to him/her by [Nationwide and Altman] . . . which in any manner has induced [the plaintiff] to agree to this settlement." The plaintiff signed the release before two witnesses and a notary public.

The plaintiff subsequently discovered that she was unable to collect damages from Rosati, who had been uninsured and had died without assets in August, 2013. On April 28, 2014, the plaintiff filed a motion to open the judgment and a motion to reinstate Altman as a defendant. The plaintiff argued that she did not know that signing the release would prevent her from reallocating the damages, at least in part, against Rosati to Altman and Nationwide, and that Eggert engaged in "unfair and deceptive" behavior when she instructed her to sign the release "without explaining what it was and how it can affect a judgment."

Altman filed an objection, arguing that the release was valid and that the plaintiff was aware of the nature

of the document when she signed it. On June 20, 2014, the court, *Pellegrino*, *J.*, heard oral argument on the plaintiff's motion to open. During oral argument, Judge Pellegrino questioned the plaintiff regarding the alleged fraud committed by Eggert. Judge Pellegrino ultimately denied the plaintiff's motion, noting that there was no evidence that Eggert had coerced the plaintiff into signing the release, and that the release, by its terms, provided that the plaintiff had read the document with care. The plaintiff did not appeal from Judge Pellegrino's decision.

On July 17, 2014, the plaintiff commenced the present action against the defendants, alleging that Eggert had committed fraud against the plaintiff and that Nationwide was vicariously liable for her actions. The plaintiff subsequently made several discovery requests to the defendants, and the defendants objected. After a hearing, the court ordered the defendants to produce responsive documents and to provide a privilege log for any documents they redacted or withheld. The defendants subsequently provided a large number of documents, but withheld several e-mails between them, claiming that those communications were protected by attorney-client privilege and the work product doctrine. The plaintiff filed motions for compliance against both defendants. The court heard oral argument and denied the plaintiff's motions. The court held that the plaintiff was not entitled to materials protected by the attorney client privilege or the work product doctrine, and that the plaintiff had offered "[n]o quantum of proof . . . to support a claim of civil fraud which would permit the privilege to be pierced."

On December 4, 2014, the defendants filed a motion for summary judgment, arguing that the plaintiff's claim was barred by the doctrine of collateral estoppel, because Judge Pellegrino's decision on the plaintiff's motion to open in the negligence action had previously

addressed the fraud issue. They also argued that the claim was barred by the terms and conditions of the release. The plaintiff filed a memorandum of law in opposition to the motion to which the defendants replied, and the parties appeared for argument on August 8, 2015. The court held that the plaintiff was collaterally estopped from asserting her fraud claims and that, even if collateral estoppel did not apply, the defendants were entitled to summary judgment because the plaintiff was unable to prove her claims for common-law fraud. The plaintiff appeals from the court's summary judgment and its denial of her motions for compliance. Additional facts will be set forth as necessary.

I

The plaintiff first claims that the trial court improperly granted the defendants' motion for summary judgment. We agree with the plaintiff that a genuine issue of material fact exists as to her claim for intentional misrepresentation, but disagree with her claim that the court erred in granting the motion for summary judgment on her claim for fraudulent nondisclosure.

As a preliminary matter, we state the standard of review applicable to the resolution of the plaintiff's appeal. "Practice Book § [17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law . . . and the party

opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact.

"It is not enough . . . 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 . . . . [T]ypically [d]emonstrating a genuine issue requires a showing of evidentiary facts or substantial evidence outside the pleadings from which material facts alleged in the pleadings can be warrantably inferred. . . . Our review of the decision to grant a motion for summary judgment is plenary. . . . We therefore must decide whether the court's conclusions were legally and logically correct and find support in the record." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Brown* v. *Otake*, 164 Conn. App. 686, 699–701, 138 A.3d 951 (2016).

In her amended complaint, the plaintiff effectively presented two claims for fraud. First, she alleged that Eggert "falsely represented to the plaintiff . . . that she would not get any of her $67,556.07 award against . . . Altman unless she signed a document . . . to settle the judgment . . . ." Second, she alleged that "Eggert, with the intent to deceive the plaintiff, knowingly failed to disclose and/or concealed that [the release and withdrawal] would result in the loss of the plaintiff's right to reallocate damages . . . ." We address each of the plaintiff's claims in turn.

A

The plaintiff first sets forth a claim for fraud based on intentional misrepresentation. "The essential elements of an action in common law fraud, as we have repeatedly held, are that: (1) a false representation was made as a statement of fact; (2) it was untrue and known

to be untrue by the party making it; (3) it was made to induce the other party to act upon it; and (4) the other party did so act upon that false representation to his injury. . . . In contrast to a negligent representation, [a] fraudulent representation . . . is one that is knowingly untrue, or made without belief in its truth, or recklessly made and for the purpose of inducing action upon it." (Citation omitted; internal quotation marks omitted.) *Sturm* v. *Harb Development, LLC*, 298 Conn. 124, 142, 2 A.3d 859 (2010).

The court determined that the defendants were entitled to summary judgment because the plaintiff's claim (1) was precluded by collateral estoppel, (2) was based on a misrepresentation that did not relate to an existing or past fact, and therefore was not actionable, and (3) constituted a sham claim pursuant to the sham affidavit rule. The defendants argue that all three of the court's determinations were proper. We disagree.

1

The plaintiff argues that the court erred in concluding that her intentional misrepresentation claim was precluded by collateral estoppel. She reasons that Judge Pellegrino "did not, at the June 20, 2014 hearing, consider the issues raised in the complaint, namely, the fraudulent statements made by . . . Eggert to the plaintiff that the plaintiff was required to sign a release and withdraw her case against . . . Altman in order to obtain the damages awarded by the jury." We agree.

"Collateral estoppel, or issue preclusion, prohibits the relitigation of an issue when that issue was actually litigated and necessarily determined in a prior action. . . . For an issue to be subject to collateral estoppel, it must have been fully and fairly litigated in the first action. It also must have been actually decided and the decision must have been necessary to the judgment." (Citations omitted; internal quotation marks omitted.)

Aetna Casualty & Surety Co. v. *Jones*, 220 Conn. 285, 296, 596 A.2d 414 (1991). "To establish whether collateral estoppel applies, the court must determine what facts were necessarily determined in the first trial, and must then assess whether the [party] is attempting to relitigate those facts in the second proceeding." (Internal quotation marks omitted.) Id., 297. "In order for collateral estoppel to bar the relitigation of an issue in a later proceeding, the issue concerning which relitigation is sought to be estopped *must be identical* to the issue decided in the prior proceeding." (Emphasis added.) Id.

First, it is not clear to us that the claim for intentional misrepresentation set forth in the complaint underlying this appeal was "actually litigated" at the hearing before Judge Pellegrino on the plaintiff's motion to open in the negligence action. In her motion to open, the plaintiff claimed that "[Eggert] stated I had to sign the [release] in order to receive the check she was going to give me *for damages won* from her client" and that "[i]t was explained that I would have to sign the documents if I was to collect *what was owed to me* by . . . Altman." (Emphasis added.) Following the plaintiff's jury verdict in the negligence action, the plaintiff was awarded $67,556.07 in damages against Altman. The plaintiff ultimately released Altman in return for $67,000. In presenting her claim at the hearing on the motion to open, the plaintiff occasionally referred to the damages awarded by the jury as "$67,000."

A careful review of the transcript of that hearing reveals that there may have been a lack of clarity as to whether the plaintiff claimed that Eggert had told her that she could not receive the *damages* award unless she signed the release, or that Eggert had told her that she would not receive the amount in *settlement* of the case unless she signed the release. For example, when the plaintiff argued that she never would have signed

the release had she known that it would prevent her from reallocating damages, the court stated: "And you would have never gotten the 60—$67,000." The plaintiff responded: "I was awarded that, Your Honor." The court responded: "All right." Later, the court stated to the plaintiff: "I mean, what—that's not fraudulent, that's just a statement of fact. My client will not permit me to give you $67,000 of my money, unless the plaintiff signs a release as to me." The plaintiff responded: "Well, my argument there, Your Honor, is I didn't need to sign a release, $67,000 was . . . awarded to me . . . I didn't need to. It was a satisfaction . . . of judgment . . . ."

Because of these apparent miscommunications, it is difficult for us to discern "what facts were necessarily determined" in the prior action with respect to the precise wording[2] of Eggert's alleged misrepresentation. As a result, there exists a genuine issue of material fact as to whether the claim set forth in the complaint underlying this appeal—that Eggert represented to the plaintiff that "she would not get any of her $67,556.07 award against . . . Altman unless she signed a document for $67,000 to settle the judgment"—was fully and fairly litigated at the hearing on the motion to open.

Furthermore, it is not clear to us that the issue of intentional misrepresentation was "actually decided"

[2] In the circumstances of this case, the nuances in the wording are more than merely semantic. By way of illustration, suppose that Eggert had actually said, "I cannot give you a check now to settle the claims against Altman unless you sign this release." This statement would quite unremarkably comport with the usual practice.

Suppose, on the other hand, Eggert had actually said, "General Statutes § 52-700 is such that you will never receive damages from Altman unless you sign this release." There is no evidence in this case that the latter words were specifically spoken, yet the plaintiff's alleged version of the words that were spoken is arguably consistent with the import of this statement.

The former version would not be a misrepresentation at all; the latter version arguably could support the first element of fraudulent misrepresentation.

by the court in rendering its decision on the motion to open. Although the court concluded that "[t]here was no evidence presented that [the plaintiff] was in any way coerced to execute the release," it did not specifically address whether the plaintiff had failed to prove the elements of a claim for fraudulent misrepresentation. As noted previously, in order for collateral estoppel to bar the relitigation of an issue, "the issue concerning which relitigation is sought to be estopped must be *identical* to the issue decided in the prior proceeding." (Emphasis added.) *Aetna Casualty & Surety Co.* v. *Jones*, supra, 220 Conn. 297. The issue of intentional misrepresentation is different from the issue of coercion. As such, a genuine issue of material fact remains as to whether the issue of intentional misrepresentation was "actually decided" by the court in rendering its decision on the plaintiff's motion to open.

Because a genuine issue of material fact exists as to whether the plaintiff's claim for intentional misrepresentation was "fully and fairly litigated" and "actually decided" in the context of her motion to open, the trial court improperly rendered summary judgment on the basis of collateral estoppel.[3]

2

The defendants argue, as an alternative ground for affirming the judgment, that the trial court properly determined that, even if the plaintiff's claim for intentional misrepresentation was not barred by collateral estoppel, the defendants nonetheless were entitled to summary judgment because the alleged misrepresentation did not relate to a past or existing fact and, therefore, was not actionable. We disagree.

"A representation of fact is a positive assertion that the fact is true. It implies that the maker has definite

[3] We note that the doctrine of res judicata does not apply because there were different defendants in the two proceedings.

knowledge or information which justifies the positive assertion." 3 Restatement (Second), Torts, § 538A, comment (a), p. 83 (1977). "[T]he general rule is that a misrepresentation must relate to an existing or past fact" to be actionable. *Brown* v. *Otake*, supra, 164 Conn. App. 706. Our Supreme Court "ha[s] not yet addressed whether statements of judgment or statements conditioned on future events can support a claim for misrepresentation, although many other jurisdictions have adopted a position against such claims." *Glazer* v. *Dress Barn, Inc.*, 274 Conn. 33, 75 n.32, 873 A.2d 929 (2005). In determining whether a statement constitutes a statement of fact, as opposed to, for example, a statement of judgment or opinion, "[t]he question is . . . not alone one of the language used but of the sense in which it is reasonably understood." 3 Restatement (Second), supra, § 538A, comment (d), p. 84.[4]

As set forth in the plaintiff's complaint, Eggert allegedly misrepresented to the plaintiff that "she would not get any of her $67,556.07 award against . . . Altman unless she signed a document for $67,000 to settle the judgment on the verdict for negligence against [Altman] and also with[drew] the case against him." The defendants argue that this statement did not relate to an existing or past fact and, therefore, is not actionable. We are not persuaded.

Because no court has determined precisely what, if anything, Eggert said to the plaintiff at the settlement

[4] "Although the Restatement (Second) of Torts is not binding precedent, our appellate courts have frequently looked to it in outlining the contours of tort law in this state. See, e.g., *Clohessy* v. *Bachelor*, 237 Conn. 31, 38–39, 46, 675 A.2d 852 (1996) (citing Restatement [Second] of Torts in recognizing action for bystander emotional distress); *Stohlts* v. *Gilkinson*, 87 Conn. App. 634, 654, 867 A.2d 860, cert. denied, 273 Conn. 930, 873 A.2d 1000 (2005) (citing Restatement [Second] of Torts in adopting exception to common-law rule that punitive damages cannot be imposed based on theory of vicarious liability)." *Wild* v. *Cocivera*, Superior Court, judicial district of Hartford, Docket No. CV-146050575-S (June 16, 2016).

conference, is it difficult to determine how Eggert's alleged misrepresentation may reasonably have been understood by the plaintiff. It is entirely possible that the alleged misrepresentation could be construed as relating to an existing fact. For example, Eggert's alleged statement possibly may have suggested that the current state of the law was such that the plaintiff was not able to receive the amount of the judgment unless she signed the release.[5] In addition, because the plaintiff was self-represented, she may have presumed Eggert, an attorney, to have special knowledge of facts unknown to her in the context of a legal proceeding. See Restatement (Second), supra, § 539, comment (b), p. 86 ("The statement of opinion . . . may also reasonably be understood to imply that [the maker] does know facts sufficient to justify him in forming the opinion . . . . This is true particularly when the maker is understood to have special knowledge of facts unknown to the recipient."); see also *Crowther* v. *Guidone*, 183 Conn. 464, 468, 441 A.2d 11 (1981) ("Considered in context, Guidone's statement that the plaintiffs could build a house on the subject property and then divide the parcel, selling the balance of the property to others, clearly was made as a statement of fact. . . . Guidone was an experienced real estate salesman who had extensive knowledge of the zoning regulations of North Branford. Thus, when he made the misrepresentation, he did not merely venture an opinion or an interpretation of the law. He indicated that he knew, as a fact, that a certain use was permissible under the applicable zoning regulations.")

Because we must view the evidence in the light most favorable to the plaintiff; see *Martel* v. *Metropolitan*

[5] The problem, of course, is that signing the release, although facilitating the immediate payment of almost the full amount of the verdict, would presumably prevent the recovery of any reallocation of damages assessed against the cotortfeasor. See General Statutes § 52-572h (g).

District Commission, 275 Conn. 38, 46, 881 A.2d 194 (2005); and because we cannot disregard the interpretation that the alleged misrepresentation reasonably could have been understood to relate to an existing set of affairs, there was a genuine issue of fact such that we decline to affirm a grant of summary judgment on this ground.

3

The defendants also argue that they were entitled to summary judgment because, based on the "glaring inconsistencies in what the plaintiff alleged that [Eggert] said at the hearing before Judge Pellegrino, and what the plaintiff averred in her affidavit opposing summary judgment," it was clear that the plaintiff was presenting a sham claim. We disagree.

"The 'sham affidavit' rule refers to the trial court practice of disregarding an offsetting affidavit in opposition to a motion for summary judgment that contradicts the affiant's prior deposition testimony." *Ross* v. *Dugan*, Superior Court, judicial district of New London, Docket No. CV-106006404-S, (December 16, 2011). "It must be strongly emphasized that the sham affidavit rule is a narrowly circumscribed doctrine that is to be applied with care. . . . [M]any courts have determined that if the witness provides a reasonable explanation for the contradiction, such as confusion or discovery of new evidence, the sham affidavit rule should not apply." (Citations omitted.) Id. Connecticut appellate courts have yet to expressly adopt this rule. Id.

The defendants claim that "[d]uring the hearing, the plaintiff said, 'when I asked Attorney Eggert what [the document was] her words to me were, you have to sign this document to get this check . . . .' In contrast, the plaintiff's affidavit opposing the [defendants'] summary judgment motion avers as follows: 'the defendant Eggert then falsely represented to me, pro se, that I would not get any of my $67,556.07 award against . . . Altman unless I signed a document . . . to settle the

judgment . . . .'' The defendants argue that because of this inconsistency, the plaintiff's claim should be disposed of pursuant to the sham affidavit rule. Although we agree that the two statements may not have been entirely consistent, the shades of meaning were somewhat abstract, especially to a layperson. Any inconsistency may of course bear on the question of credibility, but it does not destroy all probative value. Even if we were to accept the very narrow ''sham affidavit rule,'' which, again, has yet to be expressly recognized by Connecticut appellate courts, we do not find that the rule would be triggered in the circumstances of this case.

B

The plaintiff also has presented a claim for fraudulent nondisclosure. Specifically, she alleged in her complaint that Eggert ''knowingly failed to disclose and/or concealed that [the release and withdrawal] would result in the loss of the plaintiff's right to reallocate damages . . . .'' The plaintiff argues that, in granting the motion for summary judgment, the court improperly determined that she could not prove a claim for fraudulent nondisclosure because she failed to establish that she shared a fiduciary relationship with the defendants. We disagree.

It is well settled that ''[m]ere nondisclosure . . . does not ordinarily amount to fraud. . . . To constitute fraud on that ground, there must be a failure to disclose known facts and, in addition thereto, a request or an occasion or a circumstance which imposes a duty to speak.'' (Citations omitted.) *Egan* v. *Hudson Nut Products, Inc.*, 142 Conn. 344, 348, 114 A.2d 213 (1955). Therefore, in order to prove that Eggert's silence regarding the potential effects of the release and withdrawal constituted fraudulent conduct, the plaintiff needed to prove that the parties' relationship imposed a duty on

Eggert to explain the potential effects of those documents to the plaintiff. As the trial court noted, "[n]o such relationship existed in the present case because . . . Eggert was providing legal representation to the plaintiff's adversary [and not to her]." The plaintiff presented no evidence to counter this fact. Thus, the trial court properly determined that no genuine issue of material fact exists as to whether the plaintiff could establish a claim for fraudulent nondisclosure.[6]

II

Finally, the plaintiff claims that the court improperly determined that certain documents were protected by the attorney-client privilege and the work product doctrine. We disagree.

As mentioned, the plaintiff served the defendants with requests for discovery in October, 2014. The defendants objected, and the court, after hearing oral argument, ordered the defendants to provide the plaintiff with certain documents and to provide a privilege log for any documents they withheld or redacted. The defendants subsequently disclosed a substantial amount of materials—approximately 550 pages of documents—as well as a privilege log identifying materials that had been withheld or redacted. The defendants withheld several e-mails between Eggert and a representative of Nationwide, e-mails between Eggert's office and a representative of Nationwide, and correspondence between Eggert and Altman, claiming that these materials were protected by the attorney-client privilege and/or the work product doctrine. The defendants also withheld documents containing confidential

[6] The court also determined that the plaintiff's claim for fraudulent nondisclosure was precluded under the doctrine of collateral estoppel. The plaintiff argues that this determination was improper. Because we affirm the court's decision on the claim for fraudulent nondisclosure on alternative grounds, we need not reach the collateral estoppel issue for this claim.

We further note that no court has established precisely what, if anything, Eggert said. The only issue decided in this case is whether *any* information has been presented that could create a genuine issue of material fact.

information regarding reserves. The plaintiff then filed motions for compliance against both defendants, and they responded in a joint memorandum in opposition to the motions.

After a hearing, the court entered an order denying the plaintiff's motions. The order provided, in its entirety, as follows: "The plaintiff is not entitled to information which is protected by the attorney-client privilege or which represents an attorney's opinion work product. No quantum of proof has been offered to support a claim of civil fraud which would permit the privilege to be pierced. Reserve information is not reasonably calculated to lead to the discovery of admissible evidence and is thus not subject to disclosure."

We begin by setting forth the relevant standard of review. "[T]he granting or denial of a discovery request rests in the sound discretion of the court. . . . Provided the trial court properly interpreted the pertinent statutes, a question over which this court has plenary review . . . that decision will be reversed only if such an order constitutes an abuse of that discretion. . . . Under the abuse of discretion standard, [w]e must make every reasonable presumption in favor of the trial court's action. . . . The trial court's exercise of its discretion will be reversed only [when] the abuse of discretion is manifest or [when] injustice appears to have been done." (Citation omitted; internal quotation marks omitted.) *Woodbury Knoll, LLC* v. *Shipman & Goodwin, LLP*, 305 Conn. 750, 775, 48 A.3d 16 (2012).

In its order denying the plaintiff's motions for compliance, the court recognized that certain communications between the defendants were protected by the attorney-client privilege and the work product doctrine. The plaintiff argues that the attorney-client privilege and the work product doctrine "appl[y] only in the previously concluded tort case," and do not protect the defendants'

records from discovery in the present action. She further argues that "these materials are likely to contain statements or information concerning representations made to the plaintiff about, and the plaintiff's understanding of, the settlement and release in [the negligence action]." The defendants argue that the attorney-client privilege and the work product doctrine are not time limited, and the materials requested by the plaintiff are protected from discovery. We agree with the defendants.[7] On the limited record before us, we do not conclude that the trial court abused its discretion in denying the plaintiff's motions for compliance, nor that an injustice appears to have been done.

The judgment is reversed with respect to the plaintiff's claim of intentional misrepresentation and the case is remanded for further proceedings according to law; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

FINANCIAL FREEDOM ACQUISITION, LLC *v.* ANN T. GRIFFIN, EXECUTRIX (ESTATE OF ANGELA C. GRIFFIN), ET AL.
(AC 38960)

Sheldon, Mullins and Flynn, Js.

Syllabus

The plaintiff bank, F Co., sought to foreclose a mortgage on certain real property of the decedent. After the foreclosure action was commenced,

[7] We note that when an insurer engages an attorney to represent an insured, the resultant attorney-client privilege belongs to the insured. See *Metropolitan Life Ins. Co.* v. *Aetna Casualty & Surety Co.*, 249 Conn. 36, 730 A.2d 51 (1999); *Royal Indemnity Co.* v. *Terra Firma, Inc.*, Superior Court, judicial district of Middlesex, Docket No. X04-CV-05-4005063-S (February 1, 2007) (42 Conn. L. Rptr. 792). There is, however, "a common interest among the insured, the attorney and the insurer, and ordinarily the insured's privilege is not waived because of disclosure to the insurer." Id. Pursuant to this "common interest," the other involved parties are responsible for protecting the insured's or client's privilege. During oral argument before this court, the defendants argued that they shared this "common interest."

but before trial had begun, O Co., of which F Co. was a subsidiary, was substituted as the plaintiff. Thereafter, another bank merged into O Co., and although O Co. was the surviving entity of the merger, as part of the merger it changed its name to C Co., which was never substituted as the party plaintiff. Subsequently, the trial court granted O Co.'s motion for a judgment of strict foreclosure and rendered judgment thereon, from which the defendant A, individually and as the executrix of the estate of the decedent, appealed to this court. A claimed, inter alia, that the trial court improperly rejected her special defense and counterclaim sounding in breach of the implied covenant of good faith and fair dealing. In her special defense and counterclaim, A had alleged that, in light of a provision in the note executed by the decedent that permitted the decedent's estate to avoid its obligation to repay the loan upon the decedent's death if it cooperated with F Co. in selling the subject property, F Co. breached the covenant of good faith and fair dealing when it initiated the foreclosure action instead of communicating with the executrix to facilitate such a sale. *Held*:

1. A could not prevail on her claim that the trial court improperly determined that O Co. established a prima facie case of foreclosure, which was based on her claim that because C Co., a nonparty entity, owned the note as a result of the merger, O Co. failed to produce evidence sufficient to establish that it was the holder and owner of the note; the trial court's conclusion that O Co. was the holder and owner of the note executed by the decedent was legally and factually correct, as O Co. produced the note, which was endorsed in blank, at trial, which created a rebuttable presumption that O Co. was the note's owner, and O Co.'s status as holder and owner of the note and this foreclosure action were not affected by the merger and the change of name that occurred during the pendency of the foreclosure action, as O Co.'s corporate existence and identity continued in the resulting bank, O Co.'s assets, including the decedent's note, vested in the resulting bank by operation of law and without any deed or transfer, this action was not abated, discontinued, or otherwise affected by the merger and change of name, O Co. could have substituted the resulting bank in this action, but it was not required to do so, and the change of name did not create a new corporate entity, alter the resulting bank's corporate identity, or end the resulting bank's corporate existence.

2. The trial court properly found that A failed to meet her burden of proof with respect to her special defense and counterclaim sounding in breach of the implied covenant of good faith and fair dealing; the relevant provision in the note provided that the death of the decedent was a maturity event that made the loan immediately due and payable, except if the parties extended the repayment deadline by entering into a separate written agreement within thirty days of the decedent's death that required the decedent's estate to cooperate fully with F Co. in selling the property, and the trial court properly concluded that, in the absence

of such a separate written agreement extending the deadline to allow the executrix to sell the decedent's home, the relevant provision of the note did not provide for a contractual right to an extension of the deadline to sell the property, and F Co., therefore, had no obligation to undertake any action facilitating the sale of the property by the executrix, and did not breach the terms of the note by never agreeing to such an extension.

Argued April 11—officially released September 12, 2017

Procedural History

Action to foreclose a mortgage on certain real property owned by the named defendant et al., and for other relief, brought to the Superior Court in the judicial district of Litchfield, where the defendant John T. Griffin et al. were defaulted for failure to appear; thereafter, the named defendant et al. filed a counterclaim; subsequently, the court, *Pickard*, *J.*, granted the plaintiff's motion to substitute OneWest Bank, N.A., as the plaintiff; thereafter, the matter was tried to the court, *Shah*, *J.*; judgment for the substitute plaintiff on the complaint and the counterclaim; subsequently, the court, *Pickard*, *J.*, granted the substitute plaintiff's motion for a judgment of strict foreclosure and rendered judgment thereon, from which the named defendant et al. appealed to this court; thereafter, the court, *Shah*, *J.*, issued an articulation of its decision. *Affirmed.*

Ronald P. Sherlock, for the appellants (named defendant et al.).

Michael T. Grant, for the appellee (substitute plaintiff).

Opinion

MULLINS, J. In this action to foreclose a reverse mortgage, the defendants, Ann T. Griffin, in her representative capacity as executrix of the estate of Angela C. Griffin, and Ann T. Griffin, in her individual capacity, appeal from the judgment of strict foreclosure rendered

in favor of the substitute plaintiff, OneWest Bank, N.A.[1] On appeal, the defendants claim that the court erred in (1) concluding that the substitute plaintiff established a prima facie case of foreclosure and (2) rejecting their special defense and counterclaim sounding in breach of the implied covenant of good faith and fair dealing. We affirm the judgment of the trial court.

In its December 10, 2015 memorandum of a decision, the trial court set forth the following facts. "[Angela C.] Griffin [(decedent)] was the owner of the real property located at 312 Milton Road, Litchfield, Connecticut (property). On or about July 23, 2008, [the decedent] executed a note and reverse annuity mortgage (mortgage) on the [p]roperty in favor of Financial Freedom Senior Funding Corporation, [a predecessor in interest to the substitute plaintiff]. . . . [The note and mortgage] established an open-ended line of credit not to exceed $692,180 ([decedent's] loan). At that time, Financial Freedom [Senior Funding Corporation] advanced $378,791 to [the decedent] to pay off a loan from Deutsche Bank, which sought to foreclose on the mortgage it held on the property. Financial Freedom [Senior

[1] A brief explanation of the numerous parties involved in this action is necessary. Regarding the plaintiffs, this action was commenced by Financial Freedom Acquisition, LLC. The successor in interest to Financial Freedom Acquisition, LLC, OneWest Bank, N.A., subsequently was substituted for Financial Freedom Acquisition, LLC. Although Financial Freedom Acquisition, LLC, was removed from this action as a plaintiff, it still is a party to the action as a counterclaim defendant. Thus, throughout this opinion, we refer to OneWest Bank, N.A., as the substitute plaintiff and Financial Freedom Acquisition, LLC, as the named plaintiff and counterclaim defendant.

Regarding the defendants, the named plaintiff brought this action against seven defendants. Five of the defendants, John T. Griffin, Mary K. Griffin, Thomas V. Griffin, Pauline Griffin Voghel, and the Connecticut Department of Revenue Services, are nonappearing. The two appearing defendants are Ann T. Griffin, in her individual capacity, and Ann T. Griffin, in her capacity as executrix of the estate of Angela C. Griffin. In this opinion, we use "Ann Griffin" to refer to Ann T. Griffin in her individual capacity, "the executrix" to refer to Ann T. Griffin in her capacity as executrix, and "the defendants" to refer to Ann T. Griffin in both her individual and representative capacities.

Funding Corporation] obtained an appraisal at the time that valued the property at $612,709.

"[The decedent] . . . entered into the loan so that [she] could remain in the home that she had lived in for thirty years. The property is a private property that includes a colonial residence located on eleven acres of land with a pond. It has a stable and many acres of well-maintained pasture. The home was a central part of [Ann Griffin's] and [the decedent's] lives.

"Since the mortgage is a reverse annuity mortgage, no principal became due until a maturity event occurred. On April 16, 2010, [the decedent] passed away, which constituted a maturity event and rendered the balance of the loan due and payable unless there was an agreement in writing between the [named] plaintiff and certain legal representatives of [the decedent] within thirty days to cooperate fully in selling the property. The [named] plaintiff and the [executrix] had no agreement in writing to this effect, and the [executrix] did not pay the balance due upon [the decedent's] death. Thus, the nonpayment constituted a default under the mortgage. . . . The [named] plaintiff initiated the present foreclosure action in May of 2011.

"On April 30, 2010, prior to the notice of intent to foreclose, [Ann Griffin] contacted the [named plaintiff] to inform it that she intended to sell the property. The [named plaintiff's] electronic system notes indicate that [Ann Griffin] spoke with . . . a maturities administrator . . . . They discussed repayment of the [decedent's] loan, and [Ann Griffin] indicated she planned to sell the property and use the proceeds of the sale to repay the debt. Subsequent to the conversation, [the maturities administrator] sent a cash account reverse mortgage repayment notice to [Ann Griffin]. The repayment notice informed [Ann Griffin] that the death of [the decedent] constituted a maturity event, that upon

the occurrence of a maturity event the loan became due, and that [Ann Griffin] needed to discuss plans with [the named plaintiff] concerning repayment of the loan by sending in the enclosed repayment questionnaire. . . .

"On May 6, 2010, the defendant[s'] counsel faxed a correspondence, attaching the death certificate and will of [the decedent], and informing [the maturities administrator] that he was representing the defendant[s]. [Ann Griffin] was appointed executrix of [the decedent's] estate on May 17, 2010. [Ann Griffin] lacked legal authority to enter into contractual agreements on behalf of the estate until such time as she was appointed executrix.

"On or about June 17, 2010, the [executrix] entered into a listing agreement with [a realty company] for the sale of the property, with a listing price of $614,900 (listing agreement). On June 23, 2010, the defendant[s'] counsel sent a second correspondence to [the maturities administrator], which included the probate decree admitting the [decedent's] will to probate; a certified copy of the death certificate; a copy of the [decedent's] will; a certified probate certificate reflecting the appointment of [Ann Griffin] as executrix; and a signed copy of the listing agreement. The [named] plaintiff admitted to having received both written communications and attachments. The [named] plaintiff still had not received the repayment questionnaire . . . . There was no agreement in writing or any other communication that demonstrated a mutual understanding to extend the repayment date."

In addition to those facts expressly found by the trial court, the following supplemental facts, which also reasonably could have been found by the court, are relevant. Through a series of assignments and corporate restructurings, ownership of the decedent's loan changed several times. As previously explained, on July

23, 2008, the decedent executed a note and mortgage in favor of Financial Freedom Senior Funding Corporation, making it the original mortgagee and holder of the note. At the time the decedent executed the note in July, 2008, Financial Freedom Senior Funding Corporation was a subsidiary of IndyMac Bank, F.S.B. (IndyMac). The Federal Deposit Insurance Corporation (FDIC) had been appointed as receiver for IndyMac prior to the decedent's execution of the note and mortgage.

In March, 2009, OneWest Bank, F.S.B, through its parent company, IMB HoldCo, LLC, purchased from the FDIC certain IndyMac assets, including the decedent's loan. As part of that transaction, Financial Freedom Senior Funding Corporation executed an allonge to the note, specially endorsing it to "OneWest Bank, F.S.B." The named plaintiff in this action was formed during this transaction as a subsidiary of OneWest Bank, F.S.B.

At some point after it was assigned the note, OneWest Bank, F.S.B., executed an allonge to the note, endorsing it in blank. OneWest Bank, F.S.B., then transferred the note to the named plaintiff, which held it until transferring it back to OneWest Bank, F.S.B., around July, 2011.

Around February, 2014, OneWest Bank, F.S.B., converted from a federal savings bank into a national banking association and, thus, became OneWest Bank, N.A., the substitute plaintiff.

On August 3, 2015, which was slightly more than four years after this action was commenced, but before trial had begun, IMB HoldCo, LLC, the holding company of OneWest Bank, N.A., merged with CIT Group, the holding company of a bank called CIT Bank. As part of their holding companies' merger, OneWest Bank, N.A., and CIT Bank also merged. Specifically, "CIT Bank . . . merged *into* OneWest Bank, N.A." (Emphasis

added.) Although OneWest Bank, N.A., was the surviving entity of the merger with CIT Bank, OneWest Bank, N.A., as part of the merger, changed its name to "CIT Bank, N.A." "CIT Bank, N.A.," was never substituted for OneWest Bank, N.A., as the party plaintiff in this action.

Having outlined the relevant substantive facts, we now review the pertinent procedural history. The named plaintiff commenced this action in May, 2011. As previously explained, the named plaintiff was a subsidiary of OneWest Bank, N.A., which was substituted as the plaintiff in this action on September 22, 2014.

Prior to the substitution of OneWest Bank, N.A., for the named plaintiff, the defendants pleaded several special defenses. Relevant to this appeal is the defendants' special defense that the named plaintiff breached the implied covenant of good faith and fair dealing. The defendants also filed a counterclaim against the named plaintiff sounding in breach of the implied covenant of good faith and fair dealing. Although the named plaintiff was removed from this action as a plaintiff by virtue of a substitution, it still is a party to the action as a counterclaim defendant.

The case was tried to the court over the course of two days. At trial, the substitute plaintiff introduced the original note into evidence. Accompanying the note was an allonge specially endorsing the note to OneWest Bank, F.S.B., and an allonge wherein OneWest Bank, F.S.B., endorsed the note in blank. The substitute plaintiff also offered the testimony of Dion Kala, a vice president and foreclosure litigation manager employed by CIT Bank, N.A. In addition to working for CIT Bank, N.A., Kala also had been employed by OneWest Bank, N.A., as well as its predecessors in interest, including OneWest Bank, F.S.B., Financial Freedom Acquisition, LLC, and Financial Freedom Senior Funding Corporation. Kala provided testimony concerning the several

assignments and corporate restructurings that eventually brought the note into the possession of CIT Bank, N.A.

In its memorandum of decision, the court concluded that the substitute plaintiff had established a prima facie case of foreclosure and that the defendants had failed to meet their burden of proof on their special defense and counterclaim. The defendants filed a motion for articulation, asking the trial court to identify which plaintiff the court found owns the decedent's loan. In denying that motion, the court stated: "The defendant[s] rais[e] a specious claim. The plaintiff is OneWest Bank, now known as CIT Bank, N.A., because of a legal name change." The court rendered a judgment of strict foreclosure and set a law day. This appeal followed.

I

PRIMA FACIE CASE OF FORECLOSURE

The defendants' first claim on appeal is that the trial court improperly concluded that the substitute plaintiff established a prima facie case of foreclosure. In particular, the defendants argue that the substitute plaintiff did not produce evidence sufficient to establish that it was the holder and owner of the note. According to the defendants, the substitute plaintiff's own evidence established that a "separate and different legal entity" is the owner and holder of the note. That is, as a result of a corporate merger in which the substitute plaintiff was involved after this action commenced, ownership of the note vested in a distinct entity that was never made a party to this action. Thus, the defendants argue, a nonparty entity, "CIT Bank, N.A.," owns the note, and the substitute plaintiff does not. We disagree with the defendants and conclude that their argument is flawed both in fact and in law.

We begin by setting forth our standard of review. "A plaintiff establishes its prima facie case in a mortgage

foreclosure action by demonstrating by a preponderance of the evidence that it is the owner of the note, that the defendant mortgagor has defaulted on the note, and that conditions precedent to foreclosure have been satisfied. . . .

"In order to establish a prima facie case, the proponent must submit evidence which, if credited, is sufficient to establish the fact or facts which it is adduced to prove. . . . [W]hether the plaintiff has established a prima facie case [in a foreclosure action] is a question of law, over which our review is plenary." (Citation omitted; emphasis omitted; footnote omitted; internal quotation marks omitted.) *Deutsche Bank National Trust Co.* v. *Bliss*, 159 Conn. App. 483, 495–96, 124 A.3d 890, cert. denied, 320 Conn. 903, 127 A.3d 186 (2015), cert. denied, U.S. , 136 S. Ct. 2466, 195 L. Ed. 2d 801 (2016).

The only element of the substitute plaintiff's prima facie case that the defendants challenge on appeal is ownership of the note. Thus, we limit our review of the relevant law to the principles governing the possession and ownership of promissory notes. "Being the holder of a note satisfies the plaintiff's burden of demonstrating that it is the owner of the note because under our law, the note holder is presumed to be the owner of the debt, and unless the presumption is rebutted, may foreclose the mortgage . . . . The possession by the bearer of a note [e]ndorsed in blank imports prima facie [evidence] that he acquired the note in good faith for value and in the course of business, before maturity and without notice of any circumstances impeaching its validity. The production of the note [endorsed in blank] establishes [the possessor's] case prima facie against the makers and he may rest there. . . . It [is] for the defendant to set up and prove the facts which limit or change the plaintiff's rights." (Internal quotation marks omitted.) Id., 496.

We now provide a review of the law governing bank mergers, which will guide our resolution of the defendants' claim that a bank merger affects the merging banks' corporate identities and, concomitantly, their ownership rights in promissory notes. Since the merger in the present case involved one banking entity merging into, and continuing as, a *national* banking association, we begin with a brief exposition of the National Bank Act, 12 U.S.C. § 21 et seq. (2012).

"[N]ational bank[ing] [associations] . . . [are] corporate entities chartered not by any State, but by the Comptroller of the Currency of the U.S. Treasury." *Wachovia Bank* v. *Schmidt*, 546 U.S. 303, 306, 126 S. Ct. 941, 163 L. Ed. 2d 797 (2006). Thus, "[t]he National Bank Act . . . governs the operations of national banking associations." *Jackson* v. *First National Bank of Valdosta*, 349 F.2d 71, 72 (5th Cir. 1965).

Pursuant to the National Bank Act, a national banking association is formed by "making and filing articles of association and an organization certificate [with the Comptroller of the Currency of the United States] . . . ." 12 U.S.C. §§ 21 and 24 (2012). A duly formed national banking association is "a body corporate," and the National Bank Act vests such an association with several enumerated "corporate powers." 12 U.S.C. § 24 (2012). These enumerated "corporate powers" include the power "[t]o make contracts" and the power "[t]o sue and be sued, complain and defend, in any court of law and equity . . . ." 12 U.S.C. § 24 (2012).

The National Bank Act also governs mergers and consolidations of banking entities in which the surviving entity is a national banking association. See 12 U.S.C. §§ 215, 215a, and 215a-1 (2012). Specifically, that act permits, among other things, (1) the "merger" of multiple national banking associations into a single national banking association; 12 U.S.C. §§ 215a (a) and

215a-1 (a) (2012); and (2) the "consolidation" of a national banking association and a state bank into a national banking association. 12 U.S.C. §§ 215 (a) and 215a-1 (a) (2012). The type of entity that survives either a "merger" between multiple national banking associations or a "consolidation" between a state bank and a national banking association is the same—a national banking association. 12 U.S.C. §§ 215 and 215a (2012).

Mergers and consolidations, although differentiated by the National Bank Act in some respects, have identical legal ramifications for the participating entities' (1) corporate identities and (2) assets. With respect to the participants' corporate identity, "[t]he *corporate existence of each* of the consolidating [or merging] banks or [national] banking associations participating in such consolidation [or merger] *shall be* merged into and *continued* in the [resulting] national banking association and such [resulting] national banking association *shall be deemed to be the same corporation as each bank or* [*national*] *banking association participating in the consolidation* [*or merger*]." (Emphasis added.) 12 U.S.C. § 215 (e) (2012). That is, "[t]he resulting national bank[ing] [association] . . . shall be deemed to be *a continuation of the entity of each participating institution, the rights and obligations of which shall succeed to such rights and obligations and the duties and liabilities connected therewith.*" (Emphasis added.) 12 C.F.R. § 5.33 (*l*) (1).

With respect to the participating entities' assets, "[i]n any consolidation or merger in which the resulting [association] is a national bank[ing] [association] . . . *on the effective date* of the merger or consolidation, *all assets and property (real, personal and mixed, tangible and intangible, choses in action, rights, and credits)* then owned by each participating institution or which would inure to any of them, *shall, immediately by operation of law . . . become the property of the*

resulting national bank[*ing*] [*association*] . . . ." (Emphasis added.) Id., § 5.33 (*l*) (1). Thus, in a merger or a consolidation, "[a]ll rights . . . in and to every type of property . . . and choses in action shall be *transferred to and vested in the* [*resulting*] *national banking association by virtue of such consolidation* [*or merger*] *without any deed or other transfer.* The [resulting] national banking association, upon the consolidation [or merger] and *without any order or other action on the part of any court or otherwise, shall hold and enjoy all rights of property . . . in the same manner and to the same extent as such rights . . . were held or enjoyed by any one of the consolidating* [*or merging*] *banks or* [*national*] *banking associations at the time of consolidation* [*or merger*] . . . ." (Emphasis added.) 12 U.S.C. § 215 (e) (2012).

In addition to prescribing the legal ramifications of a bank merger resulting in a national banking association, the National Bank Act outlines the process by which a national banking association may change its name. See 12 U.S.C. §§ 30–32 (2012). Specifically, it provides that "[a]ny national banking association, upon written notice to the Comptroller of the Currency, may change its name, except that such new name shall include the word 'National.' " 12 U.S.C. § 30 (a) (2012). A change of name does not affect the rights and liabilities of a national banking association: "All debts, liabilities, rights, provisions, and powers of the association under its old name shall devolve upon and inure to the association under its new name." 12 U.S.C. § 31 (2012). Furthermore, a change of name does not "release any national banking association under its old name . . . from any liability" or "affect any action or proceeding . . . in which said association may be or become a party or interested." 12 U.S.C. § 32 (2012).

In *In re Worcester County National Bank*, 263 Mass. 394, 161 N.E. 797 (1928), the Supreme Judicial Court

of Massachusetts was asked to interpret the provisions of the National Bank Act governing consolidations and changes of name. In that case, a national banking association called Merchants National Bank of Worcester was appointed as the administrator of a decedent's estate in 1924. Id., 397. Three years later, Merchants National Bank of Worcester was consolidated with a state bank into a surviving consolidated national banking association. Id. As part of the consolidation process, the name of the surviving consolidated national banking association was changed to "Worcester County National Bank of Worcester." Id.

The question before the court was whether the national banking association's obligation to administer the decedent's estate pursuant to its appointment was affected by either (1) the consolidation or (2) the change of name. Id., 398–400. Answering that question in the negative, the court first held that the "corporate identity of the national bank[ing] [association] ha[d] continued unaffected by anything in connection with the consolidation." Id., 399. Despite the consolidation, the national banking association had "maintained an unbroken and unchanged identity of corporate existence . . . ." Id., 400. Second, with respect to the change of name, the court held that "[t]he simple change of name of the national bank[ing] [association] did not disturb its corporate identity or continuity of existence, which ha[d] remained uninterrupted." Id., 399.

Having outlined the relevant provisions of federal banking law, we now turn to Connecticut's banking law. Although Connecticut banking law applies only to banks organized under Connecticut law; see General Statutes §§ 36a-1 and 36a-2 (12); it provides guidance for determining the impact of a merger of banking entities. As an initial matter, Connecticut banking law confirms the applicability of the National Bank Act to national banking associations. See General Statutes

§ 36a-126 (b) (in merger of banks resulting in national banking association, resulting national banking association "shall be considered the same business and corporate entity as the constituent Connecticut bank . . . [and] as to rights, powers and duties [it] shall be a federal bank"). With respect to a banking merger resulting in a Connecticut bank, Connecticut law provides that (1) "the corporate existence of the constituent banks shall be continued by and in the resulting bank"; (2) "the entire assets . . . of each of the constituent banks shall be vested in the resulting bank without any deed or transfer"; (3) "[n]o suit, action or other proceeding pending at the time of the merger . . . before any court or tribunal in which any of such constituent banks is a party shall be abated or discontinued because of such merger . . . but may be continued and prosecuted to final effect by or against the resulting bank"; and (4) "[t]he resulting bank shall have the right to use the name of any of the constituent banks . . . ." General Statutes § 36a-125 (g).

With federal and state banking law in mind, we seek additional guidance from the corporate law of this state and other jurisdictions relating to mergers and changes of name of *nonbanking* entities. In a merger of corporations governed by Connecticut law, "[a]ll property owned by, and every contract right possessed by, each corporation that merges into the survivor . . . vest[s] in the survivor without reversion or impairment." General Statutes § 33-820 (a) (4). Furthermore, the "name of the survivor *may*, *but need not be*, substituted in any pending proceeding for the name of any party to the merger whose separate existence ceased in the merger." (Emphasis added.) General Statutes § 33-820 (a) (5). Regarding the effect of a Connecticut corporation's change of name, our law provides: "An amendment to the certificate of incorporation *does not affect* . . . a proceeding to which the corporation is a party

. . . . An amendment changing a corporation's name *does not abate a proceeding brought by or against the corporation in its former name*." (Emphasis added.) General Statutes § 33-803.

Connecticut's corporate law is substantially similar to the provisions of the American Bar Association's Model Business Corporation Act; see, e.g., *Trevek Enterprises, Inc.* v. *Victory Contracting Corp.*, 107 Conn. App. 574, 583 n.4, 945 A.2d 1056 (2008) ("[i]n 1994, the General Assembly enacted . . . a comprehensive revision . . . designed to bring our corporations statutes into conformity with the American Bar Association's revised Model Business Corporation Act"); which has been adopted in full or in substantial part by at least thirty other states. *Shawnee Telecom Resources, Inc.* v. *Brown*, 354 S.W.3d 542, 553 (Ky. 2011). Indeed, the provisions of the Model Business Corporation Act relating to the effect of corporate mergers and changes of name are nearly identical to Connecticut law. See Model Business Corporation Act, § 11.07 (a), p. 11-89 ("[A]ll property owned by, and every contract right possessed by, each corporation or eligible entity that merges into the survivor is vested in the survivor without reversion or impairment . . . . [Furthermore] the name of the survivor may, but need not be, substituted in any pending proceeding for the name of any party to the merger whose separate existence ceased in the merger . . . ."); Model Business Corporation Act, § 10.09, p. 10-70 ("An amendment to the articles of incorporation does not affect . . . a proceeding to which the corporation is a party . . . . An amendment changing a corporation's name does not abate a proceeding brought by or against the corporation in its former name.").

Mergers of corporations and mergers of limited liability companies are treated similarly under Connecticut

law.[2] When Connecticut limited liability companies merge, "[a]ny property, real, personal and mixed, and all debts due on whatever account . . . and all other choses in action . . . belonging to or due to each party to the merger . . . *vest*[*s*] *in the survivor without further act or deed*." (Emphasis added.) General Statutes § 34-197 (4). Furthermore, any "proceeding pending by or against any limited liability company that was a party to the merger . . . *may be prosecuted as if such merger . . . had not taken place*, *or* the survivor *may be* substituted in the action." (Emphasis added.) General Statutes § 34-197 (6).[3] The Uniform Limited Liability Company Act similarly provides that "all property of each merging entity vests in the surviving entity" and that "the name of the surviving entity may be substituted for the name of any merging entity that is a party to any pending action or proceeding . . . ." Unif. Limited Liability Company Act § 1026 (a) (amended 2013), 6C U.L.A. 189 (2016). The rationale behind not requiring the

[2] Mergers of partnerships also receive similar treatment under Connecticut law. See General Statutes § 34-33f (in merger of limited partnerships, "all property, real, personal and mixed . . . . and choses in action . . . shall be vested in [surviving] limited partnership without further act or deed," and any "action or proceeding . . . pending . . . against [one of the merging entities] may be prosecuted as if such merger or consolidation had not taken place, or . . . [the] survivor may be substituted in its place"); General Statutes § 34-389 (a) (in merger of limited liability partnerships, "[a]ll property owned by each of the merged partnerships vests in the survivor," and "[a]n action or proceeding pending against a partnership that is a party to the merger may be continued as if the merger had not occurred, or the survivor may be substituted as a party to the action or proceeding").

[3] Number 16-97 of the 2016 Public Acts repealed the Connecticut Limited Liability Company Act, § 34-100 et seq., effective July 1, 2017. On the effective date, the Connecticut Uniform Limited Liability Company Act replaced the Connecticut Limited Liability Company Act. With respect to the provisions governing the effect of mergers, the repealed act and the Uniform Act do not differ substantially. See Public Acts 2016, No. 16-97, § 91 (a) ("[w]hen a merger becomes effective . . . [a]ll property owned by each merging limited liability company that ceases to exists vests in the surviving limited liability company . . . [and] [a]n action or proceeding pending . . . against any merging limited liability company that ceases to exist may be continued as if the merger had not occurred").

substitution of the surviving entity's name in a pending proceeding is that "[s]uch a substitution has no substantive effect because, whether or not the survivor's name is substituted, the survivor succeeds to the claims of any party to the merger whose separate existence ceased as a result of the merger." Unif. Limited Liability Company Act § 1026 (a) (7), comment, supra, 6C U.L.A. 191. Regarding the change of a limited liability company's name, Connecticut law provides that "amend[ing] the name set forth in [the] articles of organization . . . [does not] dissolv[e] or otherwise chang[e] the legal entity itself." *David Caron Chrysler Motors, LLC* v. *Goodhall's, Inc.*, 304 Conn. 738, 746 n.8, 43 A.3d 164 (2012).

With banking law and corporate law as our legal backdrop, we turn to the present case to determine whether the trial court properly concluded that the substitute plaintiff was the holder and owner of the promissory note executed by the decedent. Our review of the record leads us to conclude that the court's determination was legally and factually correct. At trial, the substitute plaintiff, an entity called OneWest Bank, N.A., produced the decedent's note, which had been endorsed in blank. The note was admitted into evidence during the testimony of Kala, who, at the time, was working for an entity called CIT Bank, N.A., and who previously had worked for the substitute plaintiff and the named plaintiff. Kala testified that the decedent's note currently was in the possession of "CIT Bank, N.A." According to Kala, "CIT Bank, N.A." was the name of the entity surviving the merger in which (1) CIT Bank merged *into* OneWest Bank, N.A., and (2) OneWest Bank, N.A., changed its name to "CIT Bank, N.A."

Accordingly, the evidence presented at trial revealed that the name of the entity holding the note, "CIT Bank, N.A.," did not match the substitute plaintiff's name, "OneWest Bank, N.A." As previously explained, this

discrepancy, which is the basis for the defendants' challenge to the substitute plaintiff's ownership of the note, was the result of a corporate merger during the pendency of the present action to which the substitute plaintiff was a party. Kala's uncontroverted testimony established that a bank called "CIT Bank" merged *into the substitute plaintiff*, which had been a national banking association prior to the merger. Thus, the type of entity surviving the merger also was a national banking association. Despite the uncertainty surrounding the substitute plaintiff's name and corporate identity caused by the merger, the trial court concluded that the substitute plaintiff was the holder and owner of the decedent's note.

Our comprehensive review of federal and state banking law and state corporate law convinces us that the merger and change of name involving the substitute plaintiff did not affect its status as holder and owner of the decedent's note. Under the relevant federal and state authority, the merger to which the substitute plaintiff was party had the following consequences.

First, the substitute plaintiff's corporate existence and identity continued in the resulting bank. See 12 U.S.C. § 215 (e) (2012); 12 C.F.R. § 5.33 (*l*) (1); General Statutes § 36a-125 (g). Second, the substitute plaintiff's assets, including the decedent's note, vested in the resulting bank by operation of law and without any deed or transfer. See 12 U.S.C. § 215 (e) (2012); 12 C.F.R. § 5.33 (*l*) (1); General Statutes §§ 34-197 (4) and 36a-125 (g); Model Business Corporation Act, supra, § 11.07 (a), p. 11-89; Unif. Limited Liability Company Act § 1026 (a), supra, 6C U.L.A. 189. Third, the present action, which was pending at the time of the merger's consummation, was not abated, discontinued, or otherwise affected. See 12 U.S.C. § 32 (2012); General Statutes §§ 36a-125 (g), 33-820 (a) (5), and 34-197 (6); Model Business Corporation Act, supra, § 11.07 (a), p. 11-89;

Unif. Limited Liability Company Act § 1026 (a) (7), comment, supra, 6C U.L.A. 191. Last, the substitute plaintiff could have substituted the resulting bank in this action, but it was not required to do so. See General Statutes §§ 36a-125 (g), 33-820 (a) (5), and 34-197 (6); Model Business Corporation Act, supra, § 11.07 (a), p. 11-89; Unif. Limited Liability Company Act § 1026 (a), supra, 6C U.L.A. 189. Thus, the substitute plaintiff's status as holder and owner of the note and this proceeding were not affected by the merger.

Similarly, the resulting bank's change of name affected neither this proceeding nor the substitute plaintiff's status as holder and owner of the note. As a matter of law, the change of name did not (1) create a new corporate entity; (2) alter the resulting bank's corporate identity, which merely was a continuation of the substitute plaintiff's corporate identity; (3) end the resulting bank's corporate existence, which merely was a continuation of the substitute plaintiff's corporate existence; or (4) divest the resulting bank of the substitute plaintiff's assets, which had vested in the resulting bank as a result of the merger. See 12 U.S.C. §§ 30, 32, and 215 (e) (2012); General Statutes § 36a-125 (g); *In re Worcester County National Bank*, supra, 263 Mass. 399–400.

Furthermore, the change of name did not abate, discontinue, or otherwise affect this proceeding, and it did not *require* the substitute plaintiff to substitute the resulting bank's new name in this proceeding. See 12 U.S.C. § 32 (2012); General Statutes §§ 33-803, 33-820 (a) (5), 34-197 (6), and 36a-125 (g); *In re Worcester County National Bank*, supra, 263 Mass. 399; Model Business Corporation Act, supra, § 10.09, p. 10-70.

In light of the foregoing, we conclude that the substitute plaintiff's production of the decedent's note endorsed in blank, like in any other foreclosure action,

created a rebuttable presumption that the substitute plaintiff was the note's owner. See *Deutsche Bank National Trust Co.* v. *Bliss*, supra, 159 Conn. App. 496. It was incumbent on the defendants then to marshal facts rebutting that presumption. See id. For the reasons already identified, the merger and change of name of which the defendants complain do not call into question the substitute plaintiff's ownership of the decedent's note.[4] Thus, on the basis of the record before us, we conclude that the substitute plaintiff established, and the defendants did not rebut, that the substitute plaintiff owned the note.

[4] The defendants also draw our attention to another aspect of the merger at issue that supposedly calls into question the substitute plaintiff's ownership of the note. Specifically, the defendants argue that the trial court erred in failing to address how the substitute plaintiff's ownership of the note was affected by the fact that the merger also involved the acquisition of the substitute plaintiff's parent company by CIT Bank's parent company. We fail to see how this aspect of the merger undermines the substitute plaintiff's ownership of the note.

There is nothing in the record suggesting that the merger caused the substitute plaintiff to relinquish its status as an entity legally separate from its parent company, whoever that might have been after the merger. *SFA Folio Collections, Inc.* v. *Bannon*, 217 Conn. 220, 232, 585 A.2d 666 ("it is a fundamental principle of corporate law that the parent corporation and its subsidiary are treated as separate and distinct legal persons even though the parent owns all the shares in the subsidiary"), cert. denied, 501 U.S. 1223, 111 S. Ct. 2839, 115 L. Ed. 2d 1008 (1991). Indeed, the record reveals that the substitute plaintiff merged with *another subsidiary*, CIT Bank, *not the parent company* of CIT Bank. Furthermore, as previously explained, notwithstanding the change of name, the substitute plaintiff survived the merger because CIT Bank merged *into* the substitute plaintiff. Regardless of whose subsidiary the substitute plaintiff became as a result of the merger, it remained "a separate legal entity possessing its own separate assets and liabilities." *Capital Parks, Inc.* v. *Southeastern Advertising & Sales Systems, Inc.*, 30 F.3d 627, 629 (5th Cir. 1994); see also *Wright* v. *JPMorgan Chase Bank, N.A.*, 169 So. 3d 251, 252 (Fla. App. 2015) ("[a]s a separate legal entity, a parent corporation . . . cannot exercise the rights of its subsidiary" [internal quotation marks omitted]). The rule that the assets of a parent company and its subsidiary are separate has obvious implications in the foreclosure context. That is, "ownership of the note by [a] subsidiary . . . does not give [a] parent corporation . . . the right to enforce the note . . . ." *Wright* v. *JPMorgan Chase Bank, N.A.*, supra, 252. Accordingly, we

In exercising plenary review over the defendants' claim, we conclude that the court's determination that the substitute plaintiff owns the decedent's note was factually and legally correct. Accordingly, we conclude that the court properly concluded that the substitute plaintiff established a prima facie case of foreclosure.

II

THE DEFENDANTS' SPECIAL DEFENSE AND COUNTERCLAIM

The defendants' second claim is that the trial court erroneously found that the defendants failed to meet their burden of proof with respect to their special defense and counterclaim sounding in breach of the implied covenant of good faith and fair dealing. Specifically, the defendants argue that a provision in the note executed by the decedent permitted the decedent's estate to avoid its obligation to repay the loan upon the decedent's death if it cooperated with the named plaintiff in selling the decedent's property. In light of that provision, the defendants contend, the covenant of good faith and fair dealing implied into the note required the named plaintiff, upon the decedent's death, to communicate with the executrix for the purpose of facilitating the sale of the decedent's property. Thus, according to the defendants, the named plaintiff breached the covenant of good faith and fair dealing when it initiated a foreclosure action and filed a lis pendens instead of communicating with the executrix to facilitate such a sale. We disagree.

The following additional facts and procedural history are necessary to our resolution of the defendants' second claim. In response to the named plaintiff's foreclosure complaint, the defendants filed a special defense

are convinced that the substitute plaintiff, not its parent's company, owns the note and is the proper plaintiff in this foreclosure action.

and a counterclaim alleging that the named plaintiff breached the covenant of good faith and fair dealing implied into the note. In particular, the defendants predicated their theory of the breach of the covenant of good faith and fair dealing on the provision in the note establishing the date on which repayment of the loan was due. That provision, § 6 of the note, provided in relevant part: "All amounts owed under this Agreement become due and payable . . . upon the first occurrence of a Maturity Event . . . unless [the decedent] default[s] . . . . [The decedent] must repay the outstanding balance in one large or 'balloon' payment upon the occurrence of a Maturity Event or, if sooner, [when the decedent defaults]."

Pursuant to that provision, the death of the decedent generally constituted a "Maturity Event" requiring immediate repayment of the loan. The provision also permitted, however, the named plaintiff and the decedent's estate to extend the repayment date upon the decedent's death: "If [the decedent's] administrator, devisees, estate, executors, heirs, legatees or personal representative . . . agree[s] with [the named plaintiff] in writing within thirty (30) days after the death of the [decedent] . . . then repayment . . . will not be due until six months after the death of the [decedent], or such other date as may be provided in that written agreement . . . ." In the event that the parties entered such a written agreement, the decedent's estate also would have to promise in that agreement "to cooperate fully with [the named plaintiff] in selling the Property, including listing the Property for sale, caring for the Property and making any necessary repairs to the Property prior to its sale . . . ."

With the relevant contractual provisions in mind, the thrust of the defendants' allegations in their special defense and counterclaim are as follows. Section 6 of the note provided that, upon the decedent's death, the

executrix had two options—immediately repay the loan or cooperate with the named plaintiff in selling the decedent's property. If the executrix elected the second option, repayment of the loan would not be due until six months after the decedent's death or on whatever date to which the parties agreed. The executrix elected to cooperate in selling the property. Specifically, she maintained the property, made repairs to the property, obtained appraisals of the property, and listed the property for sale with a real estate agency. Thus, since the executrix chose to cooperate with the named plaintiff in selling the property, the named plaintiff was not entitled to immediate repayment of the loan and it had to communicate with the executrix to facilitate the property's sale. Failing to communicate with the executrix for that purpose, and instead filing a foreclosure action and a lis pendens, the named plaintiff failed to act in good faith and deal fairly with the executrix.

At trial, the parties introduced evidence of various correspondences that they had with each other following the decedent's death on April 16, 2010. On April, 30, 2010, the named plaintiff sent the decedent's estate a letter informing it that the "loan is due and payable." On that same day, a telephone conversation, the contents of which were disputed by the parties, occurred between Ann Griffin and an employee of the named plaintiff. The testimony of the named plaintiff's employee, which was corroborated by tracking notes of the conversation maintained by the named plaintiff, indicated that she informed Ann Griffin that the estate had three months to repay the loan. Ann Griffin denied that the named plaintiff's employee informed her that the loan had to be repaid within three months. On May 6, 2010, the defendants' attorney sent the named plaintiff a copy of the decedent's death certificate and will. On June 23, 2010, the defendants' attorney sent the named plaintiff a copy of the probate court's decree, a probate

certificate reflecting Ann Griffin's appointment as executrix of the decedent's estate, and a copy of an agreement between the decedent's estate and a real estate agent to list and sell the decedent's property. On July 7, 2010, the executrix informed the named plaintiff that she had listed the decedent's property for sale. On July 21, 2010, the named plaintiff sent the executrix a Notice of Intent to Foreclose, requiring that she repay the loan within thirty days. On July 29, 2010, the defendants' attorney sent a letter to the named plaintiff responding to the named plaintiff's Notice of Intent to Foreclose. In that letter, the defendants' attorney warned that initiating foreclosure proceedings "would constitute a patent breach of the contractual obligations" because the loan agreement provided that "repayment of the loan is not required until six months after the death of [the decedent]," and the defendants "fully cooperated . . . as required by the [loan agreement]." On August 6 and September 8, 2010, the executrix again called the named plaintiff, informing it that the property still was on the market.

The trial court concluded that the defendants failed to meet their burden of proof with respect to their special defense and counterclaim sounding in breach of the implied covenant of good faith and fair dealing. Specifically, it reasoned that the defendants' "special defense and counterclaim . . . [sought] to enforce nonexistent obligations under the [note]." Moreover, it found that there was no written agreement between the named plaintiff and the defendants extending the repayment due date and that there was no meeting of the minds between the parties regarding a repayment extension.

With these additional facts in mind, we begin our analysis of the defendants' second claim by setting forth the relevant legal principles. "[W]ith any issue of contract interpretation, we begin with the language of the

contract." *Poole* v. *Waterbury*, 266 Conn. 68, 90, 831 A.2d 211 (2003). "Although ordinarily the question of contract interpretation, being a question of the parties' intent, is a question of fact . . . [w]here there is definitive contract language, the determination of what the parties intended by their contractual commitments is a question of law. . . . When only one interpretation of a contract is possible, the court need not look outside the four corners of the contract." (Citation omitted; internal quotation marks omitted.) Id., 88–89.

"[I]t is axiomatic that the . . . duty of good faith and fair dealing is a covenant implied into a contract or a contractual relationship. . . . In other words, every contract carries an implied duty requiring that neither party do anything that will injure the right of the other to receive the benefits of the agreement. . . . The covenant of good faith and fair dealing presupposes that the terms and purpose of the contract are agreed upon by the parties and that what is in dispute is a party's discretionary application or interpretation of a contract term. . . .

"To constitute a breach of [the implied covenant of good faith and fair dealing], the acts by which a defendant allegedly impedes the plaintiff's right to receive benefits that he or she reasonably expected to receive under the contract must have been taken in bad faith. . . . Bad faith in general implies both actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive. . . . Bad faith means more than mere negligence; it involves a dishonest purpose." (Internal quotation marks omitted.) *Capstone Building Corp.* v. *American Motorists Ins. Co.*, 308 Conn. 760, 794–95, 67 A.3d 961 (2013).

Critically, our Supreme Court has stated that the covenant of good faith and fair dealing "is not implicated by conduct that does not impair contractual rights." Id., 795. "In *Renaissance Management Co.* v. *Connecticut Housing Finance Authority*, [281 Conn. 227, 240, 915 A.2d 290 (2007)], for example, [the Supreme Court] held that the defendant housing authority's refusal to accept mortgage prepayments, in order to facilitate new loans for owners of low income housing, did not violate the covenant of good faith and fair dealing when the agency was not contractually obligated to accept prepayments. In so holding, we reasoned that [t]he covenant of good faith and fair dealing presupposes the terms and purpose of the contract are agreed upon by the parties and that what is in dispute is a party's discretionary application or interpretation of a contract term." (Emphasis omitted; internal quotation marks omitted.) *Capstone Building Corp.* v. *American Motorists Ins. Co.*, supra, 795.

Indeed, we previously have observed that "[m]ost courts decline to find a breach of the covenant apart from a *breach of an express contract term*. . . . Stated otherwise, the claim [that the covenant has been breached] must be tied to an alleged breach of a specific contract term . . . ." (Citation omitted; emphasis added; internal quotation marks omitted.) *Landry* v. *Spitz*, 102 Conn. App. 34, 47, 925 A.2d 334 (2007); see also *Forte* v. *Citicorp Mortgage, Inc.*, 90 Conn. App. 727, 733–34, 881 A.2d 386 (2005) (mortgagee did not violate covenant of good faith and fair dealing by failing to allow mortgagor to refinance "because the note and the mortgage [did] not guarantee or discuss any right to refinance"); *Southbridge Associates, LLC* v. *Garofalo*, 53 Conn. App. 11, 15, 17, 728 A.2d 1114 (covenant of good faith and fair dealing not implicated by mortgagee's refusal to sell note to mortgagor because "loan documents [did] not contain a provision requiring a

holder of the notes and mortgages to negotiate with or sell the notes to [mortgagor] prior to enforcing its foreclosure rights"), cert. denied, 249 Conn. 919, 733 A.2d 229 (1999).

In the present case, the defendants' theory of breach of the covenant of good faith and fair dealing is predicated on the provision in the note prescribing the date on which repayment of the loan was due. In construing that provision, the trial court concluded that it did not *obligate* the named plaintiff to extend the repayment due date. Our construction of that provision conforms to the trial court's construction.

Our plenary review of the relevant contractual language reveals the following. The provision first sets out a general rule: The death of the decedent is a maturity event that makes the loan immediately due and payable. It subsequently provides, however, an exception to that general rule: "*If* [the decedent's estate] . . . agree[s] *with* [*the named plaintiff*] *in writing* within thirty . . . days after the [decedent's] death . . . to cooperate fully with [the named plaintiff] in selling the Property . . . then repayment . . . will not be due until six months after the [decedent's] death . . . or such other date as may be provided *in that written agreement* . . . ." (Emphasis added.) Thus, the unambiguous language of the provision *permits*, but does not require, the parties to extend the repayment deadline *by entering into a separate written agreement*.

The defendants' interpretation of the repayment provision belies the plain, unambiguous meaning of the provision's language. The defendants mistakenly construe the provision as granting the executrix a right to unilaterally extend the repayment deadline and as imposing upon the named plaintiff an obligation to honor the executrix's unilateral decision to extend the deadline. The provision guarantees no such right to the

executrix and imposes no such obligation on the named plaintiff. The fact that the provision uses the terms "agree" and "agreement" with respect to an extension indicates that such an extension can be created only by the parties' *mutual assent*. See Black's Law Dictionary (10th Ed. 2014) (defining "agreement" as "manifestation of mutual assent by two or more persons" and "agree" as act of "exchang[ing] promises").

Thus, in the absence of a written agreement extending the deadline to allow the executrix to sell the decedent's home, the named plaintiff had no obligation to undertake any action facilitating the executrix's sale of the property, e.g., communicating with the executrix regarding the sale. As previously explained, the trial court found that there was no evidence that the parties entered into such a written agreement. After reviewing the record, we conclude that this finding is not clearly erroneous. Indeed, a review of all of the correspondences between the parties reveals that there is no document that fairly can be characterized as a written agreement wherein *both* parties agree to extend the repayment deadline. The record discloses that the executrix certainly represented to the named plaintiff that she was maintaining the property and planning on selling it, but it does not disclose that the named plaintiff agreed in writing to extend the repayment deadline.

In light of the foregoing, we conclude that the defendants' special defense and counterclaim sounding in breach of the covenant of good faith and fair dealing must fail. The special defense and counterclaim are not predicated on a breach of an express term in the note; *Landry* v. *Spitz*, supra, 102 Conn. App. 47; and the named plaintiff's conduct did not impair any contractual right of the decedent or her estate. *Capstone Building Corp.* v. *American Motorists Ins. Co.*, supra, 308 Conn. 795. That is, the note guaranteed no contractual right to an extension to sell the property, and, consequently,

the named plaintiff did not breach the terms of the note by never agreeing to such an extension.

Moreover, since it properly never agreed to an extension, the named plaintiff was not obligated to take any action facilitating the executrix's sale of the property pursuant to a *nonexistent* extension agreement. In doing so, the named plaintiff retained its right under the note to receive immediate repayment of the loan upon the decedent's death. Thus, by initiating foreclosure proceedings and filing a lis pendens, the named plaintiff merely was enforcing *its* contractual rights, not acting in bad faith to impair the rights of the decedent and her estate. Accordingly, we conclude that the trial court properly rejected the defendants' counterclaim and special defense based on a breach of the covenant of good faith and fair dealing.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* ELMER G.*
(AC 37596)

Alvord, Prescott and Pellegrino, Js.

Syllabus

Convicted of two counts each of the crimes of sexual assault in the second degree and risk of injury to a child, and of three counts of the crime of criminal violation of a restraining order in connection with his alleged sexual abuse of the victim, his daughter, the defendant appealed to this court. He claimed, inter alia, that the evidence was insufficient to support his conviction of one of the counts of sexual assault in the second degree, which was based on his alleged conduct in compelling the victim to engage in fellatio, and all three counts of criminal violation of a restraining order. *Held*:

*In accordance with our policy of protecting the privacy interests of the victims of sexual abuse and the crime of risk of injury to a child, we decline to use the defendant's full name or to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

1. The evidence was sufficient to support the defendant's conviction of sexual assault in the second degree, the state having presented sufficient evidence to prove that the defendant's penis entered into the victim's mouth to some degree, however slight, to establish penetration; on the basis of the victim's testimony, the jury reasonably could have found that the victim performed fellatio on the defendant and that during the course of doing so, the defendant's penis passed into her mouth, and, on the basis of its firsthand observation of the victim's conduct, demeanor and attitude when answering the prosecutor's questions, the jury reasonably could have construed against the defendant any ambiguity in the victim's testimony concerning penetration.
2. The defendant could not prevail on his claim that the evidence was insufficient to support his conviction of three counts of criminal violation of a restraining order because the state failed to prove that the ex parte and temporary restraining orders that were issued applied to the victim or that he knew the parameters of those orders: although the restraining orders identified the victim's mother as the protected person, they also stated that they protected the minor children of the protected person, namely, the victim and her siblings, the court specifically informed the defendant at a hearing that although he could have some contact with the children, that contact was limited to weekly, supervised visits, and, therefore, there was sufficient evidence to prove that the restraining orders prohibited the defendant from contacting the victim outside of their weekly, supervised visits; moreover, although the restraining orders were in English and the defendant spoke Spanish, there was sufficient evidence to prove that he knew the terms of the temporary restraining order and that it prohibited him from contacting the victim outside of the weekly, supervised visits, defense counsel having represented to the court that he was fluent in Spanish and had reviewed the terms of the orders with the defendant, and the court, through a Spanish interpreter, having advised the defendant that his contact with his children was limited, and even if there was an inadequate evidentiary basis for determining that the defendant knew the terms of the ex parte restraining order, the evidence nevertheless was sufficient to support his conviction, as two counts of the restraining order information pertained to conduct that occurred during the effective period of the temporary restraining order, not the ex parte restraining order, and although the conduct alleged in the third count encompassed the effective periods of both restraining orders, there was sufficient evidence presented at trial to prove that the defendant sent a letter to the victim and that she received the letter during the effective period of the temporary restraining order.
3. The defendant's claim that he was deprived of a fair trial as a result of prosecutorial improprieties was unavailing: in claiming that certain of the prosecutor's questions constituted improper attempts to bolster the victim's credibility, the defendant was attempting to transform an unpreserved evidentiary claim challenging the admission of testimony

into a constitutional claim of prosecutorial impropriety, and this court declined to review such an unpreserved evidentiary claim under the prosecutorial impropriety framework; moreover, in the context of his entire closing argument, the prosecutor, by arguing in detail why the substance of the victim's testimony, her demeanor on the witness stand and the sum of the evidence presented supported a finding that the victim was not fabricating the allegations, did not improperly vouch for the credibility of the victim but, rather, appealed to the jurors' common sense and invited them to draw a conclusion on the basis of a rational appraisal of the evidence, the prosecutor did not attempt to create sympathy for the victim and thereby inject extraneous matters into the trial when he asked the jurors to use their common sense to infer that the victim's testimony was more credible because of the hardships that she had endured as a result of bringing the allegations against the defendant, and the prosecutor's reference to statements about the sexual abuse that the victim made to her school guidance counselor, who did not testify at trial, was based on facts in evidence and was not improper, as the jury reasonably could have concluded, from the testimony of the victim and a detective to whom the victim gave a statement, that the victim had told her guidance counselor about the assault.

(*One judge concurring separately*)

Argued May 16—officially released September 12, 2017

Procedural History

Two substitution informations charging the defendant, in the first case, with three counts each of the crimes of sexual assault in the second degree and risk of injury to a child, and, in the second case, with three counts of the crime of criminal violation of a restraining order, brought to the Superior Court in the judicial district of Danbury, where the cases were consolidated and tried to the jury before *Pavia*, *J.*; verdicts and judgments of guilty of two counts each of sexual assault in the second degree and risk of injury to a child, and three counts of criminal violation of a restraining order, from which the defendant appealed to this court. *Affirmed.*

Pamela S. Nagy, assistant public defender, for the appellant (defendant).

Ronald G. Weller, senior assistant state's attorney, with whom, on the brief, were *Stephen J. Sedensky III*,

state's attorney, and *Warren C. Murray*, supervisory assistant state's attorney, for the appellee (state).

Opinion

ALVORD, J. The defendant, Elmer G., appeals from the judgments of conviction, after a jury trial, of two counts of sexual assault in the second degree in violation of General Statutes § 53a-71 (a) (1), two counts of risk of injury to a child in violation of General Statutes § 53-21 (a) (2), and three counts of criminal violation of a restraining order in violation of General Statutes § 53a-223b. On appeal, the defendant claims that (1) there was insufficient evidence presented at trial to convict him of one of the two counts of sexual assault in the second degree and all three counts of criminal violation of a restraining order, and (2) certain prosecutorial improprieties at trial deprived him of his right to a fair trial. We disagree and, accordingly, affirm the judgments of the trial court.

On the basis of the evidence presented at trial, the jury reasonably could have found the following facts. The victim is the defendant's daughter. The victim was born in Guatemala and lived there until July, 2010. In Guatemala, family members raised the victim and four of her siblings (Guatemalan siblings) while their parents, the defendant and A.N., and four younger siblings (American siblings) resided together in Connecticut.[1] The victim remembered meeting the defendant for the first time in 2007, when she was approximately ten years old. During that visit, the defendant began touching the victim in a sexually inappropriate manner. In the summer of 2010, the defendant arranged for two relatives to bring the victim, who was thirteen years old, to Connecticut illegally. Before she left Guatemala, the

[1] In addition to his nine children with A.N., the defendant has two additional biological children and one adopted child with another woman in Connecticut.

defendant told her "to get a shot for pregnancy, to avoid pregnancies . . . ." Approximately two weeks after arriving in Connecticut, the defendant resumed his sexual abuse of the victim and compelled her to engage in various sexual acts, including penile-vaginal intercourse and fellatio.

In June, 2011, the Department of Children and Families (department) conducted an investigation into allegations that the defendant was physically abusing his son, one of the victim's American brothers. In January, 2012, the department conducted another investigation into domestic violence after the victim's brother told someone at school that the defendant had brandished a knife at home, threatened his mother, A.N., and cut A.N.'s leg with the knife. At about this time, the defendant returned to Guatemala for a planned visit. Because the department was concerned about the well-being of A.N. and her children upon the defendant's return from Guatemala, it helped A.N. secure new housing for herself and her children.

When the defendant learned of these events from relatives, he called A.N. to discuss the situation. Because A.N. was fearful of the defendant coming to her new residence when he returned to Connecticut, on March 2, 2012, she applied for and was issued a two week, ex parte restraining order against the defendant, which protected herself and her children in Connecticut. On March 5, 2012, the defendant received in-hand marshal service of the ex parte restraining order. On March 15, 2012, after a hearing, A.N. was issued a six month restraining order (temporary restraining order) against the defendant, which protected herself and her children in Connecticut. While the ex parte restraining order and the temporary restraining order (collectively, restraining orders) were in effect, the defendant continued to communicate with the victim in a manner that violated these orders.

After the department became involved with the victim's family in January, 2012, it referred the family to Altagracia Lara, an intensive family preservation clinician with Catholic Charities. During her conversations with the victim, Lara became concerned about the victim's relationship with the defendant and called the victim's pastor, Lourdes Lopez, and encouraged her to talk to the victim. On April 8, 2012, Lopez noticed that the victim was crying after church services and approached her to determine what was wrong. When the victim was not being responsive, Lopez brought the victim into her office, encouraged the victim to tell her what was wrong, and reassured the victim that she could trust her. The victim told Lopez that the defendant was physically and sexually abusing her. Lopez drove the victim home so they could speak with A.N. about her disclosure, and she called Lara, who reported the allegation to the department. The next morning, April 9, 2012, A.N. and Lara brought the victim to the police station to report the sexual abuse. After providing a written statement to the police, the victim was examined by a forensic pediatrician. The pediatrician found "very deep notches" in the victim's hymen, which was consistent with vaginal penetration and, after a second examination, diagnosed the victim with a sexually transmitted infection.

The defendant was subsequently charged in two informations, one alleging, inter alia, that he sexually abused the victim, and one alleging that he violated the restraining orders. In the operative sexual assault information, the defendant was charged with three counts of sexual assault in the second degree and three counts of risk of injury to a child. In the operative restraining order information, the defendant was charged with three counts of criminal violation of a restraining order. After a joint trial on both informations, the jury found the defendant guilty of two counts

of sexual assault in the second degree, two counts of risk of injury to a child, and three counts of criminal violation of a restraining order. The jury found the defendant not guilty of one count of sexual assault in the second degree and one count of risk of injury to a child. The court sentenced the defendant to a total effective term of forty years of imprisonment, execution suspended after twenty-five years, followed by twenty-five years of probation. This appeal followed.

I

We begin with the defendant's claim that there was insufficient evidence presented at trial to convict him of one count of sexual assault in the second degree based on fellatio and three counts of criminal violation of a restraining order. We conclude that there was sufficient evidence presented at trial to support all of the defendant's convictions.

"The standard of review we apply to a claim of insufficient evidence is well established. 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. . . .

"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. . . .

"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. *Crespo*, 317 Conn. 1, 16–17, 115 A.3d 447 (2015).

A

The defendant first claims that there was insufficient evidence presented at trial to support his conviction of sexual assault in the second degree based on fellatio. In particular, the defendant argues that the state failed to prove that his penis penetrated the victim's mouth because the victim's testimony was too ambiguous concerning whether penetration occurred. We disagree.

The following additional facts are relevant to this claim. In count five of the sexual assault information, the state alleged, in relevant part, that "between July, 2010, and January, 2012, the [defendant] engaged in sexual intercourse with another person, [the victim], by having said person perform an act of fellatio upon him . . . ." With respect to the charge of sexual assault in the second degree that was based on fellatio, the state engaged in the following colloquy with the victim:

"[The Prosecutor]: And could you just indicate to the ladies and gentlemen of the jury what you remember?

"[The Victim]: He asked me to do oral sex.

"[The Prosecutor]: And what do you remember about that specific event, if you can just tell the ladies and gentlemen of the jury?

"[The Victim]: Always with threats.

"[The Prosecutor]: The actual incident itself, could you describe the incident itself, could you describe the incident?

"[The Victim]: He made me put my mouth in his penis.

"[The Prosecutor]: I'm sorry. Say that again?

"[The Victim]: He made me—he forced me to put my mouth on his penis.

"[The Prosecutor]: Okay. Did—did he actually penetrate your mouth?

"[The Victim]: No.

"[The Prosecutor]: What do you mean? How about your lips?

"[The Victim]: Yes."

"A person is guilty of sexual assault in the second degree when such person engages in sexual intercourse with another person and . . . [s]uch other person is thirteen years of age or older but under sixteen years of age and the actor is more than three years older than such other person . . . ." General Statutes § 53a-71 (a) (1). The definition of "sexual intercourse" includes "fellatio . . . between persons regardless of sex. . . ." General Statutes § 53a-65 (2). "Penetration, however slight, is sufficient to complete . . . fellatio and does not require emission of semen. . . ." General Statutes § 53a-65 (2). When analyzing our Penal Code's definition of penetration, our Supreme Court has observed: " 'Penetration' is defined as 'the act or process of penetrating,'

and 'penetrate' means 'to pass *into* or through' or 'to extend *into* the *interior* of . . . .' " (Emphasis in original.) *State* v. *Scott*, 256 Conn. 517, 532, 779 A.2d 702 (2001). Thus, to prove sexual assault based on fellatio, "it is necessary for the state to establish that the defendant intended to insert his penis *into* the victim's mouth." (Emphasis in original.) Id., 533. Sexual acts that do not involve the defendant's penis entering the victim's mouth, such as the act of licking a penis, are insufficient to prove penetration because licking "involves *extending* the tongue *from* the mouth, not *inserting* the penis *into* the mouth." (Emphasis in original.) Id.

We conclude that the state presented sufficient evidence to prove that the defendant's penis entered into the victim's mouth to some degree, however slight. The victim testified that the defendant "asked [her] to do oral sex," i.e., "he forced [her] to put [her] mouth on his penis," and she responded affirmatively when the prosecutor asked her if, in doing so, the defendant's penis penetrated her lips. On the basis of this testimony, the jury reasonably could have concluded that the victim performed fellatio on the defendant and that during the course of performing fellatio the defendant's penis passed into her mouth.

The defendant disagrees, arguing that the victim's testimony that his penis did not penetrate her mouth rendered her testimony concerning penetration too ambiguous as a matter of law to support his conviction. In particular, the defendant relies on *State* v. *Hicks*, 319 N.C. 84, 90, 352 S.E.2d 424 (1987). In that North Carolina Supreme Court case, the defendant was charged, inter alia, with a first degree sexual offense on the basis of his alleged anal penetration of the victim. Id., 89–90. At trial, the only evidence of anal penetration was the seven year old victim's testimony that the defendant " 'put his penis in the back of me.' " Id., 90.

Although a physical examination of the victim "revealed a broken hymen and a genital rash that appeared to be a yeast infection"; id., 86; the examining physician testified that he found no evidence of anal intercourse. Id., 90. The North Carolina Supreme Court concluded: "Given the ambiguity of [the victim's] testimony as to anal intercourse, and absent corroborative evidence (such as physiological or demonstrative evidence) that anal intercourse occurred, we hold that as a matter of law the evidence was insufficient to support a verdict . . . ." Id.

The defendant argues that this case is analogous to *Hicks* because the victim's negative response to the prosecutor's question about whether "he actually penetrate[d] your mouth" and affirmative response to the prosecutor's question—"How about your lips?"—rendered her testimony concerning penetration too ambiguous as a matter of law to support his conviction. We disagree. The victim, who was testifying with the assistance of a Spanish interpreter, might simply have misunderstood the prosecutor's first question, and her misapprehension might have been apparent in her demeanor, as observed by the jury, when responding to the prosecutor's questions. In reviewing sufficiency of the evidence claims, "[w]e do not sit as a thirteenth juror who may cast a vote against the verdict based upon our feeling that some doubt of guilt is shown by the cold printed record. . . . Rather, we must defer to the jury's assessment of the credibility of the witnesses based on its firsthand observation of their conduct, demeanor and attitude." (Internal quotation marks omitted.) *State* v. *Morgan*, 274 Conn. 790, 800, 877 A.2d 739 (2005). "It is . . . the absolute right and responsibility of the jury to weigh conflicting evidence and to determine the credibility of the witnesses. . . . [T]he [jury] can . . . decide what—all, none or some—of a witness' testimony to accept or reject. . . . A trier of

fact is free to reject testimony even if it is uncontradicted . . . and is equally free to reject part of the testimony of a witness even if other parts have been found credible." (Internal quotation marks omitted.) *State* v. *Francione*, 136 Conn. App. 302, 311–12, 46 A.3d 219, cert. denied, 306 Conn. 903, 52 A.3d 730 (2012). On the basis of its firsthand observation of the victim's conduct, demeanor, and attitude when answering the prosecutor's questions, the jury reasonably could have construed any ambiguity in the victim's testimony concerning penetration against the defendant.

In addition, the state elicited more details from the victim about fellatio than were elicited from the seven year old victim in *Hicks* about the alleged anal sex. Prior to responding to the prosecutor's questions about penetration, the victim testified that the defendant "asked me to do oral sex" and that "he forced me to put my mouth on his penis." The jurors, on the basis of their common sense and life experiences, could have reasonably inferred that the seventeen year old victim understood what oral sex under these circumstances ordinarily involves, i.e., a man's penis entering someone's mouth. The jurors also reasonably could have inferred that when she stated that she put her mouth *on* the defendant's penis—in direct response to the prosecutor's request for specific details about the time she performed oral sex on the defendant—that she did more than simply place the lips of her mouth against the defendant's penis. That is, she placed her mouth on the defendant's penis in a manner that caused his penis to enter into her mouth.

Accordingly, we conclude that there was sufficient evidence presented at trial to support the defendant's conviction of sexual assault in the second degree based on fellatio.

B

The defendant next claims that there was insufficient evidence presented at trial to support his conviction of three counts of criminal violation of a restraining order because the state failed to prove (1) that the restraining orders applied to the victim or (2) that he knew the parameters of the restraining orders. The defendant further claims that the state failed to prove that he sent the victim a letter while either of the restraining orders were in effect.

The following additional facts are relevant to these claims. The defendant was in Guatemala from January, 2012, into early March, 2012. On March 2, 2012, A.N. was issued an ex parte restraining order against the defendant in anticipation of his imminent return to the United States. The ex parte restraining order identified A.N. as the "Protected Person" and prohibited the defendant from, inter alia, contacting "the protected person in any manner, including by written, electronic or telephone contact . . . ." With respect to the couple's minor children, the ex parte restraining order (1) stated that "[t]his order also protects the protected person's minor children"; (2) awarded temporary custody of the couple's minor children to A.N.; and (3) denied the defendant visitation rights. The order listed the names and birthdays of the couple's five minor children residing in the United States, including the victim. The order also stated that a hearing was scheduled for March 15, 2012, at 9:30 a.m., the same day that the ex parte restraining order expired. The defendant received in-hand marshal service of the ex parte restraining order on March 5, 2012.

On March 15, 2012, A.N. was issued a temporary restraining order against the defendant after a hearing. The temporary restraining order identified the protected person as A.N. and prohibited the defendant,

inter alia, from contacting "the protected person in any manner, including by written, electronic or telephone contact . . . ." With respect to the couple's minor children, the temporary restraining order stated that (1) "[t]his order also protects the protected person's minor children," and (2) the defendant may have "[w]eekly supervised visits with [the] children."

The terms of the temporary restraining order were reviewed with the parties during the temporary restraining order hearing. Specifically, at the temporary restraining order hearing, the defendant was present and represented by Attorney Thomas Wolff. At the beginning of the hearing, the defendant consented to having an employee from the department serve as a Spanish language interpreter. Additionally, Wolff informed the court that he was fluent in Spanish and that he would ensure that his client, the defendant, understood what was being said during the proceeding. Wolff then stated that he and the victim advocate had reviewed the proposed temporary restraining order with the defendant and that they had answered all of the defendant's questions about the proposed order. Wolff represented that the defendant was no longer contesting the temporary restraining order. Thereafter, the court engaged in the following colloquy with the victim advocate:

"The Court: I told you what was going to be the tenor of my orders, and I asked you to see if you could work out particulars just so that I don't enter something impractical for the parties. Were you able to do that?

"The Victim Advocate: Yes, Your Honor.

"The Court: Okay. Why don't you tell me the essence of what you've worked out.

"The Victim Advocate: What we've agreed upon is that it would be considered a no contact restraining order.

"The Court: As far as mom is concerned?

"The Victim Advocate: As far as mom is concerned.

"The Court: Right.

"The Victim Advocate: *Contact with the kids* [*will*] *be limited to weekly supervised visits.*

"The Court: *Contact with minor children weekly, supervised.* Yes . . . .

"The Victim Advocate: He would like to visit them as soon as possible, so next week would be the only option available. I provided him with the number, and they both agreed on third party contact regarding the children be made through either [S.G.] or [C.T.]." (Emphasis added.)

After further discussion concerning the terms of the order, Wolff agreed with the terms of the order as summarized by the victim advocate. He also reminded the court that the order would pertain only to the defendant and A.N.'s children who resided in the United States, and the court agreed that it had no jurisdiction over the children in Guatemala. The court then instructed the defendant as follows: "So, with that in mind, I am going to order a temporary restraining order. Now, as to [A.N.] and the five children, sir, you are not to assault, threaten, abuse, harass, follow, interfere with or stalk. You are to stay away from the home of [A.N.], or wherever she's residing, and you're not to contact her in any manner. As far as the children are concerned, *you can have contact with your children, but for now we need it supervised. It's to be weekly and supervised.* . . . Any contact that you need to have with your wife, or that your wife needs to have with you, will go through a third party, either [S.G.] or [C.T.]." (Emphasis added.) Thereafter, the defendant began supervised visits with all of his American children except the victim, who refused to attend these visits. The victim testified that

the defendant persisted in his attempts to contact her, however, by phone and by sending her messages through her siblings.

In the operative restraining order information, the defendant was charged with three counts of criminal violation of a restraining order. Count one alleged, in relevant part: "[The defendant] contacted [the victim] in violation of a restraining order . . . . [The defendant] had knowledge of the restraining order and contacted [the victim] by text message on March 28, 2012 . . . ." Count two alleged, in relevant part: "[The defendant] contacted [the victim] in violation of a restraining order . . . . [The defendant] had knowledge of the restraining order and contacted [the victim] by text message on April 10, 2012 . . . ." Count three alleged, in relevant part: "[The defendant] contacted [the victim] in violation of a restraining order . . . . [The defendant] had knowledge of the restraining order and contacted [the victim] by letter between March 5, 2012, and April 10, 2012 . . . ."

At trial, the ex parte restraining order, the temporary restraining order, and a redacted portion of the transcript from the temporary restraining order hearing were entered into evidence. The victim testified that after the restraining orders were issued, the defendant continued to call her and send her text messages on a regular basis but she typically ignored his calls and deleted his text messages. She stated that she specifically recalled receiving a text message from the defendant in March, 2012, because she reported that text message to the police. The victim further explained that she eventually changed her cell phone number in order to avoid the defendant's attempts to contact her. In April, 2012, however, the victim stated that one of her brothers brought her a letter and a new cell phone from the defendant. The victim identified the handwriting in the letter as the defendant's handwriting. She also

stated that she received a text message from the defendant on the cell phone that he provided her on April 10, 2012.

Lara, the family's intensive family preservation clinician, also testified concerning the defendant's efforts to contact the victim while the temporary restraining order was in effect. Lara stated that on March 28, 2012, she went with the victim to the police station to report a text message the defendant sent the victim earlier that day.[2] In addition, Lara testified that when she went with the victim and A.N. to the police station to report the defendant's sexual abuse on April 9, 2012, they brought the letter that the defendant sent the victim, which she translated from Spanish into English at the police station.

In the translated letter, which was admitted into evidence, the defendant references watching the victim leave church and go to "Denis dinner" with her friends. The defendant warns the victim that her church friends are taking advantage of her. He repeatedly pleads with the victim to call him, text message him, or meet with him, and he references providing her with a new cell phone. The defendant also states: "I don't have any issues with you, all the nice things you used to say and now you are saying other things." The defendant proceeds to ask the victim "to forgive me, if you want to be in God's mercy forgive me, and if not go ahead and live with resentment."

To convict a defendant of criminal violation of a restraining order, the state must prove beyond a reasonable doubt that a restraining order was issued against the defendant and that the defendant, having knowledge

[2] The police officer who interviewed the victim also testified that the victim came to the police station on March 28, 2012, that she showed him the text message from the defendant, and that the text message at issue was time-stamped from earlier that day.

of the terms of the order, contacted a person in violation of the order. General Statutes § 53a-223b (a) (2) (B); *State* v. *Carter*, 151 Conn. App. 527, 534–35, 95 A.3d 1201 (2014), appeal dismissed, 320 Conn. 564, 132 A.3d 729 (2016) (certification improvidently granted). The defendant claims that the state failed to prove that the restraining orders applied to the victim, that he knew that the restraining orders prohibited him from contacting the victim, and that he sent the victim the letter during the effective periods of the restraining orders. We address each claim in turn.

The defendant first claims that the state failed to prove that the restraining orders applied to the victim. We disagree. Although the restraining orders identified A.N. as the protected person, they also stated that the order "protects the protected person's minor children," i.e., the victim and her American siblings. In addition, at the temporary restraining order hearing, the court specifically informed the defendant that, although he could have some contact with his children, that contact was going to be limited to weekly, supervised visits. Viewing this evidence as we must, in a light most favorable to sustaining the verdict, we conclude that there was sufficient evidence presented at trial to prove that the restraining orders prohibited the defendant from contacting the victim outside of their weekly, supervised visits.

The defendant next claims that there was no evidence presented at trial that he knew the terms of the restraining orders because they were in English and he speaks Spanish. We conclude that there is sufficient evidence to prove that the defendant knew the terms of the temporary restraining order, and, as a result, there was sufficient evidence presented at trial to support the defendant's conviction of three counts of criminal violation of a restraining order. At the temporary restraining order hearing, Wolff represented that he was

fluent in Spanish and that he and the victim advocate had reviewed the terms of the proposed order with the defendant and answered all of his questions concerning its terms. In addition, the court advised the defendant through the agreed upon Spanish language interpreter that his contact with his children would be limited to weekly, supervised visits for the time being. Finally, the fact that the defendant asked the victim's brother to bring her the letter and new cell phone rather than delivering these items to the victim himself suggests that the defendant knew that he could not have contact with the victim outside of their weekly, supervised visits, which the victim was refusing to attend. As a result, the jury reasonably could have concluded that the defendant knew that the temporary restraining order prohibited him from contacting the victim outside of their weekly, supervised visits.

It is unclear, however, whether there was sufficient evidence presented at trial to prove beyond a reasonable doubt that the defendant knew that the terms of the ex parte restraining order prohibited him from contacting the victim. On the one hand, the defendant appears to have understood the ex parte restraining order enough to know that he needed to attend the March 15, 2012 hearing; in fact, he brought counsel to that hearing. On the other hand, there was no evidence presented at trial that the defendant, a Guatemalan native, was able to read and write in English. Indeed, throughout the restraining order and criminal proceedings, the defendant required the assistance of a Spanish language interpreter. The defendant's text messages that were entered into evidence were all in Spanish, and the victim testified that the defendant only "knew a little bit" of English. In addition, there was no evidence presented at trial that Wolff or anyone else translated the terms of the ex parte restraining order for the defendant. Nevertheless, even if there were an inadequate

evidentiary basis for determining that the defendant knew the terms of the ex parte restraining order, we would still conclude that there was sufficient evidence presented at trial to support the defendant's conviction.

Counts one and two of the restraining order information pertain to conduct that occurred during the effective period of the temporary restraining order, not the ex parte restraining order. The conduct alleged in count three does encompass the effective periods of both restraining orders, but there was sufficient evidence presented at trial to prove that the defendant sent and the victim received the letter during the effective period of the temporary restraining order. First, the defendant sent the victim the letter through her brother. The defendant was not authorized to visit his children after the ex parte restraining order was issued and before the temporary restraining order authorized supervised visits. Therefore, the jury reasonably could have concluded that the victim's brother obtained the letter from the defendant during one of their supervised visits after the temporary restraining order was issued. In addition, the victim testified that she received the letter from her brother around April, 2012, and the jury could have reasonably inferred from that that the victim's brother, who lived with the victim, provided the victim with the letter shortly after receiving it.[3] It also was established at trial that, after the temporary restraining order was issued, the victim refused to attend her supervised visits with the defendant and changed her cell phone number to stop the defendant from contacting her. In his letter, the defendant repeatedly pleads with the victim to contact or meet with him, and, with the letter, the defendant sent the victim a new cell phone. The jury reasonably could have inferred that these pleas were in direct

[3] In April, 2012, the victim's American brothers were between the ages of five and ten, and lived in the same household as her. The victim did not identify which of her brothers delivered the letter.

response to the victim's refusal to answer his calls and text messages or to attend their supervised visits. Similarly, the jury reasonably could have inferred that the reason the defendant was providing the victim with a new cell phone was that he was presently unable to reach her by phone because he did not have her new cell phone number.

Mindful as we are that in determining the sufficiency of the evidence we must consider its cumulative effect and construe the evidence in the light most favorable to sustaining the verdict, we determine that there was sufficient evidence presented at trial to support the defendant's conviction of criminal violation of a restraining order.

II

We next address the defendant's claims of prosecutorial impropriety.[4] The defendant claims that the prosecutor improperly bolstered the credibility of two state's witnesses on direct examination and redirect examination. The defendant also claims that during closing argument the prosecutor improperly vouched for the credibility of the victim, attempted to create sympathy for the victim and thereby injected extraneous matters into the trial, and referred to facts not in evidence.

We review claims of prosecutorial impropriety under a two step analytical process. "We first examine whether prosecutorial impropriety occurred. . . . Second, if an impropriety exists, we then examine whether it deprived the defendant of his due process right to a fair trial. . . . In other words, an impropriety is an

[4] Although the defendant did not object to all of the improprieties claimed on appeal, they are nevertheless reviewable. "We previously have recognized that a claim of prosecutorial impropriety, even in the absence of an objection, has constitutional implications and requires a due process analysis . . . ." (Internal quotation marks omitted.) *State* v. *Gibson*, 302 Conn. 653, 658–59, 31 A.3d 346 (2011).

impropriety, regardless of its ultimate effect on the fairness of the trial. Whether that impropriety was harmful and thus caused or contributed to a due process violation involves a separate and distinct inquiry." (Citations omitted.) *State* v. *Fauci*, 282 Conn. 23, 32, 917 A.2d 978 (2007). Specifically, in analyzing harm, "we ask whether the prosecutor's conduct so infected the trial with unfairness as to make the resulting conviction a denial of due process. . . . We do not, however, focus only on the conduct of the state's attorney. The fairness of the trial and not the culpability of the prosecutor is the standard for analyzing the constitutional due process claims of criminal defendants alleging prosecutorial [impropriety]. . . .

"To determine whether . . . [an] impropriety deprived the defendant of a fair trial, we must examine it under each of the *Williams* factors.[5] . . . Specifically, we must determine whether (1) the impropriety was invited by the defense, (2) the impropriety was severe, (3) the impropriety was frequent, (4) the impropriety was central to a critical issue in the case, (5) the impropriety was cured or ameliorated by a specific jury charge, and (6) the state's case against the defendant was weak due to a lack of physical evidence." (Citations omitted; footnote added; internal quotation marks omitted.) Id., 50–51.

A

We begin with the defendant's claims that the prosecutor improperly bolstered the credibility of two state's witnesses on direct examination and redirect examination. The defendant claims that the prosecutor improperly asked the victim on direct examination, "are you making this stuff up," and, "[h]as anybody put you up to testifying the way that you have testified here today in court?" The defendant also claims that the prosecutor

[5] See *State* v. *Williams*, 204 Conn. 523, 540, 529 A.2d 653 (1987).

improperly asked Pastor Lopez on redirect examination whether she was telling the truth about why she talked to the victim about her relationship with the defendant on April 8, 2012. We conclude that these claims are evidentiary in nature and, therefore, unreviewable under the prosecutorial impropriety framework.

The following additional facts are relevant to these claims. The defense's theory of the case at trial was that the victim fabricated the sexual abuse allegations because A.N. had a new boyfriend and wanted to divorce the defendant, because the victim resented the defendant asking her to babysit her younger siblings and to perform household chores, and to obtain "U-Visas" for herself, A.N., and her Guatemalan siblings.[6] At the end of direct examination, the prosecutor engaged in the following colloquy with the victim:

"[The Prosecutor]: [*A*]*re you making this stuff up?*

"[The Victim]: No.

"[The Prosecutor]: *Has anybody put you up to testifying the way that you have testified here today in court?*

"[The Victim]: No.

"[The Prosecutor]: In your own words, why are you doing it?

"[The Victim]: Because I wanted to get out of the life that I had with him." (Emphasis added.)

The following day, Pastor Lopez testified about her relationship with the victim and the victim's disclosure that the defendant was sexually abusing her. On direct examination, Lopez testified that she planned to ask the victim about her home life prior to seeing the victim crying after church on April 8, 2012, because she and

[6] At trial, evidence was presented that "U-Visas" are visas that are available to victims of criminal activity and their qualifying family members.

her husband were troubled by the victim's behavior. Lopez explained that she specifically chose to approach the victim on April 8, 2012, "[b]ecause I realized that she was very weak, and I felt that that was the right time to talk to her and see if we could help her out." On cross-examination, defense counsel confronted Lopez concerning the reason she decided to talk to the victim about her father. In relevant part, defense counsel engaged in the following colloquy with Lopez:

"[Defense Counsel]: And you said this was a decision on your own [i.e., to talk to the victim about her father]?

"[Lopez]: Oh, you're just trying to confuse me.

"[Defense Counsel]: Do you know a woman named Altagracia—Altagracia Lara?

"[Lopez]: Yes. When she called me just to—asking me that, that was a confirmation of what I already observed based on [the victim's] attitude. But that didn't have anything to do with the church. . . .

"[Defense Counsel]: It was Altagracia Lara who asked you to ask [the victim] about if anything was happening with her dad. Isn't that true?

"[Lopez]: Yes.

"[Defense Counsel]: And that is, in fact, why you asked [the victim] about whether anything was happening with her father. True?

"[Lopez]: Yes."

On redirect examination, the prosecutor engaged in the following colloquy with Lopez concerning her decision to talk to the victim about her father:

"[The Prosecutor]: You were asked a series of questions about a conversation you had with Altagracia Lara. Do you recall those?

"[Lopez]: It was just a phone call.

"[The Prosecutor]: And Alta [Lara] asked you to do something, didn't she?

"[Lopez]: She only said to me that since I was closer to [the victim], probably I should ask her about what was going on with her and her dad.

"[The Prosecutor]: So, when you asked [the victim] about what was happening, in your mind, when you asked that question, you had planned to ask that question. Correct?

"[Lopez]: Yes.

"[The Prosecutor]: And you said earlier you chose that moment because you felt she was weak?

"[Lopez]: Yes.

"[The Prosecutor]: In addition to Altagracia [Lara] telling you to ask that question, did you have any intention on asking that question yourself?

"[Lopez]: Yes.

"[The Prosecutor]: *Is that the truth?*

"[Lopez]: Yes. . . .

"[The Prosecutor]: Were you considering asking [the victim] even before Alta [Lara] called you?

"[Lopez]: Yes.

"[The Prosecutor]: And why was—why were you intending to do that?

"[Lopez]: Because of the way [the victim] was behaving." (Emphasis added.)

Defense counsel did not object to any of those questions.

On appeal, the defendant claims that the three emphasized aforementioned questions constituted improper attempts by the prosecutor to bolster the credibility of his witnesses. "Evidence accrediting or supporting a witness's honesty or integrity is not admissible until after the witness's credibility has first been attacked." C. Tait & E. Prescott, Connecticut Evidence (5th Ed. 2014) § 6.27.2 (a), p. 380; accord *State* v. *Suckley*, 26 Conn. App. 65, 72, 597 A.2d 1285, cert. denied, 221 Conn. 901, 600 A.2d 1028 (1991); see also Conn. Code Evid. §§ 6-6 (a) and 6-11 (b). Once the credibility of a witness has been attacked on cross-examination, however, a party is permitted to rehabilitate that witness' credibility during redirect examination. Relying on these evidentiary principles and our holdings in *State* v. *Juan V.*, 109 Conn. App. 431, 441, 951 A.2d 651, cert. denied, 289 Conn. 931, 958 A.2d 161 (2008), and *State* v. *Albino*, 130 Conn. App. 745, 774–75, 24 A.3d 602 (2011), aff'd on other grounds, 312 Conn. 763, 97 A.3d 478 (2014), the defendant argues that the disputed questions rose to the level of prosecutorial impropriety. Whether these claims constitute unpreserved evidentiary claims or reviewable claims of prosecutorial impropriety bears scrutiny.

In *State* v. *Juan V.*, supra, 109 Conn. App. 440, the defendant claimed that the trial court abused its discretion when it allowed the prosecutor, over his objection, to ask the four year old victim— " 'Did you know you were supposed to tell the truth to [the forensic interviewer]?' "—because this question constituted an impermissible attempt by the state to bolster the victim's credibility before the defense put it at issue on cross-examination. Id., 440–41. We rejected the defendant's evidentiary claim, holding that "it is reasonable to conclude that the state was attempting to lay a proper foundation for admissibility of the videotape [of the

victim's forensic interview]. Shortly after the court permitted the question at issue, the state concluded its direct examination of [the victim] and informed the court that it was going to seek to introduce portions of the videotaped interview under the *Whelan*[7] and the past recollection recorded exceptions to the rule against hearsay. Both of these exceptions to the rule against hearsay require the moving party to show that the out-of-court statements were reliable. Consequently, it was reasonable for the court to conclude that the state's question was not intended to bolster the veracity of [the victim] but, instead, was part of the state's effort to lay the requisite foundation for admissibility of the videotaped interview."[8] (Footnotes altered.) Id.

In *State* v. *Albino*, supra, 130 Conn. App. 774–75, we addressed several claims of prosecutorial impropriety, including whether the prosecutor improperly bolstered the credibility of three state's witnesses by asking them if they were telling the truth or if they were prepared to tell the truth on direct examination and on redirect examination.[9] After reviewing the aforementioned evidentiary principles and our holding in *Juan V.*, we stated

[7] See *State* v. *Whelan*, 200 Conn. 743, 753, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S. Ct. 597, 93 L. Ed. 2d 598 (1986).

[8] Before asking the disputed question in *Juan V.*, the prosecutor asked the victim: "And the things that you told [the forensic interviewer], were they true?" (Internal quotation marks omitted.) *State* v. *Juan V.*, supra, 109 Conn. App. 439. The defendant objected, on the ground that the state was improperly attempting to bolster the victim's credibility, and the court agreed to strike the question and the victim's affirmative answer. Id. In dicta in *Juan V.*, we also observed that the disputed question of whether the victim understood that she was supposed to tell the truth during the interview was "readily distinguishable from the impermissible and previously stricken question of whether she was, in fact, telling the truth [during the interview]. The latter is an improper invasion of the province of the jury, as it seeks to bolster [the victim's] credibility before it has come under attack." Id., 441.

[9] It appears that the prosecutor asked these questions without objection from defense counsel. See *State* v. *Albino*, supra, 130 Conn. App. 774 n.6 (providing excerpts from the disputed examinations).

in *Albino*: "Our review of these questions leads us to the conclusion that the prosecutor improperly attempted to bolster the credibility of several of the state's witnesses." Id., 775. We did not analyze further the role that each witness played in that case or whether their credibility was, or was likely to be, attacked on cross-examination. Indeed, *Albino* contains no analysis of why the prosecutor's questions rose to the level of prosecutorial impropriety, even though the defendant did not object to them at trial and two of the disputed questions occurred on redirect examination.[10]

Because *Juan V.* was addressing an evidentiary claim, not a claim of prosecutorial impropriety, our reliance on that case in *Albino* is problematic. It is well established "that [a]lthough . . . unpreserved claims of prosecutorial impropriety are to be reviewed under the *Williams* factors, that rule does not pertain to mere evidentiary claims masquerading as constitutional violations. . . . Evidentiary claims do not merit review pursuant to *Golding* . . . because they are not of constitutional magnitude. [R]obing garden variety [evidentiary] claims . . . in the majestic garb of constitutional claims does not make such claims constitutional in nature. . . . Putting a constitutional tag on a nonconstitutional claim will no more change its essential character than calling a bull a cow will change its gender." (Internal quotation marks omitted.) *State* v. *Alex B.*, 150 Conn. App. 584, 589, 90 A.3d 1078, cert. denied, 312 Conn. 924, 94 A.3d 1202 (2014); accord *State* v. *Elias V.*, 168 Conn. App. 321, 341–44, 147 A.3d 1102, cert. denied, 323 Conn. 938, 151 A.3d 386 (2016); *State* v. *Devito*, 159 Conn. App. 560, 574, 124 A.3d 14, cert.

[10] Although we conducted a due process analysis of the prosecutorial improprieties that occurred at trial, the focus of our due process analysis was on the impact of the prosecutor's repeated and improper use of the words, "victim," "murder," and "murder weapon" during the evidentiary phase of trial and throughout closing argument. *State* v. *Albino*, supra, 130 Conn. App. 759.

denied, 319 Conn. 947, 125 A.3d 1012 (2015); *State* v. *Cromety*, 102 Conn. App. 425, 431, 925 A.2d 1133, cert. denied, 284 Conn. 912, 931 A.2d 932 (2007); see *State* v. *Rowe*, 279 Conn. 139, 151–52, 900 A.2d 1276 (2006). Stated simply, "a defendant may not transform an unpreserved evidentiary claim into one of prosecutorial impropriety to obtain review of that claim . . . ." (Internal quotation marks omitted.) *State* v. *Devito*, supra, 574.

Albino did not analyze whether or why the defendant's claim was not, in fact, an attempt to transform an unpreserved evidentiary claim into one of prosecutorial impropriety to obtain review of that claim. As a result, we conclude that *Albino* does not control because we conclude that the defendant in the present case is attempting to transform his unpreserved evidentiary claims, challenging the admission of testimony, into constitutional claims of prosecutorial impropriety. Consistent with our well established precedent, we decline to review such unpreserved evidentiary claims under the prosecutorial impropriety framework.[11]

B

We next address the defendant's claims that during closing argument the prosecutor improperly vouched for the credibility of the victim, attempted to create sympathy for the victim and thereby inject extraneous matters into the trial, and referred to facts not in evidence. We conclude that no improprieties occurred during closing argument.

[11] Even if we were to conclude that the disputed questions rose to the level of prosecutorial impropriety, considering these improprieties within the framework of the entire trial, and after giving due consideration to the factors identified in *State* v. *Williams*, 204 Conn. 523, 540, 529 A.2d 653 (1987), we would still conclude that the defendant was not denied a fair trial, and, therefore, reversal of the defendant's convictions would be unwarranted.

The following additional facts are relevant to these claims. During closing argument, both parties focused on the victim's credibility and motivation in making these allegations. In relevant part, the prosecutor made the following remarks during his opening argument, the emphasized portions of which the defendant now challenges: "So, I'm making the argument to you that the attacks on her credibility fall flat. And this creates a problem for the defense. What it does is sort of this, you have this original statement by her, this story which is a compelling story. And then you look to undermine it. And when you look to undermine it what you find out is that the attacks don't really hold much weight. So we engage this thought exercise assuming that he's—that she's dishonest but we find out she's really not based upon her analysis of the evidence.

"So the failure of those—the failure of—we can sort of rule out dishonesty. We've sort of done that. The fabrications—what I'm trying to say is that if we can rule out dishonesty and we can rule out all of those things this sort of strengthening her claim that this [is] a true claim, because that's the only thing that's left. There's an old problem-solving rule it's called Occam's razor, but what it says is, when you have competing hypotheses to try to explain something the simplest explanation is always the best. Why complicate it, why not take [the victim's] words at their face value? *She is saying that she is the victim of incest because she was the victim of incest.* It's not complicated, it's simple. It is just what it appears to be. We don't have to engage in these convoluted attacks on her credibility in order to establish the basic premise.

"Consider this, *if a young girl such as* [*the victim*] *wanted to fabricate a lie, is this the lie they would fabricate? I would submit to you that there is no young girl that wants to fabricate an untruth of this extent and this magnitude.* Incest is an issue of the utmost

(indiscernible), and I'd ask you to give it your due consideration; but don't complicate it, see it as simply as the evidence shows that [the victim] seat it—saw it. . . .

"Just in conclusion, ladies and gentlemen, I—remember what the judge says about credibility. *You* [*have*] *seen how a young woman who makes up a claim of sexual assault kind of has to come through and run the legal gauntlet.* Even the members of her family can testify against her. But I think the evidence shows you that [the victim's] testimony has endured, it's remained intact in the core. When the defense was questioning [the victim], and this is important, when they questioned her, and they cross-examined her for [a] long time, they asked her not one question about the events in this house. You got to ask yourself, why did they do that?

"I would submit to you and I would construct the argument that they knew to stay away from that information because that information is radioactive. Once they got into that information, you would see her break down and that's why they stayed away from it. So, what do you do? You do what they did, you attack on the periphery, death by a thousand cuts, death by a thousand suggestions. *I would submit to you that these assaults were real.* I think the core of her testimony remains intact. She told the story [to] Lourdes Lopez. She told it to her mom. She told it to the police. She told it to Dr. Veronica [Ron-Priola, a forensic pediatrician]. *She told it to Julia Jiminez* [the victim's school guidance counselor], and she told it to this jury.

"*Remember what she's had to do. She's went through counseling. She's went through medical exams. She's went through interviews. She's went through court appearances. And she's gone through cross-examination. And after all that, I am arguing to you that this evidence shows she's not fabricating these things. Defense focused on all of the supposed reasons she's*

fabricating these claims except for one. There's one they left out. And [*the victim*] *was asked about this, she was asked,* [*the victim*]*, she was sort of asked, you know, why are you saying these things about your father. And here's what she said, 'I had to get out of the life I had with him.' If you were in her position would you feel the same way? This is exactly what a person would say that was in this position.*

"I want to just thank you for your attention. And I, remember—I want you to sort of fix in your mind the image of [the victim] and the type of person she was, and the credibility she ejected as a human being. And I want you to fix that in your mind and think about what the judge has to say about the credibility. *And while you're reflecting on her as a young lady, I want you to consider her honesty as it appears through her testimony* and the way she testified." (Emphasis added.)

Defense counsel began his closing remarks by returning to his theme that the victim fabricated these allegations because A.N. had a new boyfriend and wanted to divorce the defendant, because the victim resented the defendant asking her to babysit her younger siblings and to perform household chores, and to obtain U-Visas for herself, A.N., and her Guatemalan siblings. Defense counsel also argued extensively about why, on the basis of the evidence presented at trial, the jury should not credit the testimony of the victim and other state's witnesses. During rebuttal argument, the prosecutor briefly responded to various points made by defense counsel. He then concluded his argument by making the following remark, the emphasized portion of which the defendant now challenges: "Fabrication, this is how it works; once again, we get right back to the ultimate issue is, are they [the victim and A.N.] telling the truth or are they fabricating this? *I would argue to you that they were truthful when they testified*

here. Thank you, ladies and gentlemen." (Emphasis added.)

"[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. *Elias V.*, supra, 168 Conn. App. 347. The defendant raises various challenges to the emphasized portions of the prosecutor's closing argument. We address each category of impropriety in turn.

1

The defendant first claims that the prosecutor improperly vouched for the credibility of the victim during closing argument by making the following remarks: (1) the victim "is saying that she is the victim of incest because she was the victim of incest"; (2) "I would submit to you these assaults were real"; (3) "[a]nd while you're reflecting on her testimony as a young lady, I want you to consider her honesty as it appears through her testimony and the way she testified"; and (4) "I would argue to you that they [the victim and A.N.] were truthful when they testified here." The state responds that when these remarks are read in the context of the prosecutor's and defense counsel's entire closing arguments, they are not improper. We agree with the state.

"The parameters of the term zealous advocacy are also well settled. The prosecutor may not express his own opinion, directly or indirectly, as to the credibility

of the witnesses. . . . Nor should a prosecutor express his opinion, directly or indirectly, as to the guilt of the defendant. . . . Such expressions of personal opinion are a form of unsworn and unchecked testimony, and are particularly difficult for the jury to ignore because of the prosecutor's special position. . . . Moreover, because the jury is aware that the prosecutor has prepared and presented the case and consequently, may have access to matters not in evidence . . . it is likely to infer that such matters precipitated the personal opinions." (Internal quotation marks omitted.) *State* v. *Warholic*, 278 Conn. 354, 363, 897 A.2d 569 (2006).

"We have held, however, that [i]t is not improper for the prosecutor to comment [on] the evidence presented at trial and to argue the inferences that the jurors might draw therefrom . . . . We must give the jury the credit of being able to differentiate between argument on the evidence and attempts to persuade them to draw inferences in the state's favor, on one hand, and improper unsworn testimony, with the suggestion of secret knowledge, on the other hand." (Internal quotation marks omitted.) *State* v. *Fauci*, supra, 282 Conn. 36. Our Supreme Court previously "has concluded that the state may argue that its witnesses testified credibly, if such an argument is based on reasonable inferences drawn from the evidence. . . . Specifically, the state may argue that a witness has no motive to lie. . . . In addition, jurors, in deciding cases, are not expected to lay aside matters of common knowledge or their own observations and experiences, but rather, to apply them to the facts as presented to arrive at an intelligent and correct conclusion. . . . Therefore, it is entirely proper for counsel to appeal to a jury's common sense in closing remarks." (Citations omitted; internal quotation marks omitted.) *State* v. *Warholic*, supra, 278 Conn. 365.

Having reviewed the disputed remarks in the context of the prosecutor's entire closing argument, we conclude that the prosecutor did not improperly express his

personal belief or opinion that the victim was credible. During his closing argument, the prosecutor argued in detail why the substance of the victim's testimony, her demeanor on the witness stand, and the sum of the evidence presented at trial supported a finding that the victim was not fabricating these allegations as the defendant suggested. In making these arguments, the prosecutor repeatedly admonished the jurors to listen carefully to the court's instruction on credibility and to rely on their common sense, their life experiences, and the evidence presented at trial when making their credibility determinations. When the disputed remarks are viewed in the context of the prosecutor's entire argument, therefore, it becomes clear that the prosecutor was not expressing his personal opinion about the victim's credibility with these remarks but rather was appealing to the jurors' common sense and inviting them to draw the conclusion on the basis of a rational appraisal of the evidence presented at trial that the victim was not fabricating these allegations.

Accordingly, we conclude that the prosecutor did not express an improper personal opinion concerning the victim's credibility.

2

The defendant next challenges three remarks that the prosecutor made during his opening argument that he claims were improper attempts to create sympathy for the victim and thereby inject extraneous matters into the trial. The state responds that "the prosecutor's comments constituted a fair argument to the jury that they should reject the defendant's challenge to the victim's credibility," not to generate sympathy for the victim. We agree with the state.

Our Supreme Court "has recognized on numerous occasions that [a] prosecutor may not appeal to the emotions, passions and prejudices of the jurors. . . .

[S]uch appeals should be avoided because they have the effect of diverting the [jurors'] attention from their duty to decide the case on the evidence. . . . When the prosecutor appeals to emotions, he invites the jury to decide the case, not according to a rational appraisal of the evidence, but on the basis of powerful and irrelevant factors which are likely to skew that appraisal." (Internal quotation marks omitted.) *State* v. *Long*, 293 Conn. 31, 54, 975 A.2d 660 (2009). An improper appeal to the jurors' emotions can take the form of "a plea for sympathy for the victim . . . ." Id., 59.

The defendant first challenges two remarks by the prosecutor that, when assessing the credibility of the victim and her motivation for testifying, the jury should consider the hardships the victim has had to endure since making her allegations.[12] We conclude that these remarks did not constitute an invitation by the prosecutor for the jurors to decide the case on the basis of their emotions. Instead, the prosecutor was asking the jurors to use their common sense to infer that the victim's testimony was more credible because of the hardships she has endured as a result of bringing and maintaining her allegations against the defendant, such

[12] First, the defendant challenges the prosecutor's remark: "Remember what she's had to do. She's went through counseling. She's went through medical exams. She's went through interviews. She's went through court appearances. And she's gone through cross-examination. And after all that, I am arguing to you that this evidence shows she's not fabricating these things. Defense focused on all of the supposed reasons she's fabricating these claims except for one. There's one they left out. And [the victim] was asked about this, she was asked, [the victim], she was sort of asked, you know, why are you saying these things about your father. And here's what she said, I had to get out of the life I had with him. If you were in her position, would you feel the same way? This is exactly what a person would say that was in this position."

Second, the defendant challenges the prosecutor's argument: "You [have] seen how a young woman who makes up a claim of sexual assault kind of has to come through and run the legal gauntlet. Even the members of her family can testify against her."

as invasive medical examinations and embarrassing conversations with strangers and family members about being sexually assaulted on several occasions by her father. Our Supreme Court has repeatedly recognized that this type of argument is permissible and does not constitute an improper appeal to emotions. E.g., *State* v. *Felix R.*, 319 Conn. 1, 10, 124 A.3d 871 (2015) ("statements wherein the prosecutor recounted the difficulties that the victim faced during the investigation and trial" not improper appeals to emotions); *State* v. *Long*, supra, 293 Conn. 48 ("the comments in which the prosecutor asked the jurors to use their common sense to infer that [the victim's] complaint was more credible because it required her to undergo an uncomfortable medical examination and embarrassing conversations with both her family members and complete strangers, also were proper"); *State* v. *Warholic*, supra, 278 Conn. 377–78 (asking jurors, particularly male jurors, to assess victim's credibility by recognizing emotional difficulty victim subjected himself to by making allegations of sexual assault not improper appeal to emotions), citing *State* v. *Rose*, 353 N.W.2d 565, 568 (Minn. App. 1984) (asking jurors to assess credibility of thirteen year old victim by identifying with difficulty she must have experienced in testifying about sexual assault allegations not improper appeal to emotions), review denied (Minn. September 12, 1984).

The defendant also contends that the prosecutor injected extraneous matters into the trial by remarking that "if a young girl such as [the victim] wanted to fabricate a lie, is this the lie they would fabricate? I would submit to you that there is no young girl that wants to fabricate an untruth of this extent and this magnitude." This remark was clearly designed to rebut defense counsel's various theories for why the victim was fabricating her allegations of sexual assault by calling upon the jury to apply its common sense and life

experiences when evaluating the victim's credibility. See, e.g., *State* v. *Warholic*, supra, 278 Conn. 365–66 (asking "jury to consider, in its assessment of [the victim's] credibility, why he would put himself in a position to have to explain to his father that he had performed oral sex on an adult male" constituted proper appeal to jurors' common sense and experience in evaluating victim's testimony). Accordingly, we conclude that this remark was not improper.

3

Finally, the defendant claims that during closing argument the prosecutor improperly referred to facts not in evidence when he stated that the victim told her school guidance counselor, Jiminez, that the defendant sexually abused her because Jiminez never testified at trial.[13] We conclude that the prosecutor did not improperly refer to facts not in evidence during closing argument.

The following additional facts are relevant to this claim. Although Jiminez never testified at trial, she was mentioned during the testimony of the victim and Detective Rachael Halas. In particular, during cross-examination, defense counsel engaged in the following colloquy with the victim concerning her allegations of sexual abuse:

[13] The defendant appears to argue that the prosecutor's reference to the victim making reports of sexual abuse to Jiminez and Dr. Ron-Priola were improper because it violated the court's constancy of accusation order. We first observe that the court never precluded the admission of constancy of accusation testimony; it merely ordered that such testimony had to be admitted in accordance with our rules on the admissibility of constancy evidence. In addition, the state never offered any constancy evidence. Nonetheless, to the extent that the defendant attempts to raise a separate claim of prosecutorial impropriety on the basis of the prosecutor's purported violation of an evidentiary ruling by the court, we conclude that such a claim is inadequately briefed. See *State* v. *Buhl*, 321 Conn. 688, 724, 138 A.3d 868 (2016).

"[Defense Counsel]: And then on April 8 [2012] is when you reported the allegations to your pastor [Lopez]?

"[The Victim]: Yes.

"[Defense Counsel]: And on April 9th you reported to a social worker named Altagracia Lara?

"[The Victim]: Yes.

"[Defense Counsel]: And that same day, April 9th, you provided the police with that notebook handwritten statement? Correct?

"[The Victim]: Yes.

"[Defense Counsel]: And then on April 13th you go back, and you provide another verbal statement to the police?

"[The Victim]: I don't remember that too well.

"[Defense Counsel]: *Do you remember when your guidance counselor from Danbury High School brought you back to Detective Halas and went over some additional questions*?

"[The Victim]: *Yes*.

"[Defense Counsel]: *And do you remember talking to Mrs. Jiminez, the guidance counselor, in Spanish on that day*?

"[The Victim]: *Yes*.

"[Defense Counsel]: *About the allegations*?

"[The Victim]: *Yes*." (Emphasis added.)

The victim explained later in her testimony that the reason she had to provide an additional statement on April 13, 2012, was so that the police had more details about her allegations against the defendant.

On direct examination, the prosecutor discussed Jiminez with Detective Halas. In particular, Halas testified that she believed that another officer fluent in Spanish and "Julia Jiminez, from Danbury High School," who is "a school counselor" and fluent in Spanish, assisted Halas in taking A.N.'s statement because Halas was not fluent in Spanish. Halas also confirmed on direct and cross-examination that she asked the victim to provide a supplemental statement on April 13, 2012. She explained that she interviewed the victim through a translator and, with the assistance of that translator, wrote the victim's supplemental statement in English. Halas stated that this second interview lasted approximately one and one-half hours.

It is axiomatic that in closing argument parties are permitted to rely on the evidence presented at trial and to argue the reasonable inferences that the jurors might draw therefrom. *State* v. *O'Brien-Veader*, 318 Conn. 514, 547, 122 A.3d 555 (2015) ("[i]t is not improper for the prosecutor to comment upon the evidence presented at trial and to argue the inferences that the jurors might draw therefrom" [internal quotation marks omitted]); *State* v. *Camacho*, 282 Conn. 328, 377, 924 A.2d 99 ("[a]s a general matter a prosecutor may use any evidence properly admitted at trial"), cert. denied, 552 U.S. 956, 128 S. Ct. 388, 169 L. Ed. 2d 273 (2007); *State* v. *Arline*, 223 Conn. 52, 58, 612 A.2d 755 (1992) ("[c]ounsel may comment upon facts properly in evidence and upon reasonable inferences to be drawn from them" [emphasis omitted; internal quotation marks omitted]). Although Jiminez did not testify at trial, it was established through the testimony of the victim and Halas that Jiminez was present for, and indeed served as a translator during, the victim's one and one-half hour interview with Halas on April 13, 2012, during which she provided the police with more details about the defendant's sexual abuse. From that testimony, the jury

reasonably could have concluded that the victim "told her story" to Jiminez. Therefore, the prosecutor's reference to Jiminez was based on facts in evidence and not improper.

The judgments are affirmed.

In this opinion PELLEGRINO, J., concurred.

PRESCOTT, J., concurring. I agree with and join parts I A and II of the majority opinion. I also agree with the result reached in part I B of the majority opinion and generally with the reasoning contained therein, particularly in light of the specific manner in which the defendant, Elmer G., on appeal has challenged his conviction of three counts of criminal violation of a restraining order. I write separately to set forth my concerns regarding the ambiguity created by the court, *Reynolds*, *J.*, when it issued the restraining order of which the defendant was convicted of violating, and what I see as an anomaly in our jurisprudence regarding the degree of clarity that such orders must have in order to convict a defendant of violating them.

Although the majority opinion adequately sets forth the facts that support the defendant's conviction of the three counts of violating a restraining order, I nevertheless reiterate some of those facts that I believe deserve emphasis. First, both the ex parte restraining order and the later temporary restraining order identified A.N. as the "protected person" and expressly prohibited the defendant from contacting "the protected person" in any manner, including having no "written, electronic or telephone contact . . . ." Although the orders also awarded temporary custody of the defendant's minor children to A.N., denied the defendant regular visitation rights, and provided that the orders "also [protect] the protected person's minor children," neither *expressly*

indicates that the prohibitions against written, electronic, and telephone contact with the protected person were to apply equally to the minor children, although such an interpretation certainly is not an unreasonable one.

To the extent that the written temporary restraining order was clear, the March 15, 2012 hearing on that order created, in my view, uncertainty as to its scope. The order, as described on the record, again identified the protected person as A.N. There is no ambiguity that the defendant was prohibited from contacting "the protected person in any manner, including by written, electronic or telephone contact . . . ." A review of the transcript of the hearing further demonstrates that the court and the parties were in agreement that the order would constitute a no contact restraining order *with respect to A.N.* The precise scope of the order with respect to the children, however, was far less clear.

The court engaged in the following colloquy with the victim advocate concerning the parties' understandings as to the scope of the restraining order:

"The Court: I told you what was going to be the tenor of my orders, and I asked you to see if you could work out particulars just so that I don't enter something impractical for the parties. Were you able to do that?

"The Victim Advocate: Yes, Your Honor.

"The Court: Okay. Why don't you tell me the essence of what you've worked out.

"The Victim Advocate: What we've agreed upon is that it would be considered a no contact restraining order.

"The Court: As far as mom is concerned?

"The Victim Advocate: As far as mom is concerned.

"The Court: Right.

"The Victim Advocate: Contact with the kids [will] be limited to weekly supervised visits.

"The Court: Contact with minor children weekly, supervised. Yes . . . ."

Everyone agreed that in-person contact with the children was to be strictly limited to weekly supervised visits. There was, however, no clear statement by the court or the parties with respect to whether other, non-in-person contact with the couple's minor children, such as letters, telephone calls, e-mails or text messages, was also prohibited by the terms of the order. Although the court explicitly instructed the defendant and ensured his understanding that he was not to contact A.N. "in any manner," that same language was never used with respect to contact with the children.

The court's instructions to the defendant provided as follows: "So, with that in mind, I am going to order a temporary restraining order. Now, as to [A.N.] and the five children, sir, you are not to assault, threaten, abuse, harass, follow, interfere with or stalk. You are to stay away from the home of [A.N.], or wherever she's residing, and you're not to contact *her* in any manner. As far as the children are concerned, you can have contact with your children, but for now we need it supervised. It's to be weekly and supervised. . . . Any contact that you need to have with your wife, or that your wife needs to have with you, will go through a third party, either [S.G.] or [C.T.]."

The defendant was charged with criminally violating the restraining order in three ways. First, he allegedly contacted the victim via a text message on March 28, 2012. Second, he allegedly contacted the victim by text message on April 10, 2012. Third, he allegedly contacted the victim by way of a written letter sometime "between

March 5, 2012, and April 10, 2012 . . . .'' Although the record establishes that the victim received the letter in April, 2012, there is no direct evidence as to when the letter was written or given to the victim's sibling for delivery. In other words, the third violation may have occurred when the ex parte restraining order was in effect.

In order to convict the defendant of violating the restraining order, the state was obligated to prove beyond a reasonable doubt that (1) a restraining order was issued against the defendant, (2) the defendant had knowledge of the terms of the order, (3) the order protected the victim in this case, (4) the order prevented the defendant from calling or writing to her, and (5) the defendant wrote to and called the victim while the order was in effect. General Statutes § 53a-223b (a) (1) (A) and (2) (B); *State* v. *Carter*, 151 Conn. App. 527, 534–35, 95 A.3d 1201 (2014), appeal dismissed, 320 Conn. 564, 132 A.3d 729 (2016) (certification improvidently granted).

The court gave the jury the following instructions with respect to determining whether the defendant had knowledge of the terms of the restraining order: ''The [relevant] statute . . . reads in pertinent part as follows: a person is guilty of criminal violation of a restraining order when a restraining order has been issued against such person and such person having knowledge of the terms of the order contacts the person in violation of the order.

''For you to find the defendant guilty of this charge, the state must prove the following elements beyond a reasonable doubt: the first element is that a restraining order has been issued against the defendant. The second element is that the defendant had knowledge of the terms of the order. This means that the defendant must know of the conditions of the order. A person

acts knowingly with respect to conduct which a circumstance described by a statute defining an offense when he is aware that his conduct is of such a nature or that such circumstance exists. An act is done knowingly if done voluntarily and purposefully, and not because of mistake, inadvertence or accident.

"Ordinarily, knowledge can be established only through an inference from other proven facts and circumstances. The inference may be drawn if the circumstances are such that a reasonable person of honest intention in this situation of the defendant would have concluded that the defendant had knowledge of the terms of the order. The determinative question is whether the circumstances in the particular case form a basis for a sound inference as to the knowledge of the defendant in the transaction under inquiry.

"The third element is that the defendant violated a condition of the restraining order in that he contacted a person in violation of the order.

"In summary, the state must prove beyond a reasonable doubt that a restraining order had been issued against the defendant and that the defendant violated a condition of that order."

The defendant claims on appeal that there was insufficient evidence to prove beyond a reasonable doubt that he violated either the ex parte restraining order or the temporary restraining order issued to him on March 15, 2012. Specifically, he contends that the evidence was insufficient because it did not establish beyond a reasonable doubt that the orders protected the victim in this case, and that, even if they did, he knew that they prevented him from text messaging or writing to the victim while in effect.

Because the defendant chose to raise his challenge to his conviction in this manner, we are constrained by

the well-worn standard for reviewing the sufficiency of the evidence. Under that standard, which requires us to construe all of the evidence in a light most favorable to sustaining the verdict; *State* v. *Carter*, supra, 151 Conn. App. 533; I agree with the majority that there was sufficient evidence, including the reasonable inferences to be drawn therefrom, to establish that the defendant believed that the temporary restraining order prevented him from text messaging or writing to the victim. In other words, even if the temporary restraining order and the court's explanation of it, taken together, created an ambiguity regarding whether the defendant was permitted to text message or write to the victim while the order was in effect, the jury appears to have resolved that ambiguity in favor of the state by concluding that he had had knowledge of the terms of the order.

In several related contexts, however, we require that a court order be sufficiently clear and unambiguous as a matter of law before a litigant is held responsible for violating it. This requirement is particularly important in circumstances in which the conduct that is said to violate the order is otherwise noncriminal conduct. See *State* v. *Boseman*, 87 Conn. App. 9, 17, 863 A.2d 704 (2004), cert. denied, 272 Conn. 923, 867 A.2d 838 (2005).

For example, motions for contempt in civil cases may not be granted unless the court order the litigant allegedly violated is clear and unambiguous as a matter of law. As our Supreme Court has stated: "[O]ur analysis of a judgment of contempt consists of two levels of inquiry. First, we must resolve the threshold question of whether the underlying order constituted a court order that was sufficiently clear and unambiguous so as to support a judgment of contempt. See *Blaydes* v. *Blaydes*, 187 Conn. 464, 467, 446 A.2d 825 (1982) (civil contempt may be founded only upon clear and unambiguous court order); *Dowd* v. *Dowd*, 96 Conn. App. 75, 79, 899 A.2d 76 (first inquiry on review of judgment of

contempt for failure to abide by separation agreement was whether agreement was clear and unambiguous), cert. denied, 280 Conn. 907, 907 A.2d 89 (2006). This is a legal inquiry subject to de novo review. See *In re Jeffrey C.*, [261 Conn. 189, 194–97, 802 A.2d 772 (2002)] (conducting, but not specifying, de novo review of whether failure to follow supplemental orders could result in finding of contempt); *Baldwin* v. *Miles*, 58 Conn. 496, 501–502, 20 A. 618 (1890) (conducting, but not specifying, de novo review of whether injunction's language was too vague and indefinite so as to support judgment of contempt); see also *Perez* v. *Danbury Hospital*, 347 F.3d 419, 423–25 (2d Cir. 2003) (reviewing de novo district court's determination that consent decree on which judgment of contempt was based was clear and unambiguous)." *In re Leah S.*, 284 Conn. 685, 693, 935 A.2d 1021 (2007).

We have imposed similar requirements in violation of probation proceedings. In *State* v. *Boseman*, supra, 87 Conn. App. 16, this court held that conditions of probation, as a matter of law, must be sufficiently clear so as to provide a probationer fair warning of the conduct proscribed: "The claim that the defendant lacked sufficient notice concerning this condition presents a question of law over which our review is plenary. . . . [T]he interpretation of a probation condition and whether it affords a probationer fair warning of the conduct proscribed thereby are essentially matters of law and, therefore, give rise to de novo review on appeal." (Citation omitted; internal quotation marks omitted.) Id.

In *Boseman*, the defendant was charged with violating his probation on the ground that, by dropping off a new lunch box for his son at the home where the child lived with his mother, he had violated a condition of probation that he have no contact with the mother of his child. This court emphasized in *Boseman* that

"[w]here noncriminal activity forms the basis for the revocation of probation, due process requires specific knowledge that the behavior involved is proscribed. [W]here the proscribed acts are not criminal, due process mandates that the [probationer] cannot be subject[ed] to a forfeiture of his liberty for those acts unless he is given prior fair warning." (Internal quotation marks omitted.) Id., 17.

Finally, criminal statutes themselves must "provide fair notice of the conduct to which they pertain . . . . [W]e insist that laws give [a] person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. . . . [A] law forbidding or requiring conduct in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates due process of law." (Citation omitted; internal quotation marks omitted.) *State* v. *Indrisano*, 228 Conn. 795, 802, 640 A.2d 986 (1994). Whether a criminal statute is unconstitutionally vague is a question of law to be decided by the court. *State* v. *Winot*, 294 Conn. 753, 758–59, 988 A.2d 188 (2010).

My research, however, has not revealed any authorities that discuss, with respect to prosecutions for violations of a protective order or a temporary restraining order, whether such an order must have the same degree of clarity and unambiguity that must exist for the enforcement of civil orders, probation conditions and our criminal statutes. Instead, this issue seems to be addressed solely as a factual question for the finder of fact as part of its determination regarding whether the defendant had "knowledge of the terms of the order . . . ." General Statutes § 53a-223b (a) (2).

In sum, I have serious concerns regarding whether the temporary restraining order in this case, as explained to the defendant by the court, was sufficiently clear and unambiguous as a matter of law that the defendant should suffer a loss of liberty for violating it. This is particularly true in light of the fact that the conduct underlying his conviction was otherwise noncriminal conduct but for the existence of the restraining order. Indeed, if this same order was sought to be enforced by way of civil contempt in a family matter, I would have serious doubt about whether it would pass the threshold showing that it was clear and unambiguous under the particular circumstances of this case.

Nevertheless, I conclude that the defendant's conviction must be affirmed for several reasons. First, the defendant never moved to dismiss the counts of the information on the ground that they were insufficient as a matter of law and thus should not be submitted to the jury for its consideration. See Practice Book § 41-8. Second, the defendant has not argued on appeal that, as a matter of law, the restraining orders lacked sufficient clarity and thus could not be enforced under the circumstances of this case. Finally, the defendant did not submit any particular request to charge that would seek even a jury determination regarding the question of whether the restraining orders were sufficiently clear and unambiguous. Instead, the defendant was content to have the jury decide, as a factual question, whether he had knowledge of the terms of the orders.

The jury resolved this question in favor of the state. On appeal, the defendant challenges the sufficiency of the evidence as it relates to that question. In light of our standard of review, I am obligated to affirm the defendant's conviction on those counts.

A BETTER WAY WHOLESALE AUTOS, INC. *v.* KIARA RODRIGUEZ ET AL. (AC 38839)

Mullins, Beach and Harper, Js.

Syllabus

The plaintiff sought to vacate an arbitration award rendered in favor of the defendant R and the defendant finance company in connection with the plaintiff's sale of a used vehicle to R, who had initiated the arbitration process seeking rescission of her purchase and sale agreement, as well as her financing agreement, for an alleged warranty violation. During the pendency of the arbitration process, R settled with the finance company, which subsequently brought cross claims against the plaintiff for, inter alia, alleged violations of their dealer agreement. The arbitrator entered an award in favor of the defendants, ordering, inter alia, that the finance company return the vehicle to the plaintiff. Thereafter, the trial court denied the plaintiff's application to vacate the arbitration award and granted the defendants' motions to confirm the award. From the judgment rendered thereon, the plaintiff appealed to this court. The plaintiff claimed, inter alia, that the parties' submission to the arbitrator was restricted, and that because title to the vehicle was never at issue, the arbitrator exceeded his authority in ordering the finance company to return the vehicle to it. *Held*:

1. The trial court properly denied the plaintiff's application to vacate the arbitration award: given the plain language of the arbitration agreement, which provided that any claim or dispute between R and the plaintiff arising out of the purchase or condition of the vehicle was to be settled by way of binding arbitration, and given that arbitration was commenced pursuant to that agreement, which contained no restrictions on the issues that could be decided by the arbitrator, the submission to the arbitrator was unrestricted and, thus, possession and title to the vehicle was at issue from the onset of the arbitration and was within the scope of the submission; moreover, the arbitrator, by ordering the return of the vehicle to the plaintiff, did not exceed his power by rendering an award that was beyond the scope of the unrestricted submission, as the submission permitted the arbitrator to decide any claim or dispute between R and the plaintiff arising out of the purchase or condition of the vehicle, or arising out of the contract or resulting relationship, R specifically requested on the form submitted demanding the arbitration that the contract be cancelled and that the purchase of the vehicle be revoked, and, therefore, it would be nonsensical to conclude that the arbitrator had the authority to cancel the contract and to revoke the purchase but that he did not have the authority to decide what happened to the vehicle that was the subject of the purchase and the contract.

2. The plaintiff's claim that the trial court improperly ordered it to pay the attorney's fees and costs of the finance company in defending the arbitrator's award was not reviewable, the plaintiff having failed to brief the claim adequately.

Argued April 17—officially released September 12, 2017

Procedural History

Application to vacate an arbitration award, brought to the Superior Court in the judicial district of Waterbury, where the matter was removed to the United States District Court for the District of Connecticut; thereafter, the matter was remanded to state court, where the defendants filed separate motions to confirm the award; subsequently, the matter was tried to the court, *M. Taylor*, *J.*; judgment granting the motions to confirm and denying the application to vacate, from which the plaintiff appealed to this court; thereafter, the court granted the named defendant's motion for attorney's fees. *Affirmed.*

Kenneth A. Votre, for the appellant (plaintiff).

Daniel S. Blinn, for the appellee (named defendant).

Proloy K. Das, with whom was *Melissa A. Federico*, for the appellee (defendant American Credit Acceptance, LLC).

Opinion

MULLINS, J. The plaintiff, A Better Way Wholesale Autos, Inc. (A Better Way), appeals from the judgment of the trial court denying its application to vacate an arbitration award and granting the motions to confirm the arbitration award filed by the defendants, Kiara Rodriguez and American Credit Acceptance, LLC (finance company). A Better Way also appeals from the court's judgment modifying the arbitration award to include attorney's fees and costs to the finance company for its defense of the award in the Superior Court. On appeal, A Better Way claims that the trial court

erred in (1) denying its application to vacate the award on the ground that the arbitrator's decision was beyond the scope of the parties' submission, and (2) ordering A Better Way to pay the attorney's fees and costs of the finance company in defending the arbitrator's award in the Superior Court.[1] We affirm the judgment of the trial court.

The following facts, as set forth by the trial court in its January 14, 2016 memorandum of decision and procedural history inform our review. "The underlying arbitration between the parties arises from the sale of a used 2006 Toyota Scion [vehicle] by A Better Way to . . . Rodriguez. In this dispute, Rodriguez included [the finance company] as a defendant in its role as the assignee of the financing agreement in her retail installment sales contract with A Better Way.

"Rodriguez initiated the arbitration process by a written demand, dated June 4, 2014, for damages and the rescission of her purchase and sale agreement with A

[1] Specifically, A Better Way briefs six claims and subclaims on appeal, many of which overlap. It claims that the trial court erred: (1) "in concluding that the arbitrator's award was not 'so imperfectly executed' and that a mutual, final, and definite award was made by the arbitrator"; (1) (a) "the arbitrator's ruling on the repossession of the automobile is outside the scope of the submission"; (1) (b) "there is no applicable arbitration clause between plaintiff [A Better Way] and [the] defendant [finance company]"; (2) "as a matter of law in concluding that the return of . . . [the] vehicle was implicit in [Rodriquez'] demands on [A Better Way]"; (3) "as a matter of law in concluding that the arbitrator's decision regarding [the] disposition of the vehicle was within the parties' submission agreement"; (3) (a) "the submission in this case is not unrestricted and may be reviewed for errors of law and the arbitrator made errors of law and the trial court adopted them"; (3) (b) "the award must be vacated under [General Statutes §] 52-418"; (4) "in finding that the arbitrator's order to return [Rodriguez'] vehicle to [A Better Way] was a rational disposition of the property as it was outside the scope of the submission"; (5) "in finding that the dealer agreement between [A Better Way] and [the finance company] provided for attorney's fees and costs incurred by [the finance company]"; and (6) "in concluding that [A Better Way] shall pay [attorney's] fees and costs to [the finance company]." To avoid duplicative analysis, we have combined these claims.

Better Way, as well as her financing agreement with [the finance company]. In the demand letter, she [stated that she] 'revokes her acceptance of the vehicle,' asserting, inter alia, a warranty violation. Importantly, the vehicle was left in the possession of A Better Way. She previously had written to A Better Way on March 21, 2014, stating that '[i]f you are unable to fix my car, then I would like to cancel the sale . . . .' [Rodriguez'] letters were submitted, along with her demand for arbitration, to the American Arbitration Association on June 27, 2014. . . . In accordance with the agreement of the parties, the arbitration was conducted by the American Arbitration Association, with Attorney John R. Downey serving as arbitrator." (Citation omitted.)

"Rodriguez made her submission to arbitration pursuant to an arbitration clause with A Better Way which, in relevant part, provides: 'Any claim or dispute, whether in contract, tort, statute or otherwise (including the interpretation and scope of this . . . clause, and the arbitrability of the claim or dispute), between you and us or our employees, agents, successors or assigns, which arises out of or relates to your credit application, purchase or condition of this vehicle, this contract or any resulting transaction or relationship (including any such relationship with third parties who do not sign this contract) shall, at your or our election, be resolved by neutral, binding arbitration and not by a court action.' . . . Although the arbitration submission was made by Rodriguez pursuant to her retail installment sales contract with A Better Way, she included [the finance company] as a defendant because it was specifically identified in her contract as the assignee of the financing agreement."[2] (Citation omitted.)

[2] The arbitration clause in A Better Way's agreement with Rodriguez also provides in relevant part: "Any arbitration under this Arbitration Clause shall be governed by the Federal Arbitration Act (9 U.S.C. § 1 et seq.) and not by any state law concerning arbitration. . . . Any court having jurisdiction may enter judgment on the arbitrator's award."

"During the pendency of the arbitration process, Rodriguez settled with [the finance company] and, based upon alleged violations of their Dealer Agreement, [the finance company] brought cross claims against A Better Way.[3] . . . In its proposed findings and orders filed after the conclusion of the arbitration hearing, [the finance company] proposed the return of the [vehicle] to A Better Way. . . .

"On May 12, 2015, Attorney Downey entered an Award of Arbitrator in favor of Rodriguez and [the finance company]. . . . The award provides for the following payments to Rodriguez: (1) [Truth in Lending Act, 15 U.S.C. § 1601 et seq. (TILA)] statutory damages of $1000; (2) [Connecticut Unfair Trade Practices Act, General Statutes § 42-110a et seq. (CUTPA)] damages of $1000; (3) punitive damages of $2000; and (4) attorney's

The choice of law provision in the agreement provides that the agreement shall be governed by federal and Connecticut law.

[3] The arbitration clause of the dealer agreement between A Better Way and the finance company, specifically section 25 of that agreement, provides in relevant part: "The parties agree that . . . if any dispute . . . occurs arising out of . . . this Agreement, at the request of a party, the parties shall resolve such dispute by binding arbitration administered and conducted under the then current Commercial Arbitration Rules of the American Arbitration Association and Title 9 of the United States Code. The parties agree that once one party has elected to arbitrate, binding arbitration is the exclusive method for resolving any and all disputes and that by agreeing to this arbitration provision and entering into this Agreement, the parties are waiving their right to a jury trial. . . . The arbitrator shall apply and be bound by governing state or federal law when making an award. . . . A party may enter judgment on the award in any court of competent jurisdiction. . . . The prevailing party in any arbitration proceeding, or judicial action to enforce an arbitration determination or award, shall be entitled to reimbursement from the other party for costs, filing fees, reasonable pretrial, trial and appellate attorney's fees . . . . The parties acknowledge and agree that the Federal Arbitration Act (9 U.S.C. § 1 et seq.) shall govern any arbitration under this arbitration provision and Agreement. All arbitration hearings shall take place in Spartanburg, South Carolina, unless the parties mutually agree in writing on a different location to hold any such arbitration hearing."

The choice of law provision in the dealer agreement provides that the agreement shall be governed by the law of South Carolina.

fees of $12,500. The award also provides for the following [as to the finance company]: (1) arbitration costs of $3700; (2) legal fees of $25,000; and (3) [the finance company's] return of the [vehicle] to A Better Way." (Citations omitted; footnotes altered.)

A Better Way, specifically pursuant to General Statutes § 52-418,[4] filed an application to vacate the portion of the award that ordered the finance company to return the vehicle to A Better Way on the grounds that "[t]he parties to the arbitration did not state that possession of the vehicle was at issue in any of the pleadings before the arbitrator . . . [and] the submission did not include a determination of the ownership of the vehicle." A Better Way contended that the arbitrator, therefore, had exceeded his powers in determining ownership of the vehicle.[5] Rodriguez and the finance company each filed a motion to confirm the award; the finance company moved pursuant to the Federal Arbitration Act, 9 U.S.C. § 9, and Rodriguez moved pursuant to General Statutes § 52-417. The finance company also requested that it be reimbursed $28,245.92

[4] We note that the arbitration clause in the dealer agreement and in A Better Way's agreement with Rodriguez each specify that any arbitration proceeding shall be governed by the Federal Arbitration Act, 9 U.S.C. § 1 et seq. Rodriguez' agreement also specifically states that "[a]ny arbitration under this Arbitration Clause shall be governed by the Federal Arbitration Act (9 U.S.C. § 1 et seq.) and not by any state law concerning arbitration."

On appeal, A Better Way continues to argue the merits of its § 52-418 application to vacate an arbitration award specifically under Connecticut law, without reference to the Federal Arbitration Act or any federal case law. It also does not rely on the law of South Carolina in any of its claims or arguments. See footnote 3 of this opinion. Furthermore, it makes no claim of error concerning the trial court's application of Connecticut law in this case. Accordingly, we assume, without deciding, that Connecticut law applies to this matter. Any claim to the contrary has been waived by A Better Way.

[5] In its application to vacate the award, A Better Way specifically requested: "Wherefore, [A Better Way] respectfully requests the court to vacate the arbitration award due to the arbitrator exceeding his powers *in awarding title of the subject vehicle to American Credit Acceptance*." (Emphasis added.) This appears to be a clerical error, which the parties and the court apparently chose to disregard.

for the legal fees and costs it incurred in defending the award in the Superior Court in light of A Better Way's application to vacate. At the time of the hearing, the finance company also argued that it anticipated incurring an additional $3840 in fees and costs for the hearing.

In a January 14, 2016 memorandum of decision, the court granted the motions to confirm the award, and it denied the application to vacate. Specifically, the court determined that title and possession of the vehicle always were at issue, and that this was evidenced by Rodriguez' original letter in which she sought to rescind the entire agreement. The court, therefore, found no basis upon which to vacate the award. As to the finance company's request for the payment of the attorney's fees it incurred in defending the award, the court found that, pursuant to section 25 of the dealer agreement and General Statutes § 52-419 (b),[6] the finance company was entitled to such reimbursement. The court then ordered that A Better Way reimburse the finance company $621.92 in costs and expenses and $20,000 in attorney's fees within thirty days. This appeal followed.[7] Additional facts will be set forth as necessary.

[6] Section 52-419 provides: "(a) Upon the application of any party to an arbitration, the superior court for the judicial district in which one of the parties resides or, in a controversy concerning land, for the judicial district in which the land is situated, or, when the court is not in session, any judge thereof, shall make an order modifying or correcting the award if it finds any of the following defects: (1) If there has been an evident material miscalculation of figures or an evident material mistake in the description of any person, thing or property referred to in the award; (2) if the arbitrators have awarded upon a matter not submitted to them unless it is a matter not affecting the merits of the decision upon the matters submitted; or (3) if the award is imperfect in matter of form not affecting the merits of the controversy.

"(b) The order shall modify and correct the award, so as to effect the intent thereof and promote justice between the parties."

[7] After A Better Way filed its appeal, Rodriguez filed a motion for counsel fees, which the court granted in the amount of $6500. A Better Way has not amended its appeal to include a challenge to this award.

I

A Better Way claims that the trial court erred in denying its application to vacate the award on the ground that the arbitrator's decision was beyond the scope of the parties' submission in that the title to the vehicle was not within that submission. It further contends that the award should be considered in a way similar to the mosaic rule[8] in a family matter and that it must be vacated in its entirety because the order that the finance company return the vehicle to A Better Way was outside the scope of the parties' submission. Accordingly, A Better Way argues, the court improperly denied its application to vacate the award. The finance company and Rodriguez argue that the court made a proper determination that the submission was unrestricted and that possession and title to the vehicle always was at issue, and, therefore, the arbitrator acted within his authority in determining who should take possession of the vehicle.[9] We agree that the court properly denied A Better Way's application to vacate the award of the arbitrator.

[8] See *Marshall* v. *Marshall*, 119 Conn. App. 120, 135–36, 988 A.2d 314 (2010) (explaining the mosaic rule).

[9] The finance company also argues that we should dismiss the challenge to the portion of the award regarding the return of the vehicle because A Better Way is not aggrieved by it; it actually inures to A Better Way's benefit. During oral argument before this court, the finance company also stated that, if A Better Way does not want to accept title to the vehicle, it is willing to keep the vehicle and that it has no objection to the vehicle being returned to the finance company.

"Two broad yet distinct categories of aggrievement exist, classical and statutory. . . . Classical aggrievement requires a two part showing. First, a party must demonstrate a specific, personal and legal interest in the subject matter of the decision, as opposed to a general interest that all members of the community share. . . . Second, the party must also show that the . . . decision has specially and injuriously affected that specific personal or legal interest. . . . Aggrievement does not demand certainty, only the possibility of an adverse effect on a legally protected interest. . . .

"Statutory aggrievement exists by legislative fiat, not by judicial analysis of the particular facts of the case. In other words, in cases of statutory aggrievement, particular legislation grants standing to those who claim injury

We set forth the standard of review. "Arbitration is a creature of contract and the parties themselves, by the terms of their submission, define the powers of the arbitrators. . . . The authority of an arbitrator to adjudicate the controversy is limited only if the agreement contains *express language* restricting the breadth of issues, reserving explicit rights, or conditioning the award on court review. In the absence of any such qualifications, an agreement is unrestricted." (Citation omitted; emphasis added; internal quotation marks omitted.) *LaFrance* v. *Lodmell*, 322 Conn. 828, 850–51, 144 A.3d 373 (2016).

"When the scope of the submission is unrestricted, the resulting award is not subject to de novo review even for errors of law so long as the award conforms to the submission. . . . Because we favor arbitration as a means of settling private disputes, we undertake judicial review of arbitration awards in a manner designed to minimize interference with an efficient and economical system of alternative dispute resolution. . . . *Garrity* v. *McCaskey*, 223 Conn. 1, 4–5, 612 A.2d

to an interest protected by that legislation." (Internal quotation marks omitted.) *Mayer* v. *Historic District Commission*, 325 Conn. 765, 772–73, 160 A.3d 333 (2017).

We conclude that A Better Way has standing to appeal. Section 52-418 provides in relevant part: "(a) *Upon the application of any party to an arbitration*, the superior court for the judicial district in which one of the parties resides or, in a controversy concerning land, for the judicial district in which the land is situated or, when the court is not in session, any judge thereof, shall make an order vacating the award if it finds any of the following defects: . . . (4) if the arbitrators have exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made." (Emphasis added.)

There can be no dispute that A Better Way was a party to the arbitration and that it applied to vacate the award on the ground that the arbitrator exceeded his powers. Additionally, A Better Way argues that taking possession of the car is a burden on it, which, arguably, establishes "the possibility of an adverse effect on a legally protected interest" required for classical aggrievement. *Mayer* v. *Historic District Commission*, supra, 325 Conn. 773. Accordingly, A Better Way has standing to raise this issue on appeal.

742 (1992). Accordingly, the factual findings of the arbitrator . . . are not subject to judicial review. *Burr Road Operating Co. II, LLC* v. *New England Health Care Employees Union, District 1199*, 316 Conn. 618, 638, 114 A.3d 144 (2015); see also *Harty* v. *Cantor Fitzgerald & Co.*, 275 Conn. 72, 80, 881 A.2d 139 (2005) ([u]nder an unrestricted submission, the arbitrators' decision is considered final and binding; thus the courts will not review the evidence considered by the arbitrators nor will they review the award for errors of law or fact . . .)." (Internal quotation marks omitted.) *Norwalk Police Union, Local 1727, Council 15, AFSCME, AFL-CIO* v. *Norwalk*, 324 Conn. 618, 628–29, 153 A.3d 1280 (2017).

"The resulting award can be reviewed, however, to determine if the award conforms to the submission. . . . *Garrity* v. *McCaskey*, supra, 223 Conn. 4. Such a limited scope of judicial review is warranted given the fact that the parties voluntarily bargained for the decision of the arbitrator and, as such, the parties are presumed to have assumed the risks of and waived objections to that decision. . . . It is clear that a party cannot object to an award which accomplishes precisely what the [arbitrator was] authorized to do merely because that party dislikes the results. . . . *American Universal Ins. Co.* v. *DelGreco*, [205 Conn. 178, 186–87, 530 A.2d 171 (1987)]. The significance, therefore, of a determination that an arbitration submission was unrestricted or restricted is not to determine what [the arbitrator is] obligated to do, but to determine the scope of judicial review of what [he or she has] done. Put another way, the *submission* tells [the arbitrator] what [he or she is] obligated to decide. The determination by a court of whether the submission was restricted or unrestricted tells the court what its scope of review is regarding the [arbitrator's] decision." (Emphasis in

original; internal quotation marks omitted.) *LaFrance* v. *Lodmell*, supra, 322 Conn. 851–52.

Here, A Better Way asserts that the parties' submission to the arbitrator was restricted. It argues that, in the case of the finance company and A Better Way, there was no submission at all. It further argues that Rodriguez, in her submission, also never requested that the vehicle be ordered returned to A Better Way. We conclude that the parties' submission was unrestricted and that the title to the vehicle was at play from the onset, with Rodriguez' request that the purchase be cancelled.

The arbitration clause in the finance agreement between Rodriguez and A Better Way, which was assigned from A Better Way to the finance company, provided in relevant part: "*Any claim or dispute*, whether in contract, tort, statute or otherwise (including the interpretation and scope of this Arbitration Clause, and the arbitrability of the claim or dispute), between you and us or our employees, agents, successors or assigns, which arises out of or relates to your credit application, purchase or condition of this vehicle, this contract or any resulting transaction or relationship . . . shall, at your or our election, be resolved by neutral, binding arbitration and not by a court action. . . .

"The arbitrator shall apply governing substantive law in making an award. The arbitration hearing shall be conducted in the federal district in which you reside unless the Creditor-Seller is a party to the claim or dispute, in which case the hearing will be held in the federal district where this contract was executed. . . . Each party shall be responsible for its own attorney, expert and other fees, unless awarded by the arbitrator under applicable law. . . .

"You and we retain any rights to self-help remedies, such as repossession. You and we retain the right to

seek remedies in small claims court for disputes or claims within that court's jurisdiction, unless such action is transferred, removed or appealed to a different court. Neither you nor we waive the right to arbitrate by using self-help remedies or filing suit. Any court having jurisdiction may enter judgment on the arbitrator's award. This Arbitration Clause shall survive any termination, payoff or transfer of this contract." (Emphasis added.)

Under the plain language of the arbitration agreement, *any claim or dispute between Rodriguez and A Better Way (and its assigns) arising out of the purchase or condition of the vehicle, or arising out of the contract or a resulting relationship, was to be settled by binding arbitration, if elected.* The parties commenced arbitration pursuant to this agreement, which clearly contains no restrictions on the issues that could be decided by the arbitrator. Therefore, the submission in this case was unrestricted. We next consider whether the portion of the arbitrator's award, ordering the finance company to return the vehicle to A Better Way, was beyond the unrestricted submission of the parties.

"Even in the case of an unrestricted submission, we have . . . recognized three grounds for vacating an award: (1) the award rules on the constitutionality of a statute . . . (2) the award violates clear public policy . . . [and] (3) the award contravenes one or more of the statutory proscriptions of § 52-418. . . . [Section] 52-418 (a) (4) provides that an arbitration award shall be vacated if the arbitrators have exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made. In our construction of § 52-418 (a) (4), we have, as a general matter, looked to a comparison of the award with the submission to determine whether the arbitrators have exceeded their powers." (Internal

quotation marks omitted.) *Comprehensive Orthopaedics & Musculoskeletal Care, LLC* v. *Axtmayer*, 293 Conn. 748, 754, 980 A.2d 297 (2009).

A Better Way asserts that the arbitrator exceeded his power in ordering the finance company to return the vehicle to it because title to the vehicle was never at issue, and, therefore, the award was beyond the scope of the submission. We disagree.

After purchasing the vehicle from A Better Way, experiencing many difficulties with it, and leaving the vehicle in the possession of A Better Way, Rodriguez filed a claim for arbitration with the American Arbitration Association, specifically requesting "[r]evocation of acceptance of the vehicle, cancellation of the contract and deletion of trade line reporting." She named both A Better Way and the finance company in her claim. Thereafter, the finance company filed cross claims against A Better Way for contractual indemnification, indemnification and contribution, unjust enrichment, and two counts of breach of contract, namely, the dealer agreement.

The arbitrator found that Rodriguez had sent a letter to A Better Way stating that if it could not fix her vehicle, she wanted to *cancel the sale* and get her money back. A Better Way threw away that letter, and, after Rodriguez was informed, she mailed another copy to A Better Way. The arbitrator further found that A Better Way had required Rodriguez to purchase a service contract as a condition of her financing without proper disclosure, and that A Better Way previously had required other customers to do the same. The arbitrator found the conduct of A Better Way to be "deceptive and unethical and [in] violat[ion of] CUTPA . . . [and] TILA." The arbitrator also found A Better Way to be in breach of the dealer agreement with the finance company. As part of his award, the arbitrator ordered that the finance

company "cause [the vehicle] to be returned to [A Better Way]."

The unrestricted submission here permitted the arbitrator to decide any claim or dispute between Rodriguez and A Better Way, and its assigns, arising out of the purchase or condition of the vehicle, or arising out of the contract or a resulting relationship. Rodriguez *specifically requested* on the face of the form that she submitted demanding the arbitration in this case that the *contract be cancelled* and that the *purchase of the vehicle be revoked*. We conclude that it would be nonsensical to conclude that the arbitrator had the authority to cancel the contract and to revoke the purchase but that he did not have the authority to decide what happened to the vehicle that was the subject of the purchase and the contract. Certainly, that could not be the case. We agree with the trial court that the title to the vehicle was at issue from the onset of this arbitration and that the arbitrator did not exceed his power by rendering an award that was beyond the scope of the submission.

II

A Better Way also claims that the trial court improperly ordered it to pay the attorney's fees and costs of the finance company in defending the arbitrator's award. Specifically, it sets forth two separate claims in its appellate brief regarding the trial court's award of attorney's fees to the finance company: (1) "The trial court erred in concluding that the dealer agreement between [A Better Way and the finance company] provided for attorney's fees and costs incurred by [the finance company]"[10]; and (2) "The trial court erred in concluding

[10] Insofar as this claim could be read as challenging the trial court's confirmation of the arbitrator's award of attorney's fees to the finance company, a review of the pleadings reveals that A Better Way did not seek to vacate the award on that ground. Rather, the only ground alleged in the application to vacate was that the award was beyond the scope of the parties' submission because the arbitrator ordered that the finance company return the vehicle

that [A Better Way] shall pay for attorney's fees and costs to [the finance company]." A Better Way also argues that the arbitration provision in the dealer agreement, specifically section 25 of the dealer agreement, which contains a fee shifting provision; see footnote 3 of this opinion; was "never invoked" during this arbitration.[11] We decline to review these claims and arguments.

First, A Better Way fails to set forth any standard of review for these claims. See Practice Book § 67-4 (d) ("[t]he argument on each point shall include a separate, brief statement of the standard of review the appellant believes should be applied"); *Thompson* v. *Rhodes*, 125 Conn. App. 649, 651, 10 A.3d 537 (2010) (concluding

to A Better Way. There also was nothing concerning the arbitrator's award of attorney fees to A Better Way in A Better Way's memorandum in support of its application to vacate. Furthermore, a thorough review of the trial court's decision reveals that it did not consider the propriety of the arbitrator's award of fees and costs to the finance company in its decision. Accordingly, we consider any such claim waived.

[11] On this issue, the finance company argues that A Better Way never objected to its cross claims during arbitration, which clearly claimed a breach of the dealer agreement and damages thereunder. During oral argument it also argued that if A Better Way had objections to the cross claims and their arbitrability, it could have filed an action in the Superior Court to enjoin the arbitration of the cross claims or it could have raised an objection before the arbitrator; A Better Way did neither. Therefore, the finance company argues, A Better Way waived any claim that the dealer agreement, including section 25, did not apply. A Better Way responds that section 25 of the dealer agreement is severable from the rest of the dealer agreement and that without specifically invoking that provision and undertaking the specific arbitration procedures applicable under that provision, the parties had proceeded with arbitration only under the finance agreement.

The arbitrator, although specifically finding that A Better Way had breached the dealer agreement, did not mention section 25 in his written award. The trial court concluded that the dealer agreement, including section 25, had been invoked by the finance company's filing of cross claims at the arbitration. The court awarded attorney's fees and costs to the finance company for its defense of the arbitration award through a modification of the arbitration award specifically pursuant to § 52-419 (b). A Better Way neither discusses nor mentions § 52-419 in its appellate brief or in its reply brief.

claim inadequately briefed when plaintiff failed, inter alia, to provide standard of review); *In re Adelina G.*, 56 Conn. App. 40, 43, 740 A.2d 920 (1999) (declining to review claim when respondent failed to provide standard of review and cited to legal authority that undermined argument).

Second, A Better Way provides a citation to only one case, *Steiger* v. *J.S. Builders, Inc.*, 39 Conn. App. 32, 38–39, 663 A.2d 432 (1995), for the proposition that *Steiger* sets forth the factors that a court should consider in assessing *the reasonableness of an award of attorney's fees*, despite its claims that there was *no basis* for the trial court to award *any* fees whatsoever for the finance company's defense of the arbitration award.[12]

In light of the foregoing, we decline to review these claims on the basis of inadequate briefing. See *Connecticut Light & Power Co.* v. *Gilmore*, 289 Conn. 88, 124–25, 956 A.2d 1145 (2008) (defendant's claim deemed abandoned, through inadequate briefing, because she devoted little more than one page to discussion of claim,

[12] Additionally, throughout these claims, A Better Way, although fully acknowledging that section 17 of the dealer agreement specifically provides that the "[d]ealer shall defend, indemnify, and hold Finance Company . . . harmless from and against any and all, claims, losses, liabilities, damages, injuries, costs, expenses, outside attorneys' fees, court costs and other amounts arising out of or resulting from (i) Dealer's breach of this Agreement," asserts that it "did not breach any term of its contract with [the finance company] and was therefore not liable for the reimbursement of attorney's fees under the dealer agreement, and the trial court erred in awarding such attorney's fees." The contention that it "did not breach any term of its contract," in addition to being inadequately briefed, simply is untenable in light of the specific unchallenged findings of the arbitrator. Here, the arbitrator specifically found that the finance company prevailed on its cross claim for *breach of the dealer agreement*, specifically *section 9 (K) and section 17 (A) of the dealer agreement.*

Section 9 (K) of the dealer agreement provides in relevant part: "In the event a Buyer attempts to return or surrender the Vehicle to Dealer (e.g., a voluntary repossession), Dealer shall immediately notify Finance Company, which in no event shall exceed one (1) business day."

and single case on which defendant relied for precedent was not relevant to claim on appeal).

The judgment is affirmed.

In this opinion the other judges concurred.

CHRISTOPHER P. MCCLANCY ET AL. *v.* BANK OF AMERICA, N.A., ET AL.
(AC 38568)

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

Syllabus

The plaintiffs sought to recover damages from the defendant bank for, inter alia, breach of contract, in connection with actions purportedly taken and promises allegedly made while the plaintiffs were attempting to modify the terms of a note and mortgage they had executed in favor of the bank. The bank sent the plaintiffs correspondence stating that their modification application was under review, but then subsequently transferred its servicing rights to another company. The plaintiffs never received a modification of their loan. The trial court granted the bank's motion for summary judgment as to all claims against it and rendered judgment thereon, from which the plaintiffs appealed to this court. On appeal, they claimed, inter alia, that the trial court erred in granting summary judgment when genuine issues of material fact existed with respect to their claims for breach of contract, negligent misrepresentation, reckless misrepresentation, and violations of the Connecticut Unfair Trade Practices Act (CUTPA) (§ 42-110a et seq.). *Held*:

1. The plaintiffs' claim that the trial court improperly granted the bank's motion for summary judgment when issues of material fact existed with respect to their breach of contract claims was not reviewable, the plaintiffs having failed to brief their claim adequately.
2. The plaintiffs could not prevail on their claim that the trial court erred in failing to determine that their breach of contract claim fell within a purported promissory estoppel exception to the statute of frauds; our courts have not established a promissory estoppel exception to the statute of frauds, and even if promissory estoppel could bar a statute of frauds defense, the plaintiffs failed to provide evidence that the bank made a promise to grant a loan modification once the required documentation was submitted, as the bank never offered and the plaintiffs never accepted modification terms, and the bank represented only that it would consider the plaintiffs' modification application once the plaintiffs submitted the required documentation.

3. The trial court properly rendered summary judgment on the plaintiffs' claim of negligent misrepresentation, the plaintiffs having failed to present evidence that the bank's representation that it would evaluate their loan for a possible modification was false when made; the record showed that the bank took steps to consider the plaintiffs' modification request while it was still servicing the loan, and evidence that the bank transferred the loan before making a decision on the modification, standing alone, was insufficient to establish that its prior representation that it would consider the plaintiffs for a loan modification was false when made.

4. The trial court properly rendered summary judgment on the plaintiffs' CUTPA claim, which was based on their claim that the bank acted in bad faith in its communications with the plaintiffs as they worked to submit a loan modification request and in transferring their loan during that process; the plaintiffs failed to present evidence raising a genuine issue of material fact about whether the bank engaged in unfair or deceptive practices or violated any identifiable public policy in association with the plaintiffs' loan modification application, as this court determined that the plaintiffs failed to present evidence of a promise made by the bank to modify their loan or that the bank misrepresented facts when it promised to review the loan for a possible modification, the note and mortgage did not obligate the bank to grant a loan modification, and the mortgage expressly gave the bank the right to transfer the loan servicing rights.

Argued May 22—officially released September 12, 2017

Procedural History

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Heller*, *J.*, granted the named defendant's motion for summary judgment, from which the plaintiffs appealed to this court. *Affirmed.*

Kenneth A. Votre, for the appellants (plaintiffs).

Pierre-Yves Kolakowski, for the appellee (named defendant).

Opinion

BEAR, J. In this litigation arising from an attempt to modify the payment terms of a promissory note and mortgage, the plaintiffs, Christopher P. McClancy and

Loretta Giannone, appeal from the summary judgment of the trial court rendered in favor of the defendant, Bank of America, N.A.[1] On appeal, the plaintiffs claim that the court erred (1) in rendering summary judgment when genuine issues of material fact existed with respect to their breach of contract claim; (2) in failing to determine that the plaintiffs' contract claim fell within an exception to the statute of frauds, General Statutes § 52-550; (3) in rendering summary judgment when genuine issues of material fact remained with respect to their negligent and reckless misrepresentation claims; and (4) in determining that no genuine issues of material fact existed with respect to the plaintiffs' claim of a violation of the Connecticut Unfair Trade Practices Act, General Statutes § 42-110a et seq. (CUTPA). We affirm the judgment of the trial court.

The following uncontested facts and procedural history are relevant to this appeal. On May 8, 2007, the plaintiffs executed a note to the defendant and a mortgage to secure that note in favor of the defendant on property in Darien.[2] The defendant serviced this home

[1] The plaintiffs brought this action against Bayview Loan Servicing, LLC (Bayview), E*Trade Savings Bank (E*Trade), Bank of America, and Bank of America Home Loan Servicing, LP. On July 1, 2011, Bank of America, and Bank of America Home Loan Servicing, LP merged, leaving Bank of America as the sole surviving entity and successor in interest. Summary judgment was sought by and rendered in favor of Bank of America, individually and as successor in interest to Bank of America Home Loan Servicing, LP. Bayview and E*Trade, therefore, are not parties to this appeal, and all references to the defendant herein are to Bank of America, individually and as successor in interest to Bank of America Home Loan Servicing, LP.

[2] In their recitation of the facts and in their complaint, the plaintiffs claim that the note was signed in favor of a different lender. The only evidence of the original note and mortgage in the record was provided by the defendant in its appendix. Both the note and mortgage contain the names of the plaintiffs and the defendant, and were executed, where required, by them. Additionally, the plaintiffs submitted a copy of the assignment of the mortgage from the defendant to E*Trade in 2012, recorded on the Darien land records, that refers to the recording of the mortgage provided by the defendant in its appendix.

loan. In the summer and fall of 2011, the plaintiffs and the defendant communicated with respect to the possible modification of the plaintiffs' loan. After the plaintiffs, in November, 2011, had submitted a completed application for modification, on December 1, 2011, the defendant transferred its servicing rights to Bayview. In November, 2011, the defendant had given prior notice to the plaintiffs that this would occur and that Bayview would be responsible for continuing the modification discussions. Neither Bayview nor the defendant entered into a modification with the plaintiffs.

On June 26, 2013, the plaintiffs commenced this action against the defendant and its predecessor in interest for actions purportedly taken and promises allegedly made while the plaintiffs were attempting to modify their loan. In the operative complaint filed June 24, 2014, the plaintiffs alleged claims of breach of contract, negligent misrepresentation, reckless misrepresentation, intentional misrepresentation—fraud, violation of CUTPA, and civil conspiracy against the defendant and its predecessor in interest.[3]

On May 20, 2015, the defendant filed a motion for summary judgment on all claims against it and its successor in interest. In support of its motion, the defendant submitted the adjustable rate note dated May 3, 2007, made and signed by the plaintiffs, to the defendant; a mortgage deed dated May 3, 2007, recorded May 4, 2007, and signed by the plaintiffs in favor of the defendant;[4] a sworn affidavit of Tiffany Barnfield, assistant vice president, senior operations manager for the defendant; excerpts from the March 9, 2015 deposition of McClancy; and excerpts from the March 9, 2015 deposition of Giannone.

[3] The plaintiffs on appeal do not raise any issues related to their intentional misrepresentation or civil conspiracy claims.

[4] The mortgage was also signed by a nonparty, Patricia G. McClancy.

The plaintiffs filed a memorandum in opposition to the motion for summary judgment. In support of the memorandum in opposition, the plaintiffs submitted an affidavit of McClancy, attached to which were a letter from the plaintiffs to the defendant's predecessor in interest dated June 16, 2011, authorizing an attorney to negotiate a modification of the loan on their behalf; letters from the defendant to the plaintiffs dated November 2, November 10, November 21, and two from November 25, 2011; and an assignment of the mortgage on the plaintiffs' property from the defendant to E*Trade. The November 10, 2011 letter informed the plaintiffs that the servicing rights to their loan would be transferred to Bayview effective December 1, 2011. The court rendered summary judgment on October 30, 2015. This appeal followed.

We start by setting forth the applicable standard of review. "The standards governing our review of a trial court's decision to grant a motion for summary judgment are well established. Practice Book [§ 17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . . A material fact . . . [is] a fact which will make a difference in the result of the case. . . . Finally, the scope of our review of the trial court's decision to grant the

plaintiff's motion for summary judgment is plenary."[5] (Internal quotation marks omitted.) *Romprey* v. *Safeco Ins. Co. of America*, 310 Conn. 304, 312–13, 77 A.3d 726 (2013).

I

The plaintiffs claim that the court erred in granting summary judgment on their breach of contract claims when genuine issues of material fact existed with respect to the existence of a contract.[6] The court concluded that the plaintiffs had failed to present evidence that there was a contract between the plaintiffs and the defendant with respect to a modification of any of the terms of the note or mortgage, or as an independent agreement. Additionally, the court reasoned the defendant had the express right under the loan documents to transfer the note and mortgage at any time without notice to the plaintiffs and, therefore, it was not a breach of contract when it transferred its servicing rights.

[5] Citing *Bank of America, FSB* v. *Hanlon*, 65 Conn. App. 577, 581, 783 A.2d 88 (2001), the defendant asserts that the burden on appeal is on the party opposing summary judgment to demonstrate that the court's decision to grant the movant's summary judgment motion was clearly erroneous. Our Supreme Court expressly has disavowed this description of the law: "In reciting the applicable standard of review when a trial court's decision to grant a motion for summary judgment is challenged on appeal, the Appellate Court correctly stated that such review is plenary. . . . The Appellate Court, however, also stated that, '[o]n appeal . . . the burden is on the . . . party [opposing summary judgment] to demonstrate that the trial court's decision to grant the movant's summary judgment [motion] *was clearly erroneous*.' . . . We hereby disavow this latter statement as an inaccurate description of the law governing appellate review of summary judgment dispositions." (Citations omitted; emphasis in original; footnote omitted.) *Recall Total Information Management., Inc.* v. *Federal Ins. Co.*, 317 Conn. 46, 51–52, 115 A.3d 458 (2015).

[6] The plaintiffs appear to assert that the court erred in dismissing their contract claims against all of the defendants. The court's decision applied only to the defendant individually and as successor in interest. Consequently, we cannot, and do not, address the contract claims against Bayview and E*Trade.

We conclude that the plaintiffs' claim that there were genuine issues of material fact on their contract claim is inadequately briefed. "We are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than [mere] abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . We do not reverse the judgment of a trial court on the basis of challenges to its rulings that have not been adequately briefed." (Citation omitted; internal quotation marks omitted.) *Grasso* v. *Connecticut Hospice, Inc.*, 138 Conn. App. 759, 768, 54 A.3d 221 (2012).

The section of the plaintiffs' brief devoted to breach of contract is a single paragraph, contains no case citations, and fails to provide an analysis demonstrating why the court's conclusions were incorrect. Other than to state in a conclusory manner that facts were in dispute, the plaintiffs failed to cite evidence in the record supporting their claim on appeal that genuine issues of material fact existed as to the court's determination that they failed to put forth evidence of a contract.

The plaintiffs' reply brief fares no better. Although they cite some evidence in the record and the statute of limitations for oral contracts, they still fail to analyze their claim by applying contract law to the evidence in the record. Consequently, based upon this inadequate briefing, we do not review this claim.

II

The plaintiffs also claim that the court erred in failing to find that their claims fell within an exception to the statute of frauds; specifically, promissory estoppel. We first note that our courts have not established a promissory estoppel exception to the statute of frauds. See *Glazer* v. *Dress Barn, Inc.*, 274 Conn. 33, 89–90 n.38, 873 A.2d 929 (2005) ("This court previously has not addressed whether promises that otherwise would be

subject to the requirements of the statute of frauds may be enforced on promissory estoppel grounds in the absence of compliance with the statute of frauds; see 1 Restatement (Second) [of Contracts § 139 (1981)]; or whether a separate promise to put the agreement in writing may provide a basis to avoid the statute of frauds. See 10 S. Williston, [Contracts (4th Ed. 1999)] § 27:14, pp. 128–33; annot., 56 A.L.R.3d 1057 [1974 and Supp. 2004].") The doctrine of equitable estoppel accompanied by the doctrine of part performance on the contract, however, bars the assertion of the statute of frauds as a defense. Id., 60–63. We do not decide whether promissory estoppel bars the defense of statute of frauds because, even if it did, the plaintiffs failed to provide evidence of the promise claimed to have been made.

"Under the law of contract, a promise is generally not enforceable unless it is supported by consideration. . . . [Our Supreme Court] has recognized, however, the development of liability in contract for action induced by reliance upon a promise, despite the absence of common-law consideration normally required to bind a promisor . . . . Section 90 of the Restatement [(Second) of Contracts] states that under the doctrine of promissory estoppel [a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. . . . A fundamental element of promissory estoppel, therefore, is the existence of a clear and definite promise which a promisor could reasonably have expected to induce reliance. Thus, a promisor is not liable to a promisee who has relied on a promise if, judged by an objective standard, he had no reason to expect any reliance at all." (Citation omitted; internal quotation marks omitted.) *Stewart* v. *Cendant Mobility*

Services Corp., 267 Conn. 96, 104–105, 837 A.2d 736 (2003).

The plaintiffs' claim is based on a purported promise to grant a loan modification once the required documentation was submitted. Having determined that there was no promise by the defendant to grant a loan modification, the court did not reach whether an alleged oral contract fell under an exception to the statute of frauds. In making this determination, the court cited McClancy's deposition testimony in which he acknowledged that the defendant never offered terms for a loan modification and that he never accepted terms for a modification. The court also explained that McClancy's affidavit submitted in opposition to the motion for summary judgment did not support a claim that the defendant promised to modify the loan. McClancy averred in his affidavit that the defendant represented to him that he would be considered for a loan modification once he supplied the required documentation; this, the court determined, did not support his claim of a promise to modify the loan. We agree with the court that, as it set forth, the plaintiffs failed to present evidence of a promise to modify the loan.[7] Accordingly, there was no basis for a claim of promissory estoppel nor for any possible exception to the statute of frauds on that ground.

III

The plaintiffs claim that genuine issues of material fact remain on their claims of negligent misrepresentation and, therefore, the court improperly rendered sum-

[7] To the extent that the plaintiffs' arguments can be read to raise a claim of promissory estoppel on the basis of any promise to consider a modification, that argument was not made before the trial court and, thus, we do not consider it. See *Shook v. Bartholomew*, 173 Conn. App. 813, 819, A.3d (2017); see also Practice Book § 60-5.

mary judgment.[8] The defendant argues that the plaintiffs failed to identify any specific representations made by it, and any representations that were knowingly false. Additionally, the defendant argues that the plaintiffs' reliance on the transfer of the loan as a basis for this claim is ineffectual because it had the express right under the mortgage to transfer the loan.

"Guided by the principles articulated in § 552 of Restatement (Second) of Torts [our Supreme Court] has long recognized liability for negligent misrepresentation. . . . [Our Supreme Court has] held that even an innocent misrepresentation of fact may be actionable if the declarant has the means of knowing, ought to know, or has the duty of knowing the truth. . . . Traditionally, an action for negligent misrepresentation requires the plaintiff to establish (1) that the defendant made a misrepresentation of fact (2) that the defendant knew or should have known was false . . . (3) that the plaintiff reasonably relied on the misrepresentation, and (4) suffered pecuniary harm as a result." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Coppola Construction Co.* v. *Hoffman Enterprises Ltd. Partnership*, 309 Conn. 342, 351–52, 71 A.3d 480 (2013).

In the present case, the court determined that "the plaintiffs . . . presented, at best, evidence that [the defendant] represented to them that it would evaluate their loan for a possible modification . . . ." The court concluded, as do we, that the plaintiffs failed to present evidence that this representation was false when made. This representation appears to have been made in a

[8] To the extent that the plaintiffs claim that the court improperly rendered summary judgment on their claims of reckless and intentional misrepresentation, we consider these claims to be abandoned for inadequate briefing because the plaintiffs have failed to set forth the applicable law or analyze these claims. See *Grasso* v. *Connecticut Hospice, Inc.*, supra, 138 Conn. App. 768.

November 2, 2011 letter to the plaintiffs.[9] In a letter dated November 10, 2011, the defendant notified the plaintiffs that the servicing of their loan would be transferred to Bayview effective December 1, 2011. In that letter, the plaintiffs were informed that, if they were being considered for a loan modification, all documentation would be forwarded to Bayview, Bayview would be making all decisions on qualification for foreclosure avoidance programs, the transfer could extend the time needed for such a determination, and that they should continue to make loan payments to Bayview after the transfer. The evidence presented by the plaintiffs indicates that throughout the month of November, 2011, while still servicer of their loan, the defendant continued to consider their materials and it informed the plaintiffs that more information was being gathered and that a specialist had been assigned to their request.

The plaintiffs failed to present evidence sufficient to raise a genuine issue of material fact that the representation was false when made. To the contrary, it appears that the defendant took steps to consider the plaintiffs' modification request while still servicing the loan. Standing alone, evidence that the defendant transferred the loan before making a decision on the modification is not evidence that its prior representation that it would consider the plaintiffs for a loan modification was false when made. Consequently, the plaintiffs raised no genuine issue of material fact and the court properly rendered summary judgment on the plaintiffs' claim of negligent misrepresentation.

IV

The plaintiffs claim that the court improperly granted summary judgment with respect to their CUTPA cause

[9] That letter states: "We recently received your request for financial assistance with the above captioned loan. Bank of America, N.A. understands your situation and would like to evaluate your financial situation in order to determine whether we can help you."

of action, which is based on their claim that the defendant acted in bad faith in its communications with the plaintiffs as they worked to submit a loan modification request and in transferring their loan during this process. "[General Statutes §] 42-110b (a) provides that [n]o person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. It is well settled that in determining whether a practice violates CUTPA we have adopted the criteria set out in the cigarette rule by the federal trade commission for determining when a practice is unfair: (1) [W]hether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers, [competitors or other businesspersons]. . . . All three criteria do not need to be satisfied to support a finding of unfairness. A practice may be unfair because of the degree to which it meets one of the criteria or because to a lesser extent it meets all three. . . . Thus a violation of CUTPA may be established by showing either an actual deceptive practice . . . or a practice amounting to a violation of public policy." (Citation omitted; internal quotation marks omitted.) *Ramirez* v. *Health Net of the Northeast, Inc.*, 285 Conn. 1, 18–19, 938 A.2d 576 (2008).

Having already determined that the plaintiffs failed to present evidence raising a genuine issue of material fact about whether the defendant made a promise to modify the loan or that the defendant misrepresented facts when it promised to review the loan for a possible modification, we determine that the plaintiffs' CUTPA claim is without merit. The note and the mortgage did

not obligate the defendant to grant a loan modification, and the mortgage expressly gave the defendant the right to transfer the loan servicing rights. Accordingly, the plaintiffs failed to present evidence raising a genuine issue of material fact about whether the defendant engaged in unfair or deceptive practices, or violated any identifiable public policy in association with the plaintiffs' loan modification application.

The judgment is affirmed.

In this opinion the other judges concurred.