KRISTIN WILKINS ET AL. *v.* CONNECTICUT CHILDBIRTH AND WOMEN'S CENTER ET AL.
(AC 38224)

Lavine, Keller and Bishop, Js.

Syllabus

The plaintiff sought, in two actions that were consolidated for trial, to recover damages from the defendant W Co. for medical malpractice, claiming that W Co. and its agents were negligent in their care and treatment of the plaintiff immediately after the delivery of her daughter and in her postdelivery care with regard to her pregnancy. Specifically, the plaintiff alleged, inter alia, that W Co. had failed to diagnose and to treat a fourth degree obstetrical laceration at the time of the delivery. The matter was tried to a jury, which returned a verdict in favor of W Co. From the judgments rendered thereon, the plaintiff appealed to this court. She claimed, inter alia, that the trial court abused its discretion in submitting a threshold interrogatory to the jury and in framing its answer to a question from the jury. Specifically, the first jury interrogatory asked the jury to determine whether the plaintiff had in fact sustained a fourth degree laceration and/or a severe tear of her vaginal tissue, her perineal skin and muscle, and anal sphincter muscle during labor and delivery, and it stated that if the answer was no, the jury was to return a verdict for W Co. During deliberations, the jury asked the court whether it was sufficient if it found that there was an injury to just one of those areas or whether it had to find an injury to all three of those areas. The court answered that in light of the use of the word "and" in the interrogatory, the injury should be evaluated as a whole and not as separate injuries. *Held* that the trial court did not abuse its

discretion in giving the jury the first interrogatory or in framing its answer to the jury's question: that court's use of the first interrogatory and its answer to the jury that the injury should be evaluated as a whole were consistent with the language of the plaintiff's complaint, the evidence adduced at trial and the plaintiff's arguments, and were permissible in order to elicit a determination of the material threshold fact, namely, whether the plaintiff had sustained a fourth degree laceration and/or severe tear to her vaginal tissue, perineal skin and muscle, and anal sphincter muscle at the time of giving birth, as alleged in the complaint, as the existence of such an injury was central to all of the claims alleged in the complaint, and the expert testimony presented focused on the existence of such an injury and did not relate that the plaintiff sustained anything less than a fourth degree laceration during labor; moreover, because the crux of the plaintiff's claim at trial was that she sustained such an injury and the success of her presentation at trial depended on the factual determination of whether she did indeed suffer the claimed injury, it was within the court's discretion to submit the interrogatory to the jury asking it to determine first whether it found that the plaintiff sustained such an injury, and the plaintiff could not claim that the court erred in framing the language utilized by the plaintiff herself as the core of her complaint.

Argued April 19—officially released September 19, 2017

Procedural History

Action, in two cases, to recover damages for personal injuries sustained by the named plaintiff as a result of the defendants' alleged medical malpractice, and for other relief, brought to the Superior Court in the judicial district of Danbury, where the plaintiff Billy Wilkins withdrew his claim for loss of consortium; thereafter, the actions were withdrawn as to the named defendant, and the cases were consolidated and tried to a jury before *Truglia*, *J.*; verdict for the defendant Women's Health Associates, P.C., in both cases; subsequently, the court denied the named plaintiff's corrected motion to set aside the verdict and rendered judgments in accordance with the verdict, from which the named plaintiff appealed to this court. *Affirmed.*

Alinor C. Sterling, with whom were *Sarah Steinfeld* and, on the brief, *Carey B. Reilly*, for the appellant (named plaintiff).

David J. Robertson, with whom were *Christopher H. Blau* and, on the brief, *Madonna A. Sacco* and *Matthew M. Sconziano*, for the appellee (defendant Women's Health Associates, P.C.).

Opinion

BISHOP, J. In this medical negligence action, the plaintiff Kristin Wilkins[1] appeals from judgments in two cases, which were consolidated for trial, in favor of the defendant Women's Health Associates, P.C.[2] On appeal, she argues that the court abused its discretion in submitting a threshold jury interrogatory and in framing its answer to a question from the jury regarding that interrogatory, and, therefore, the jury verdict, returned in the defendant's favor, should be set aside and a new trial should be ordered. We disagree and, accordingly, we affirm the judgments of the trial court.

The jury reasonably could have found the following facts. The defendant is a birthing center located in Danbury, which employs physicians and certified nurse-midwives, in addition to other medical professionals and support staff. The plaintiff gave birth to her second child on April 17, 2007, at the defendant birthing center, where she was attended to by staff, including Katy Maker, a certified nurse-midwife. Immediately following the birth, Maker visually and physically examined the plaintiff's vaginal and perineal areas[3] to determine whether there had been any obstetrical lacerations during birth.[4] Maker documented in the plaintiff's medical

[1] Kristin Wilkins' husband, Billy Wilkins, also was a plaintiff, but he withdrew his claims for loss of consortium prior to the verdict. Therefore, we refer in this opinion to Kristin Wilkins as the plaintiff.

[2] The plaintiff's claims against the named defendant, Connecticut Childbirth & Women's Center, were withdrawn prior to the verdict. All subsequent references to the defendant are to Women's Health Associates, P.C.

[3] The perineum is the "area between the vagina and . . . [the] rectum or anus and [is] really made up of mostly muscles."

[4] An obstetrical laceration is one in which the vaginal, perineal, and/or anal structures "tear during the course of delivery."

chart that the plaintiff had not sustained any obstetrical lacerations and that her perineum was intact.[5] The following day, April 18, 2007, at the plaintiff's home, Maker again visually and physically examined the plaintiff's vaginal and perineal areas to ensure that she was healing properly from birth. Maker did not document that the plaintiff had a laceration or any abnormalities. The plaintiff also returned to the defendant center on April 25, 2007 for a one week postpartum visit, performed by another certified nurse-midwife, Catherine Parisi. Parisi noted on the medical form during that visit that there were no problems with the plaintiff's perineum. The plaintiff next returned to the defendant center on May 31, 2007, for a six week follow-up examination, performed by Maker. Maker visually and physically examined the plaintiff's vaginal and perineal areas, and documented in the plaintiff's medical chart that she had "healed well" from the birth, and recorded no lacerations or abnormalities.

On August 1 or 2, 2007, the plaintiff returned to the defendant center again for an annual examination, at which time no lacerations or abnormalities were recorded. On September 4, 2007, the plaintiff was examined by a dermatologist, unaffiliated with the defendant, who documented that the plaintiff's genitalia were normal.

On March 6, 2008, the plaintiff returned to the defendant center for an annual gynecological examination, performed by Parisi. Parisi noted on the medical chart under "Reason for Visit" that it was an annual examination, and also, on the basis of how the plaintiff described her condition, that the plaintiff was "concerned about healing of laceration from birth last year, some rectal

[5] The plaintiff testified at trial that Maker told her that there was "a small first degree tear" that looked like it would "heal on its own," so she would not stitch it. Maker testified, however, that she never told the plaintiff that there was any laceration that occurred at birth.

incontinence, [and] 'loose' tissue in vagina." Parisi examined the plaintiff's perineal area and noted on the medical form that her external genitalia "showed abnormalities [and a] poorly healed laceration," though Parisi testified that she did not know whether a laceration had occurred at birth. Parisi referred the plaintiff to Kenneth Blau, a gynecologist specializing in pelvic reconstructive surgery and urogynecology,[6] who was the founder, managing partner, and president of the defendant. Blau examined the plaintiff on April 26, 2008, and recorded that the plaintiff's perineum was "totally absent," that she had "no sphincter, thin membrane between anus and vagina," and that she required "complete perineal/anal reconstruction . . . ." He opined that the cause of such an injury was a "failed episiotomy restitution," though he testified that he was not sure whether the plaintiff had an episiotomy when she gave birth, and was relying on the plaintiff's own recollection.[7]

The plaintiff later began treatment with another urogynecologist, Richard Bercik, who is unaffiliated with the defendant. On July 31, 2008, Bercik performed an abdominal examination, a pelvic examination, and a rectal examination of the plaintiff. He determined that the plaintiff's "external genitalia were gaping or essentially . . . wide open," that her "sphincter muscles, both the internal and external sphincters, were torn," that "she had a complete separation of [the] wall between the vagina and the rectum," that "[t]he muscles that would make up the perineal body . . . were no longer there . . . and there was, actually, an absent perineum, so there was no separation between the

[6] Urogynecology is a subspecialty of gynecology "that deals with vaginal fl[ow] dysfunction and abnormalities."

[7] An episiotomy is the intentional cutting of the vaginal tissue during birth to prevent an obstetrical laceration from occurring. The testimony and evidence reflects that the plaintiff did not require an episiotomy during labor.

vagina and the rectum," and "[e]ssentially the lining of the rectum, the mucosa of the rectum and the mucosa of the vagina were . . . basically next to each other with no tissue in between . . . ." Bercik testified that the plaintiff was suffering from a "cloaca, which is a term for a combined vagina and anus." He diagnosed the plaintiff with a fourth degree obstetrical laceration, which he opined dated back to the time of delivery, and was either unrepaired, or was repaired, but the repair had subsequently broken down.

A fourth degree laceration extends "from the vagina all the way through into the rectal mucosa," which is "the most internal part of the . . . anal sphincter."[8] Bercik surgically repaired the fourth degree laceration on September 8, 2008.

The plaintiff filed a complaint in this medical negligence action on February 19, 2010, alleging that the defendant and its agents were negligent in their care

[8] At trial, Bercik testified to the other degrees of lacerations as follows: "[A] first degree laceration is when that tear only includes the lining of the vagina or the . . . vaginal epithelia. . . .

"The second degree laceration is one in which that laceration or tear . . . extends into the perineum, but not to the muscles of the anal sphincter. . . .

"Then there's something we call a third degree laceration, which is actually broken down into A, B, and C. So, a third degree laceration, in general, refers to that—that tear now extends into the anal sphincter, but not to the rectal epithelium or mucosa.

"So, [a third degree] A) laceration . . . extends into the external anal sphincter, but not through the entire thickness . . . [and it is] what we call a partial tear of this external anal sphincter.

"Three B) is a complete tear of the [external] anal sphincter, but not the internal sphincter.

"And, then three C) is one which encompasses both [the] internal and external anal sphincter, but not yet to the rectal mucosa."

Blau testified that "[a] fourth degree . . . laceration is really a fairly catastrophic event at a delivery. . . . [T]his is a large gaping defect in the perineum and it extends all the way from the vagina down to the . . . rectal canal . . . the symptoms are incontinence and pain and bleeding, difficulty with intercourse, defecatory abnormalities or problems with incontinence, fecal incontinence, anal incontinence."

and treatment of the plaintiff immediately after the delivery of her daughter, on April 17, 2007, and in her postpartum examination on April 18, 2007. In her operative one count amended complaint, dated January 16, 2015, the plaintiff asserted that the defendant was negligent in the following ways: (1) "failed to adequately and properly care for, treat, diagnose, monitor and supervise the plaintiff . . . for delivery and postdelivery care with regard to her pregnancy"; (2) "failed to inspect properly the vaginal, perineal and anal areas of the plaintiff . . . immediately following the vaginal delivery on April 17, 2007 and/or on April 18, 2007"; (3) "failed to diagnose a [fourth] degree and/or severe tear of the vaginal tissue, perineal skin/muscle and anal sphincter immediately following the vaginal delivery"; (4) "failed to inform the plaintiff that she had a [fourth] degree and/or severe tear of her vaginal tissue, perineal skin/muscle and anal sphincter immediately following the vaginal delivery"; (5) "failed to treat properly and in a timely manner the plaintiff's [fourth] degree and/or severe tear of her vaginal tissue, perineal skin/muscle and anal sphincter immediately following the vaginal delivery"; and (6) "failed to refer properly and in a timely manner the plaintiff for treatment of the [fourth] degree tear and/or severe tear of her vaginal tissue, perineal skin/muscle and anal sphincter immediately following the vaginal delivery . . . ." The plaintiff alleged many physical injuries, including an unrepaired fourth degree obstetrical laceration, fecal incontinence, surgery, "tear of the vaginal tissue, perineal skin, perineal muscle, anal sphincter and/or rectal tissue," and absent perineum.[9]

[9] Additionally, the plaintiff alleged that she suffered from dyspareunia, "disrupted external and internal anal sphincters," "completely disrupted perineal body," "attenuated rectovaginal space," "rectovaginal fistula," "very thin rectovaginal septum," "perineal discomfort," "weakened anal sphincter," "pocket between vagina and rectum in which feces gets trapped," "increased risk of tissue breakdown and loss of elasticity/strength of anal sphincter with menopause," and "psychological, physiological and neurological sequelae."

The jury trial took place over the course of nineteen days, at which the plaintiff called to testify, inter alia, the plaintiff, Bercik, and Blau, and entered into evidence the video depositions of many of the defendant's nurse-midwives, including Maker and Parisi. The plaintiff's theory of the case, that the defendant failed to diagnose and treat a fourth degree laceration at the time of the delivery, vastly differed from the defendant's theory, that the plaintiff did not suffer a fourth degree obstetrical laceration during delivery.[10] The defendant moved for a directed verdict on January 20, 2015, alleging, inter alia, that the plaintiff failed to establish that the defendant was negligent in its care of the plaintiff. The court, *Truglia*, *J.*, denied the defendant's motion.

At the end of the evidence portion of the trial, on February 24, 2015, the court held a charge conference to discuss a draft of the proposed jury charge and jury interrogatories. The first jury interrogatory suggested by the court purported to ask the jury to determine whether the plaintiff had in fact sustained a fourth degree laceration during labor and delivery on April 17, 2007. The plaintiff objected to the interrogatory as creating a prejudicial threshold issue. The plaintiff also argued that not all of the allegations in the complaint specified that there was a fourth degree laceration, and, therefore, the jury did not necessarily have to find that there was such an injury in order to return a verdict in the plaintiff's favor. In the event that the interrogatory was given to the jury, however, the plaintiff requested that the court add the clause "and/or severe tear of her vaginal tissue, her perineal skin and muscle and anal

[10] The defendant did not dispute that the plaintiff did in fact have a fourth degree laceration at some point in time, but did dispute that it occurred during the birth of the plaintiff's second child, on April 17, 2007, or shortly thereafter, on April 18, 2007. The plaintiff claims only that the defendant was negligent in its care of the plaintiff on April 17, 2007 and/or April 18, 2007, and does not make any claim against the defendant in its follow-up care of the plaintiff.

sphincter muscle" after "fourth degree laceration" in order to conform to the language used in the complaint.

The defendant, however, agreed with the court's use of this first interrogatory stating: "[I]t is the definitive question that was asked of all the experts. If there was no fourth degree laceration . . . or no perineal skin muscle and anal sphincter [tear] during labor and delivery on April [17, 2007] . . . [then] the whole case is gone." The defendant further stated that there was no claim in the case that the plaintiff had anything other than a fourth degree laceration, and there was "no testimony about [a first] or a second or a third" degree laceration, and that "everything . . . fails if there was no fourth degree laceration," to which the court responded, "[t]hat's how I see it."

On February 25, 2015, after instructing the jury, the court submitted its proposed first interrogatory with the additional language requested by the plaintiff. The interrogatory stated as follows: "1. Do you find that the plaintiff has proven by a preponderance of the evidence that she sustained a fourth degree laceration and/or a severe tear of her vaginal tissue, her perineal skin and muscle and anal sphincter muscle during her labor and delivery on April 17, 2007?" The interrogatory further instructed: "*If your answer to this question is yes, please proceed to the next questions. If your answer is no, please proceed directly to the verdict form for defendant Women's Health Associates, P.C., and enter a verdict for the defendant.*" (Emphasis in original.)

On the following day, during deliberations, the jury asked the court the following question: "Is the injury stated after and/or evaluated as a whole or should they be evaluated separately?" After some discussion as to how to interpret the question, the court, the plaintiff's counsel, and the defendant's counsel agreed on an understanding—that "the jury wants to know if they

find that there was an injury to just the vaginal tissue, just the perineal skin or just the . . . anal sphincter muscle, [whether] that's sufficient or whether they have to find an injury to all three of those areas . . . ." The defendant argued that the clause, "a severe tear of her vaginal tissue, her perineal skin and muscle and anal sphincter muscle," should be evaluated as a whole because of the use of word "and," whereas the plaintiff argued that the jury could evaluate it as a whole, or as separate injuries. In determining the answer to the question, the court stated to the plaintiff: "[Y]our complaint speaks of [the] failure to diagnose a fourth degree and/or severe tear of the vaginal tissue, perineal skin/muscle and anal sphincter. Those things are the same in the court's view. Fourth degree and/or severe tear mean the same thing."

Accordingly, the court instructed the jury as follows: "The answer to your question is: the injury stated after and/or, in interrogatory number one, should be evaluated as a whole, that's the answer to this question and that's all I can say, at this time." Thereafter, the jury answered "no" to the first interrogatory and, accordingly, returned a verdict in favor of the defendant on February 26, 2015.

The plaintiff filed a motion to set aside the verdict on March 4, 2015, alleging, inter alia, that the court improperly submitted the first jury interrogatory. The court denied the motion on July 28, 2015, stating that the interrogatory and subsequent instruction were "entirely consistent with the plaintiff's allegations of negligence and offer of proof at trial." Accordingly, the court rendered judgment in favor of the defendant on July 28, 2015. This appeal followed.

On appeal, the plaintiff argues that the court abused its discretion in giving the jury an unnecessary threshold interrogatory, and, therefore, the jury verdict should be

set aside and a new trial should be ordered. Specifically, the plaintiff argues that the interrogatory was unnecessary and confusing, that the complaint made claims other than those allowed by the interrogatory, that the evidence supported claims based on injuries other than those posed in the interrogatory, and that the court's instruction following the jury's question "cemented the error." In each of her arguments, the plaintiff is essentially making the same claim: that the jury could have returned a verdict for the plaintiff even if it did not find that the plaintiff had sustained a fourth degree laceration and/or severe tear of her vaginal tissue, perineal skin/muscle, and anal sphincter muscle during labor. In response, the defendant argues that the court acted well within its discretion in giving the jury the first interrogatory because it "accurately captured and reflected" the plaintiff's claims at trial. We agree with the defendant.

We first set forth our standard of review. "The power of the trial court to submit proper interrogatories to the jury, to be answered when returning [its] verdict, does not depend upon the consent of the parties or the authority of statute law. In the absence of any mandatory enactment, it is within the reasonable discretion of the presiding judge to require or to refuse to require the jury to answer pertinent interrogatories, as the proper administration of justice may require. . . . The trial court has broad discretion to regulate the manner in which interrogatories are presented to the jury, as well as their form and content. . . . Moreover, [i]n order to establish reversible error, the defendant must prove both an abuse of discretion and a harm that resulted from such abuse." (Internal quotation marks omitted.) *Champeau* v. *Blitzer*, 157 Conn. App. 201, 210, 115 A.3d 1126, cert. denied, 317 Conn. 909, 115 A.3d 1105 (2015).[11]

[11] The plaintiff argues that the court essentially directed a verdict in favor of the defendant and, therefore, the standard of review applicable to directed

We further note that jury interrogatories must be consistent with the pleadings and the evidence adduced at trial, so as not to mislead the jury. *Chapman* v. *Norfolk & Dedham Mutual Fire Ins. Co.*, 39 Conn. App. 306, 316, 665 A.2d 112, cert. denied, 235 Conn. 925, 666 A.2d 1185 (1995). "The function of jury interrogatories is to provide a guide for the jury's reasoning, and a written chronicle of that reasoning." *Hammer* v. *Mount Sinai Hospital*, 25 Conn. App. 702, 710, 596 A.2d 1318, cert. denied, 220 Conn. 933, 599 A.2d 384 (1991). The purpose of jury interrogatories is to elicit a determination of material facts, to furnish the means of testing the correctness of the verdict rendered, and of ascertaining its extent. *Viera* v. *Cohen*, 283 Conn. 412, 451, 927 A.2d 843 (2007). In the present case, the court's use of the first interrogatory was consistent with the pleadings and the evidence, and was permissible in order to elicit a determination of the material, threshold fact: whether the plaintiff sustained a fourth degree laceration and/or severe tear to her vaginal tissue, perineal skin and muscle, and anal sphincter at the time of giving birth.

The plaintiff's argument that the interrogatory was improper because the complaint made claims other than those allowed by the interrogatory must fail because the tenor of the complaint, as highlighted by the testimony elicited at trial, relied on the plaintiff suffering from a fourth degree laceration and/or severe tear at the time of birth. Additionally, the plaintiff's argument that the interrogatory was improper because the jury could have found something less than a fourth

verdicts applies in this case, which is that "[w]e review a court's decision to direct a verdict for the defendant by considering all of the evidence, including reasonable inferences, in the light most favorable to the plaintiff." (Internal quotation marks omitted.) *Burton* v. *Stamford*, 115 Conn. App. 47, 67, 971 A.2d 739, cert. denied, 293 Conn. 912, 978 A.2d 1108 (2009). We do not agree with the plaintiff's characterization of the court's action and, therefore, decline to apply this standard of review.

degree laceration is inconsistent with the testimony elicited at trial. So, too, is her argument that the interrogatory was improper because the complaint and evidence supported a jury's finding for the plaintiff even if there was no fourth degree laceration and/or severe tear. Finally, the plaintiff's argument that the court's supplemental instruction to the interrogatory "cemented the [court's] error" must also fail for the same reasons.

In her one count negligence complaint, the plaintiff alleged six subclaims, four of which specifically linked the defendant's negligence to the existence of a fourth degree laceration and/or "severe tear of the vaginal tissue, perineal skin/muscle, and anal sphincter" on April 17 or 18, 2007. The two allegations that did not specifically mention the claimed injury were that the defendant "failed to adequately and properly care for, treat, diagnose, monitor and supervise the plaintiff . . . for delivery and postdelivery care with regard to her pregnancy, " and "failed to inspect properly the vaginal, perineal and anal areas of the plaintiff . . . immediately following the vaginal delivery on April 17, 2007 and/or on April 18, 2007." It is clear from the evidence the plaintiff elicited at trial that, although the complaint itself did not reiterate the claim of a fourth degree laceration in these two subclaims, the existence of such an injury was central to all of her claims.

The plaintiff presented expert testimony from Elizabeth Howard, a nurse-midwife with a doctorate in nursing, who testified regarding the standard of care, that the plaintiff sustained a *fourth degree* laceration during birth. She further testified that without a proper examination, a fourth degree laceration could have been missed, and that, in fact, Maker did fail to accurately diagnose a "significant obstetrical laceration" because of an improper examination. In addition to Howard, the plaintiff presented testimony from one other expert

witness, Bercik, regarding causation. Both Bercik and Howard testified that they believed the plaintiff sustained a *fourth degree* laceration during childbirth. The plaintiff, contrary to her assertions in her brief, elicited no expert testimony that the plaintiff sustained anything less than a fourth degree laceration during labor. Further, Bercik testified on direct examination that a fourth degree laceration does not "generally progress from a first to a second, or [from] a second to a third," and further testified on cross-examination that "[w]ithin a degree of medical probability," a small tear would not turn into a fourth degree laceration. Blau also testified on direct examination in the plaintiff's case-in-chief as well as on cross-examination that a first degree laceration, sustained during childbirth, would not evolve into a fourth degree laceration.[12] Additionally, the plaintiff's counsel, herself, relied on the expert testimony that the

[12] The plaintiff also argues that the court mistakenly believed that a fourth degree laceration was the same thing as a severe tear of the vaginal tissue, perineal skin and muscle, and anal sphincter. In her brief, the plaintiff argues that the latter injury could be considered a *third* degree laceration as opposed to a *fourth* degree laceration. It appears clear from the undisputed evidence, however, that a "severe tear of the vaginal tissue, perineal skin and muscle, and anal sphincter," as listed in the complaint, is the natural sequelae of a fourth degree laceration. Also, even if we agreed with the plaintiff that the court was mistaken in its analysis that they are the same injury, the argument fails because of the framing of the interrogatory. Specifically, the use of the term "and/or" in the interrogatory allowed the jury to determine the two stated injuries, a "fourth degree laceration" and a "severe tear of the vaginal tissue, perineal skin/muscle, and anal sphincter," separately. In sum, if the jury had believed that a forth degree laceration was a different injury from a severe tear, it could have answered "yes" to the interrogatory if indeed it determined that the plaintiff had sustained such an injury during labor. Moreover, the evidence could not have supported reasonably a jury's conclusion that the plaintiff sustained a lesser laceration, such as a third degree laceration, during labor, as the record contains no evidence in support of such a finding. See *Carrano* v. *Yale-New Haven Hospital*, 279 Conn. 622, 656, 904 A.2d 149 (2006) ("[g]enerally, the plaintiff must present expert testimony in support of a medical malpractice claim because the requirements for proper medical diagnosis and treatment are not within the common knowledge of laypersons" [internal quotation marks omitted]).

plaintiff sustained a fourth degree laceration in opposing the defendant's motion for a directed verdict. Counsel argued that the testimony of both Bercik and Howard supported the claim that the plaintiff sustained a fourth degree laceration at the time of birth, and, therefore, a directed verdict was improper.[13]

The crux of the plaintiff's claim at trial was that she had sustained a fourth degree laceration and/or severe tear of the vaginal tissue, perineal skin/muscle and anal sphincter during childbirth on April 17, 2007, and the success of her presentation at trial rose and fell on the factual determination as to whether she did indeed suffer such an injury. For the plaintiff to now claim, on appeal, that the dispute at trial implicated a question regarding the extent of the plaintiff's injuries, and not whether the plaintiff had, in fact, sustained the claimed injuries at childbirth is at odds with the factual record. It was clear throughout the plaintiff's case-in-chief that she was alleging that she sustained a fourth degree obstetrical laceration during childbirth. Indeed, during opening arguments, the plaintiff's counsel stated: "[T]he evidence in this case and the primary dispute in this case is that [the plaintiff] suffered a fourth degree obstetrical laceration." It is clear further from the plaintiff's opposition to the defendant's motion for a directed verdict that the plaintiff realized that the factual dispute in question was at the heart of this case. Counsel stated: "[T]here's a fact in dispute here. . . . [T]hat's what the jury's here for, to . . . resolve the facts in dispute. . . . I mean, *this case is about a factual dispute, it's less about standard of care and deviation from the standard of care, than it is about the facts.* . . . [I]t is ultimately going to be for the jury to decide, based on the state of the evidence, what they believe the facts

[13] We realize that counsel's statements are not evidence, though it is illustrative and provides useful insight into the plaintiff's theory of the case at trial, as opposed to what she now argues on appeal.

to have been." (Emphasis added.) Further, the following colloquy occurred during argument on the defendant's motion for a directed verdict:

"[The Plaintiff's Counsel]: [I]t is for the jury to decide whether or not the totality of that evidence supports the fact that there was a laceration existing at the time, so—

"The Court: A fourth degree laceration, existing at the time. . . .

"[The Plaintiff's Counsel]: A fourth degree laceration, although it—it's also the complaint had—as stated says—right, not a first degree, right, a severe . . . injury to the perineal skin, yes.

"The Court: No, your allegation is that it was a fourth degree.

"[The Plaintiff's Counsel]: And/or, it says; and/or severe—

"The Court: And/or a severe tear of the vaginal tissue.

"[The Plaintiff's Counsel]: Right. Exactly. So, and that's been the allegation all along." Indeed, at the plaintiff's request, the court amended the language of the interrogatory and jury instructions to specifically include a "severe tear" as an alternative injury for the jury to determine, as described by the plaintiff herself in her complaint. Furthermore, the plaintiff alleged in her complaint that she sustained an "unrepaired fourth degree obstetrical laceration."

Finally, the plaintiff's argument that the court's supplemental instruction to the jury on the interrogatory "cemented the [court's] error" must also fail for all of the reasons stated above. The plaintiff continues to argue in this claim that the interrogatory was unnecessary and precluded the jury from finding in her favor, even though it found that the plaintiff had not sustained a fourth degree laceration and/or severe tear during

labor. Again, this argument is inconsistent with the plaintiff's contentions throughout trial, as well as the testimony and evidence elicited by the plaintiff. In its question to the court regarding the first interrogatory, the jury asked whether "the injury stated after and/or [should be] evaluated as a whole or should they be evaluated separately," to which the court responded: "The injury stated after and/or . . . should be evaluated as a whole . . . ."[14] The plaintiff's counsel even argued to the court that the plaintiff's "allegation all along" has been that the plaintiff suffered a fourth degree laceration and/or severe tear of her vaginal tissue, perineal skin/muscle and anal sphincter. Also, the language of the interrogatory was taken from the plaintiff's complaint, specifically at the plaintiff's request. The plaintiff may not now claim that the court erred in framing the language that the plaintiff herself utilized as the core of her complaint against the defendant.

Because it is clear from the plaintiff's complaint, the evidence elicited at trial, and the plaintiff's arguments

[14] The defendant argues that the court "correctly instructed the jury to consider both parts of the first interrogatory together." It appears, however, that the defendant misunderstands the court's answer to the jury's question. The interrogatory asked the jury to determine whether the plaintiff had sustained a "fourth degree laceration *and/or a severe tear of* [*the*] *vaginal tissue . . . perineal skin and muscle, and anal sphincter* . . . ." (Emphasis added.) The jury asked the court whether "the injury *stated after and/or* [should be] evaluated as a whole or should they be evaluated separately?" (Emphasis added.) The court answered: "The injury *stated after and/or* . . . should be evaluated as a whole . . . ." (Emphasis added.) In sum, the court was not instructing the jury that a *fourth degree laceration* and a severe tear should be read as one injury, but instead that a "severe tear of the vaginal tissue, perineal skin and muscle, and anal sphincter" should be read as one injury. Though the court opined, outside of the presence of the jury, that a fourth degree laceration and severe tear, as listed in the interrogatory, *were* the same injury, it did not instruct the jury to read the interrogatory as such. The jury was free to determine separately, by virtue of the use of "and/or," whether the plaintiff sustained a fourth degree laceration, or whether she sustained a severe tear of the vaginal tissue, perineal skin and muscle, and anal sphincter. See also footnote 11 of this opinion.

that the case revolved around the existence of a fourth degree laceration and/or a severe tear of the vaginal tissue, perineal skin and muscle, and anal sphincter, it was within the court's discretion to submit this interrogatory to the jury, asking it to determine first whether it found that the plaintiff sustained such an injury. Accordingly, in propounding this threshold interrogatory and the following instruction, the court did not abuse its discretion.[15]

The judgments are affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* TERRENCE LAMONT BOYD
(AC 38542)

Keller, Mullins and Norcott, Js.

Syllabus

Convicted of the crimes of disorderly conduct and interfering with an officer arising out of an altercation outside a bar with a female patron, R, and his subsequent arrest, the defendant appealed to this court. He claimed, inter alia, that the evidence was insufficient to support his conviction of disorderly conduct. Specifically, he claimed that his act of raising his hand as R came toward him was insufficient to establish the intent element of the crime of disorderly conduct. *Held*:

1. There was sufficient evidence presented at trial to support a finding that the defendant engaged in violent, tumultuous or threatening behavior to support his conviction of disorderly conduct: R testified that she ducked because she believed that the defendant was going to hit her, other witnesses testified that the defendant aggressively swung at the back of R's head or shoved her, and the jury was free to credit that testimony and to reject the defendant's self-serving testimony that he raised his hand as R came toward him only to get her to back off; moreover, the mens rea language in the disorderly conduct statute (§ 53a-182) requires that a defendant's predominant intent must be to cause what a reasonable person operating under contemporary community

[15] A court's decision, sua sponte, to submit a narrowing interrogatory to the jury carries some risks. It is not our role, on review, however, to substitute our judgment for the court's reasonable exercise of discretion.

standards would consider a feeling of anxiety prompted by threatened danger or harm, and the state here presented sufficient evidence concerning the circumstances leading up to the offensive conduct from which the jury reasonably could have found that the defendant specifically intended to cause R inconvenience, annoyance, or alarm by either swinging his fist at the back of her head or shoving her.

2. The defendant could not prevail on his claim that the trial court improperly failed to instruct the jury concerning the definition of certain terms when it set forth the elements of the charge of interfering with an officer; the entirety of the defendant's claim was predicated on his mistaken interpretation of the trial court's supplemental charge to the jury as its principal charge, and the court, in its principal charge, instructed the jury with the exact definitions that the defendant claimed on appeal were omitted and in substantial conformance with his request to charge.

Argued May 22—officially released September 19, 2017

Procedural History

Substitute information charging the defendant with two counts of the crime of threatening in the second degree, and with the crimes of disorderly conduct and interfering with an officer, brought to the Superior Court in the judicial district of Stamford-Norwalk and tried to the jury before *Holden, J.*; verdict and judgment of guilty of disorderly conduct and interfering with an officer, from which the defendant appealed to this court. *Affirmed.*

Richard H. Stannard III, with whom, on the brief, was *Justin R. Clark*, for the appellant (defendant).

Linda Currie-Zeffiro, assistant state's attorney, with whom, on the brief, were *Richard J. Colangelo, Jr.*, state's attorney, and *Katherine Donoghue*, deputy assistant state's attorney, for the appellee (state).

Opinion

NORCOTT, J. The defendant, Terrence Lamont Boyd, appeals from the judgment of conviction, rendered after a jury trial, of disorderly conduct in violation of General

Statutes § 53a-182 (a) (1)[1] and interfering with an officer in violation of General Statutes § 53a-167a (a).[2] The jury found the defendant not guilty of two counts of threatening in the second degree, each in violation of General Statutes § 53a-62 (a) (2). On appeal, the defendant claims that (1) there was insufficient evidence presented at trial to convict him of disorderly conduct and (2) the trial court erred when it provided incomplete or incorrect jury instructions. We disagree and, accordingly, affirm the judgment of the trial court.

On the basis of the evidence presented at trial, the jury reasonably could have found the following facts. At approximately 11 p.m. on June 27, 2014, Bridgette Powell arrived with Alisabeth Rojas at the Moose Lodge (bar) in South Norwalk. The defendant arrived at the bar separately. Rojas, an employee of the bar, was attending as a patron that night. Although Rojas did not previously know the defendant, Powell had known him for a long time. While at the bar, Powell and Rojas consumed alcoholic drinks.

At approximately 2 a.m. on June 28, 2014, when the patrons were leaving the bar, Melvyn Mayberry, a bouncer working that night, saw Rojas tell the defendant that it was time to leave the bar. The defendant responded that he was not going to leave. After Mayberry informed the defendant that he needed to leave, he agreed and, escorted by Mayberry, began to exit the bar. Mayberry saw the defendant and Rojas begin to argue immediately outside the bar, and inserted himself

[1] General Statutes § 53a-182 (a) provides in relevant part: "A person is guilty of disorderly conduct when, with intent to cause inconvenience, annoyance or alarm . . . such person: (1) Engages in fighting or in violent, tumultuous or threatening behavior . . . ."

[2] General Statutes § 53a-167a (a) provides in relevant part: "A person is guilty of interfering with an officer when such person obstructs, resists, hinders or endangers any peace officer . . . in the performance of such peace officer's . . . duties."

between the two. He heard the defendant say "the bitch ain't gonna cut me." At that point, all of the parties were at the top of the stairs on the landing outside the bar. Mayberry escorted Powell, Rojas, and the defendant down the stairs and into the alley, toward their respective cars, while still maintaining a physical barrier between the defendant and Rojas, with Rojas walking slightly ahead.

Meanwhile, Garrett Kruger, a uniformed Norwalk police officer, was in his patrol cruiser across the street when he saw Powell, Rojas, and the defendant exiting the bar and "screaming and yelling at each other." Based on his observations, the defendant "appeared to be the aggressor." Kruger drove his cruiser into the alley where Powell, Rojas, and the defendant were fighting and radioed for backup. He then exited his cruiser and loudly told Powell, Rojas, and the defendant to "leave the area and disperse" and to "stop yelling at each other." They followed Kruger's command to disperse and began to walk further down the alley toward their cars, but they did not cease yelling at one another. As a result, Kruger followed them on foot down the alleyway from a distance of approximately fifteen feet. Kruger saw the defendant "screaming at the two females," accompanied by aggressive arm movements, "as if he was almost talking with his hands in an angry tone of voice."

After Kruger, Mayberry, Powell, Rojas, and the defendant exited the alley into the small parking lot where the patrons' cars were located, the defendant came within three feet of Rojas as she turned her back to open the passenger side door of Powell's car. Kruger and Mayberry saw the defendant swing his fist at Rojas' head while her back was to him and as she was bending down to open the car door. Kruger was within four feet of the defendant and Rojas when he saw the "defendant [take] an aggressive stance toward [Rojas] and [ball]

up his fists, [come] all the way back and [begin] to throw a punch." Rojas ducked when she peripherally saw the movement and felt "threatened." As a result, Rojas lost her balance, stumbled, and fell to one knee.[3]

Immediately after Rojas fell, Mayberry grabbed the defendant in a "bear hug," and Kruger simultaneously grabbed the defendant, using "[m]ild physical force" to place the defendant's forearms and hands against the alley wall. During this struggle, Kruger identified himself as a police officer and told the defendant multiple times to "calm down" and to "relax," but the defendant kept screaming at Kruger to "go fuck [himself]" and "what the fuck are you arresting me for?" Instead of complying with Kruger's commands, the defendant balled his fists and tensed up his back before attempting to spin to face Kruger. Kruger then used the defendant's body momentum to take him to the ground.

Ramon Tejada, another uniformed Norwalk police officer, ran down the alley to assist at this moment. While the defendant was on the ground, he was actively resisting arrest by refusing the officers' requests to give them both of his hands, which were then underneath his body. Kruger, who was on the defendant's left side, managed to pull out the defendant's left arm and to place a handcuff on his left wrist. Kruger and Tejada, who was on the defendant's right side, repeatedly commanded the defendant to pull out his right arm so that they could secure the other handcuff, but the defendant failed to comply with those commands and, at one point, said that "he was not going to let go." Together, Tejada and Kruger eventually were able to secure the defendant with handcuffs. While they were walking with the defendant toward the front of the alley to the cruisers,

[3] Powell testified at trial that she saw the defendant "shove" Rojas and that Rojas fell because "she lost her balance" and "because she had some heels on."

the defendant stated: "Why am I getting arrested? I didn't fucking do shit. She stabbed me. Why am I the one getting arrested?" The defendant refused to allow the officers to check for injury, but Kruger shone a flashlight along the defendant's body to check for any tears or rips to his clothing and for any stab wounds. Neither officer saw any indication of a wound on the defendant's body. The defendant did not have blood on him, was not limping, and did not complain of being in pain at any point. Because the officers did not see any indication of a stab wound, they placed him in the back of Tejada's cruiser instead of calling the Norwalk paramedic team.

After securing the defendant in Tejada's cruiser, both officers walked back to Rojas and searched her person and purse for any sharp object that may have been used to stab the defendant. Nothing was located, and there was no indication of blood on her person or belongings.

On July 7, 2015, the defendant was charged in the operative information with disorderly conduct, interfering with an officer, and two counts of threatening in the second degree. After a jury trial, the defendant was found guilty of disorderly conduct and interfering with an officer, and not guilty of the two counts of threatening in the second degree. On August 27, 2015, the court sentenced the defendant to a total effective sentence of fifteen months imprisonment. This appeal followed. Additional facts will be set forth as necessary.

I

The defendant first claims that there was insufficient evidence presented at trial to convict him of disorderly conduct. He specifically contends that his testimony at trial established that his actions on the day of the incident did not meet the elements of the court's instruction to the jury on disorderly conduct because he "merely rais[ed] his hand up or [put] it out as [Rojas] came

[toward] him and . . . she ran into it and fell as a result of the push." The state responds that it presented ample evidence from which the jury could have found, beyond a reasonable doubt, that the defendant's actions satisfied the elements of disorderly conduct. We agree with the state.

The following additional facts are relevant to this claim. Contrary to the testimony of the other witnesses, who observed the defendant aggressively swing at the back of Rojas' head, the defendant testified that he, in an effort to "protect" himself, "pushed her" away from him.

"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. . . .

"Moreover, it does not diminish the probative force of the evidence that it consists, in whole or in part, of

evidence that is circumstantial rather than direct. . . . It is not one fact, but the cumulative impact of a multitude of facts which establishes guilt in a case involving substantial circumstantial evidence. . . . In evaluating evidence, the [finder] of fact is not required to accept as dispositive those inferences that are consistent with the defendant's innocence. . . . The [finder of fact] may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical. . . .

"Finally, [a]s we have often noted, proof beyond a reasonable doubt does not mean proof beyond all possible doubt . . . nor does proof beyond a reasonable doubt require acceptance of every hypothesis of innocence posed by the defendant that, had it been found credible by the [finder of fact], would have resulted in an acquittal. . . . On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the [finder of fact's] verdict of guilty." (Internal quotation marks omitted.) *State* v. *Crespo*, 317 Conn. 1, 16–17, 115 A.3d 447 (2015).

The court's instructions adopted, nearly verbatim, our articulation of the elements of disorderly conduct: "We have explained that the crime of disorderly conduct consists of two elements: (1) that the defendant intended to cause, or recklessly created a risk of causing, inconvenience, annoyance or alarm and (2) that he did so by engaging in fighting or in violent, tumultuous or threatening behavior . . . ." (Internal quotation marks omitted.) *State* v. *Briggs*, 94 Conn. App. 722, 726–27, 894 A.2d 1008, cert. denied, 278 Conn. 912, 899 A.2d 39 (2006).

We conclude that there was sufficient evidence presented at trial to support the defendant's conviction of

disorderly conduct. Both Mayberry and Kruger testified that the defendant aggressively swung at the back of Rojas' head when she was trying to enter Powell's car. Although Powell testified that the defendant neither swung at nor punched Rojas, and that Rojas fell because of a combination of her intoxicated state and her high heels, she also testified that the defendant shoved Rojas. Rojas testified that, when she saw the defendant in her peripheral vision, she ducked because she believed that he was going to hit her. She further testified that she fell to one knee as a result of her movement to avoid the defendant hitting her.

The defendant concedes that "[i]f the state's version of the facts is to be believed, then [he] would certainly have engaged in 'fighting or in violent, tumultuous or threatening behavior.' " He insists, however, that the evidence, namely, his own testimony,[4] supported that he "merely rais[ed] his hand up or [put] it out as [Rojas] came [toward] him and that she ran into it and fell as a result of the push." He further argues that this self-serving testimony supported his argument that his "conscious objective in raising his hand was not necessarily to cause inconvenience, annoyance or alarm." He also argues, without citing to any legal authority, that "the mere act of raising one's hand—either in defense or offense—does not necessarily satisfy the intent element of the crime of disorderly conduct." We are not persuaded.

First, this argument ignores our standard of review, which requires us to construe the evidence in the light most favorable to sustaining the verdict and to defer to the jury's credibility assessments. See *State* v. *Crespo*, supra, 317 Conn. 16–17; *State* v. *Jason B.*, 111 Conn.

[4] The defendant testified that he pushed Rojas away from him, and that he touched her shoulder as she came towards him in an effort to get her to "back up." He also testified that he was simply trying to protect himself.

App. 359, 363, 958 A.2d 1266 (2008), cert. denied, 290 Conn. 904, 962 A.2d 794 (2009). "[The jury] is free to juxtapose conflicting versions of events and determine which is more credible. . . . It is the [jury's] exclusive province to weigh the conflicting evidence and to determine the credibility of witnesses. . . . The [jury] can . . . decide what—all, none, or some—of a witness' testimony to accept or reject." (Internal quotation marks omitted.) *State* v. *Senquiz*, 68 Conn. App. 571, 576, 793 A.2d 1095, cert. denied, 260 Conn. 923, 797 A.2d 519 (2002).

The defendant's argument also fails to account for well-established law that interprets the mens rea language of § 53a-182 (a)—"with intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof"— to "mean that the defendant's predominant intent [must be] to cause what a reasonable person operating under contemporary community standards would consider a disturbance to or impediment of a lawful activity, a deep feeling of vexation or provocation, or a feeling of anxiety prompted by threatened danger or harm." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Andriulaitis*, 169 Conn. App. 286, 293, 150 A.3d 720 (2016), citing *State* v. *Indrisano*, 228 Conn. 795, 810, 640 A.2d 986 (1994).

The state presented sufficient evidence from which the jury reasonably could have found that the defendant specifically intended to cause Rojas inconvenience, annoyance, or alarm by either swinging his fist at the back of her head, or shoving her. The jury was free to credit the testimony of Mayberry, Kruger, Powell, and Rojas that the defendant either swung his fist at the back of Rojas' head, or shoved her, and was also free to reject the defendant's self-serving testimony that he merely pushed her shoulder or raised his hand to get her to "back off." See *State* v. *Senquiz*, supra, 68 Conn.

App. 576. The jury also was free to credit the circumstances leading up to the offensive conduct, including the undisputed argument between Rojas and the defendant that continued from the front of the bar, down the alley, and to Powell's car, to draw the inference that the defendant, whom Kruger described as the aggressor, intended to cause Rojas inconvenience, annoyance, or alarm.

We conclude that the evidence presented at trial was sufficient for a reasonable fact finder to conclude that the state proved beyond a reasonable doubt all of the necessary elements required to support a conviction for disorderly conduct under § 53a-182 (a) (1).

II

The defendant next claims that the court improperly failed to charge the jury, pursuant to his request to charge, on all of the elements of interfering with an officer. Specifically, he argues that the court erred when it failed to instruct the jury on the definitions of the elements of interference and the element of intent. The entirety of the defendant's claim is predicated on his mistaken interpretation of the court's supplemental jury charge as its principal jury charge. As a result, the defendant fails to recognize that the court, in its principal charge, charged the jury with the exact instructions he now claims, on appeal, were missing. Accordingly, we reject the defendant's claim of instructional error.

The following procedural history is relevant to our disposition of the defendant's claim. On the first day of trial, both the defendant and the state submitted to the court very similar requests to charge. After the parties rested, the court held an on-the-record charging conference. After confirming that defense counsel had seen the state's proposed request to charge, the court stated that it would charge the jury in accordance with the state's proposed charge, with the exception that it

might give one instruction in regard to the element of intent, instead of repeating the same for each charge. The court outlined its proposed instructions as to the charge of interfering with an officer, which included the exact same language on intent that the court gave the next day in its actual charge. After consulting with both parties, the court advised that it would hear any objections to the proposed charge the following morning.

The following day, the defendant objected only to the court's proposed instruction regarding consciousness of guilt evidence, and the court subsequently omitted it. After the closing arguments, the court instructed the jury (principal charge). After the court instructed the jury and the jurors exited the courtroom, it provided the parties with a final opportunity to comment on the principal charge. The state had three objections to the court's principal charge, two relating to the court's instructions on interfering with an officer. In relevant part, the state argued first that the court incorrectly had included the word "not" in its instruction to the jury on how broadly it was to construe the words "hinders," "endangers," or "interferes." Second, the state argued that the court failed to name Tejada in addition to Kruger in its summary of the charge on interfering with an officer. Defense counsel had one objection to the court's charge, but it did not relate to the court's charge on interfering with an officer. When the court asked the parties if there was "[a]nything else," counsel answered, "[t]hat's it."

In response to the parties' objections or their perceived deficiencies in the court's principal charge, the court provided the following supplemental charge, which the defendant now argues constituted the court's entire instruction as to the elements of interfering with a police officer: "Interfering with a police officer; that applies to either [Tejada] or [Kruger]. Further, the

words in the first element are obstructed, resisted, hindered or endangered a [police] officer. That's interfered with an officer. And the words, hinders, endangers or interferes, are to be broadly construed to prohibit any act that would amount to meddling in or hampering the activities of the police in the performance of their duties. And again, you'll have the elements with you for your review." The court subsequently gave the jurors a written copy of its principal charge for use in their deliberations.

"We begin with the well established standard of review governing the defendant's challenge to the trial court's jury instruction. Our review of the defendant's claim requires that we examine the [trial] court's entire charge to determine whether it is reasonably possible that the jury could have been misled by the omission of the requested instruction. . . . While a request to charge that is relevant to the issues in a case and that accurately states the applicable law must be honored, a [trial] court need not tailor its charge to the precise letter of such a request. . . . If a requested charge is in substance given, the [trial] court's failure to give a charge in exact conformance with the words of the request will not constitute a ground for reversal. . . . As long as [the instructions] are correct in law, adapted to the issues and sufficient for the guidance of the jury . . . we will not view the instructions as improper." (Internal quotation marks omitted.) *State* v. *Kitchens*, 299 Conn. 447, 454–55, 10 A.3d 942 (2011).

"A party may preserve for appeal a claim that a jury instruction was improper either by submitting a written request to charge or by taking an exception to the charge as given. [See Practice Book §§ 16-20 and 42-16]." *State* v. *Terwilliger*, 294 Conn. 399, 406, 984 A.2d 721 (2009). "Thus, a party may preserve for appeal a claim that an instruction, which was proper to give, was nonetheless defective either by: (1) submitting a

written request to charge covering the matter; or (2) taking an exception to the charge as given. . . . Moreover, the submission of a request to charge covering the matter at issue preserves a claim that the trial court improperly failed to give an instruction on that matter. . . .

"Under either method, some degree of specificity is required, as a general request to charge or exception will not preserve specific claims. . . . Thus, a claim concerning an improperly delivered jury instruction will not be preserved for appellate review by a request to charge that does not address the specific component at issue . . . ." (Citations omitted; internal quotation marks omitted.) *State* v. *Johnson*, 165 Conn. App. 255, 284–85, 138 A.3d 1108, cert. denied, 322 Conn. 904, 138 A.3d 933 (2016).

We conclude that the defendant preserved his claim of instructional error by filing a request to charge. The defendant's claim ultimately fails, however, because he has misconstrued the court's *supplemental charge* as its complete charge. In particular, the defendant argues that the court improperly omitted in its supplemental instruction language that both his and the state's requests to charge included, to wit: the definitions of "obstructs," "resists," "hinders," and "endangers," and that each are to be "broadly construed to prohibit any act that would amount to meddling in or hampering the activities of police in the performance of their duties." He additionally argues that the court improperly omitted both parties' request to charge on the intent element of interfering with an officer, which included language that "[a] person acts intentionally with respect to a result when his conscious objective is to cause such [a] result." We conclude, however, that after completing a careful review of the record, it is clear that in its principal charge, the court instructed the jury in substantial conformance with the defendant's request to

charge. Indeed, the court instructed the jury exactly as the defendant now argues the court should have instructed the jury concerning the elements of interfering with an officer.[5] Accordingly, we reject the defendant's claims of error.

The judgment is affirmed.

In this opinion the other judges concurred.

MARK FULLER *v.* ANN BALDINO
(AC 38660)

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

Syllabus

The plaintiff filed a third party petition for visitation with the defendant's minor child after his relationship with the defendant ended. The defendant moved to dismiss the petition for lack of subject matter jurisdiction on the ground that the plaintiff failed to allege facts sufficient to satisfy the jurisdictional prerequisites set forth in *Roth* v. *Weston* (259 Conn. 202), specifically, that the plaintiff have a parent-like relationship with the child and that the denial of visitation would result in real and substantial harm to the child. The trial court granted the motion to dismiss and rendered judgment thereon dismissing the petition, from which the plaintiff appealed to this court, claiming, inter alia, that the trial court improperly dismissed his petition without an evidentiary hearing on the ground that he failed to allege facts sufficient to satisfy the jurisdictional prerequisites set forth in *Roth*. *Held* that the trial court properly dismissed the plaintiff's visitation petition for lack of subject matter jurisdiction without an evidentiary hearing, that court having properly determined that the petition failed to sufficiently allege that the denial of visitation would subject the child to real and significant harm; although the plaintiff alleged that he had a strong bond with the child, that the child suffered and was very emotional when unable to see him,

[5] The only meaningful difference between the defendant's request and the charge given is that the defendant requested more elaboration of the second element of interference with an officer, which addresses the jury's consideration of whether the officers' use of force was justified. The defendant's appellate claim, however, does not challenge the court's instruction as to the use of force. Instead, he challenges only the court's purported failure to instruct the jury on the definitions of the elements of interference and the element of intent.

and that he played a significant role in caring for the child's severe health conditions, those allegations did not rise to the level of neglect, abuse, or abandonment, as *Roth* and its progeny require, and the petition did not specifically state the type of harm the child would suffer if the plaintiff was denied visitation.

Argued May 24—officially released September 19, 2017

Procedural History

Petition for visitation of the defendant's minor child, brought to the Superior Court in the judicial district of Ansonia-Milford, where the court, *S. Richards*, *J.*, granted the defendant's motion to dismiss and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Marissa Bigelli Hernandez, for the appellant (plaintiff).

Bonnie Amendola, for the appellee (defendant).

Opinion

LAVERY, J. The plaintiff, Mark Fuller, appeals from the judgment of the trial court dismissing his third party petition for visitation rights pursuant to General Statutes § 46b-59[1] and Practice Book § 25-4 as to the minor child of the defendant, Ann Baldino. The plaintiff claims that the court improperly dismissed his petition without an evidentiary hearing on the ground that he failed to allege facts establishing the requirements for jurisdiction set forth in *Roth* v. *Weston*, 259 Conn. 202, 789 A.2d 431 (2002).[2] We affirm the judgment of the trial court.

[1] General Statutes § 46b-59 (b) provides in relevant part: "Any person may submit a verified petition to the Superior Court for the right of visitation with any minor child. Such petition shall include specific and good-faith allegations that (1) a parent-like relationship exists between the person and the minor child, and (2) denial of visitation would cause real and significant harm."

[2] In support of his overarching claim that the court improperly dismissed his third party petition for lack of subject matter jurisdiction, the plaintiff claims in his main brief that the court improperly (1) violated his due process rights when it denied his petition without an evidentiary hearing; (2) concluded that he lacked standing under § 46b-59; (3) applied § 46b-59 and relevant case law; (4) found that he did not plead sufficient facts that

The record reveals the following relevant facts and procedural history. On July 31, 2015, the plaintiff filed a third party petition for visitation seeking visitation rights with regard to the defendant's child. The petition alleged the following facts. Since 2006, the plaintiff and the child "have had a parent-like relationship." The plaintiff ended his romantic relationship with the defendant around December, 2013, but "continued to parent the minor child until December, 2014." The plaintiff "has been the only father the minor child has known since the child was approximately two years old. Until December, 2014 . . . the [plaintiff] acted as a hands-on parent and held himself out as [the] father. The minor child recognizes the [plaintiff] as 'dad.' " Throughout the plaintiff's relationship with the child, the plaintiff provided financial support for the child; has "cared for the daily needs of the child"; and "has been involved with the major decisions concerning the child's health, education, and welfare." Finally, the petition alleged that the "[d]enial of visitation will cause real and significant harm to the child due to the relationship and bond formed between the [plaintiff] and minor child over the past nine years."

The defendant moved to dismiss the petition for lack of subject matter jurisdiction, arguing that the petition did not allege sufficient facts to establish the prerequisites for jurisdiction set forth in *Roth* v. *Weston*, supra, 259 Conn. 202, namely, that the plaintiff had a parent-like relationship with the child and that the denial of

could be proven through clear and convincing evidence; (5) precluded him at oral argument from citing to similar trial court cases as persuasive authority; (6) failed to consider public policy; and (7) decided that he did not meet his burden of proof to invoke the trial court's subject matter jurisdiction. Our review of the plaintiff's briefs reveals that these arguments all contribute to the plaintiff's central claim that the court erroneously determined that he had failed to plead the jurisdictional requirements of *Roth*. Accordingly, we address these arguments but do not distinguish between them as separate claims.

visitation would inflict real and substantial harm on the child. The defendant submitted an affidavit in support of her motion to dismiss in which she, inter alia, admitted that she granted the plaintiff visitation for a period of time after their 2013 separation but denied that the plaintiff had provided financial or other support to the child during their relationship.

Subsequently, the plaintiff filed an objection, arguing that his petition had set forth the necessary factual predicate for subject matter jurisdiction. In support of his objection, the plaintiff filed a memorandum of law and an affidavit in which he expanded upon some of the factual allegations made in his petition. As relevant in this appeal, the petitioner averred in his affidavit (1) that he first met the child in 2005 and lived with the child and the defendant from 2006 until their separation in 2013; (2) that during that time period, and extending until December, 2014, he was the child's "primary parent" in that he took the child to his medical appointments and was "involved in all major decision making," including decisions regarding the child's health; (3) that he would care for the child's "severe health conditions" and presently does not know whether the child continues to receive proper care; (4) that, around the end of their relationship, the defendant "would take off for a day or two at a time without divulging where she was," leaving the child in his care; (5) that he has built a "very strong bond" with the child and that the child "suffers" and "is very emotional" when unable to see him; and (6) that the child has indicated that he misses the plaintiff and still considers the plaintiff to be his father.

The court heard argument on November 4, 2015, and ultimately granted the defendant's motion to dismiss on the record. The court concluded that, although the petition alleged sufficient facts to establish that the plaintiff had a parent-like relationship with the child,

neither the petition nor the plaintiff's affidavit sufficiently alleged that the denial of visitation would cause the child to experience real and substantial harm. This appeal followed.

The plaintiff claims that the court improperly concluded that his petition and affidavit failed to allege facts establishing the jurisdictional requirements of *Roth*. Specifically, the plaintiff argues that the court, in determining that he failed to sufficiently allege that denial of visitation would cause real and substantial harm to the child, failed to consider that the emotional harm suffered by the child as a result of his separation from the plaintiff is sufficient under *Roth*.[3] According to the plaintiff, he pleaded the substantial harm requirement by virtue of his allegations of his close parental relationship with the child. The defendant concedes

[3] The plaintiff also argues that the trial court misinterpreted *Roth* to require an allegation of unfitness against the parent as opposed to an allegation of real and significant harm to the child. As an initial matter, we agree that the harm component of *Roth* did not require the plaintiff to allege that the defendant was an unfit parent. See *DiGiovanna* v. *St. George*, 300 Conn. 59, 73, 12 A.3d 900 (2011) ("because the requisite harm for obtaining visitation over a fit parent's objection is akin to, but falls short of, the neglected, uncared-for or dependent standard for intervention by the department, parents unsuccessfully may oppose visitation without necessarily being unfit or in need of such intervention"). Indeed, the jurisdictional requirements of *Roth presuppose* that the parent is not unfit. See *Roth* v. *Weston*, supra, 259 Conn. 234 (summarizing jurisdictional "requirements that must be satisfied in order for a court . . . to have jurisdiction over a petition for visitation contrary to the wishes of a fit parent").

Upon review of the record, however, we conclude that, in assessing the sufficiency of the allegations, the trial court looked for *either* allegations of unfitness of the parent *or* allegations of real and substantial harm to the child. Where the parent is not unfit, there is a constitutionally required presumption that the parent's opposition to visitation is in the best interests of the child. See *Crockett* v. *Pastore*, 259 Conn. 240, 249, 789 A.2d 453 (2002); *Roth* v. *Weston*, supra, 259 Conn. 232. It is the plaintiff's burden to overcome this presumption "by alleging and demonstrating that without visitation the child would suffer real and significant harm." *Crockett* v. *Pastore*, supra, 49. Because, in reaching its conclusion, the court explicitly looked for allegations of real and substantial harm to the child, we see no basis for concluding that the court did not apply the proper standard as set forth in *Roth*.

that the plaintiff sufficiently alleged a parent-like relationship with the child but asserts that the court properly concluded that the allegations do not amount to the sort of real and substantial harm contemplated by *Roth*. We agree with the defendant.[4]

We begin by setting forth the relevant standard of review and the applicable legal principles. "The standard of review of a motion to dismiss is . . . well established. In ruling upon whether a complaint survives a motion to dismiss, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing

[4] We note that, at oral argument before this court, the defendant twice conceded that it was appropriate for the trial court, in determining whether the plaintiff alleged the jurisdictional requirements set forth in *Roth* v. *Weston*, supra, 259 Conn. 202, to consider the factual averments set forth in the affidavit that the plaintiff filed in support of his objection to the motion to dismiss. The court observed in *Roth*, however, that, "[o]rdinarily, in determining whether the trial court had jurisdiction over a petition for visitation, we simply would examine the allegations *of the petition* and compare them to the jurisdictional requirements set forth herein." (Emphasis added.) Id., 235; see also *Fennelly* v. *Norton*, 103 Conn. App. 125, 139 n.11, 931 A.2d 269 ("[i]n the absence of any disputed issues of fact pertaining to jurisdiction . . . we think the admittedly high requirements of *Roth*, the strict application thereof and the policy considerations discussed therein require a court, when confronted with a motion to dismiss for lack of subject matter jurisdiction predicated solely on the application's failure to comply with *Roth*, *to decide that motion on the application itself*" [emphasis added; internal quotation marks omitted]), cert. denied, 284 Conn. 918, 931 A.2d 936 (2007); *Fennelly* v. *Norton*, supra, 139 ("[b]ecause the defendant's motion to dismiss for lack of jurisdiction was predicated on the insufficiency of the application for visitation, it was inappropriate for the court to look beyond that pleading and permit the plaintiffs to augment the application with additional allegations at the evidentiary hearing"); see also Practice Book § 25-4 ("[e]very *application* . . . in an action for visitation of a minor child . . . shall state . . . the facts necessary to give the court jurisdiction" [emphasis added]). Although these authorities suggest that courts determining whether the jurisdictional requirements of *Roth* have been satisfied cannot look beyond the four corners of the application itself, we need not decide that issue in the present case because the defendant does not claim error in that aspect of the court's decision, and, moreover, because the facts alleged in the affidavit, even if considered, are insufficient to satisfy *Roth*.

them in a manner most favorable to the pleader. . . . A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . Because a challenge to the jurisdiction of the court presents a question of law, our review of the court's legal conclusion is plenary. . . . Subject matter jurisdiction involves the authority of the court to adjudicate the type of controversy presented by the action before it. . . . [A] court lacks discretion to consider the merits of a case over which it is without jurisdiction . . . ." (Citation omitted; internal quotation marks omitted.) *Fennelly* v. *Norton*, 103 Conn. App. 125, 133–34, 931 A.2d 269, cert. denied, 284 Conn. 918, 931 A.2d 936 (2007).

In *Roth*, our Supreme Court recognized that the "constitutionally protected interest of parents to raise their children without interference undeniably warrants deference and, absent a powerful countervailing interest, protection of the greatest possible magnitude." *Roth* v. *Weston*, supra, 259 Conn. 228. To safeguard parents' rights against unwarranted intrusions into their authority, the court in *Roth* set forth requirements "that must be satisfied in order for a court . . . to have jurisdiction over a petition for visitation contrary to the wishes of a fit parent . . . ." Id., 234. Specifically, "the petition must contain specific, good faith allegations that the petitioner has a relationship with the child that is similar in nature to a parent-child relationship. The petition must also contain specific, good faith allegations that the denial of the visitation will cause real and significant harm to the child. As we have stated, that degree of harm requires more than a determination that visitation would be in the child's best interest. It must be a degree of harm analogous to the kind of harm contemplated by [General Statutes] §§ 46b-120 and 46b-129, namely, that the child is 'neglected, uncared-for or dependent.' The degree of specificity of the allegations must be

sufficient to justify requiring the fit parent to subject his or her parental judgment to unwanted litigation. Only if these specific, good faith allegations are made will a court have jurisdiction over the petition." Id., 234–35.

In the present case, the plaintiff argues that he satisfied the real and significant harm requirement because he pleaded facts establishing that he and the child had "such a close father-child bond for an extended period of time . . . ." The court in *Roth* explained that, although "an allegation such as abuse, neglect or abandonment" clearly would satisfy the real and significant harm requirement; *Roth* v. *Weston*, supra, 259 Conn. 224; the "more difficult issue is whether the child's own complementary interest in preserving relationships that serve his or her welfare and protection can also constitute a compelling interest that warrants intruding upon the fundamental rights of parents to rear their children." Id., 225. The court stated: "We can envision circumstances in which a nonparent and a child have developed such substantial emotional ties that the denial of visitation could cause serious and immediate harm to that child. For instance, when a person has acted in a parental-type capacity for an extended period of time, becoming an integral part of the child's regular routine, that child could suffer serious harm should contact with that person be denied or so limited as to seriously disrupt that relationship. Thus, proof of a close and substantial relationship and proof of real and significant harm should visitation be denied are, in effect, two sides of the same coin. Without having established substantial, emotional ties to the child, a petitioning party could never prove that serious harm would result to the child should visitation be denied. This is as opposed to the situation in which visitation with a third party would be in the best interests of the child or would be very beneficial. The level of harm that would result

from the denial of visitation in such a situation is not of the magnitude that constitutionally could justify overruling a fit parent's visitation decision. Indeed, the only level of emotional harm that could justify court intervention is one that is akin to the level of harm that would allow the state to assume custody under . . . §§ 46b-120 and 46b-129—namely, that the child is 'neglected, uncared-for or dependent' as those terms have been defined." Id., 225–26; see also *Crockett* v. *Pastore*, 259 Conn. 240, 249–50, 789 A.2d 453 (2002) (petitioner must allege that denial of visitation would cause real and significant harm and not merely that visitation will be in best interests of child).

With these legal principles in mind, we turn to the present case. Because the first prong of *Roth* is not at issue in this case, we address only the requirement that the plaintiff allege real and substantial harm. We conclude that the plaintiff failed to carry the burden *Roth* sets where the type of harm alleged is emotional and stems from the denial of visitation itself. Although the plaintiff alleges that he has a "very strong bond" with the child and that the child "suffers" and is "very emotional" when unable to see him, these allegations do not rise to the level of neglect, abuse or abandonment. At the most, these allegations suggest that visitation would be beneficial to or in the best interests of the child, which falls short of the standard set forth in *Roth*. See *Roth* v. *Weston*, supra, 259 Conn. 226. Furthermore, the petition must state with *specificity* the type of harm the child will suffer. See *Martocchio* v. *Savoir*, 153 Conn. App. 492, 502, 101 A.3d 953 (2014); see also *Fennelly* v. *Norton*, supra, 103 Conn. App. 140–41 (merely checking box on application for visitation that stated that "[t]he applicant has/had a relationship with the child(ren) that is similar in nature to a parent-child relationship and denial of visitation would cause real and significant harm to the child(ren)" does not suffice

for specific, good faith allegations required by *Roth*). Neither the plaintiff's petition nor his affidavit specifies what harm the child will suffer if he is denied visitation. Instead, the plaintiff asks the court to infer the neglect, lack of care, or abandonment from his allegation that the child will "suffer" as a consequence of the termination of their relationship. This is not enough to establish subject matter jurisdiction under *Roth*, which requires specific, good faith allegations that the denial of visitation will subject the child to real and significant harm. See *Crockett* v. *Pastore*, supra, 259 Conn. 249–50; *Roth* v. *Weston*, supra, 226.

In *Clements* v. *Jones*, 71 Conn. App. 688, 695–96, 803 A.2d 378 (2002), this court concluded that the plaintiff failed to "allege that a denial of visitation would result in harm to the child. Rather, the aspects of the application that can be construed as relating to harm state that the plaintiff often received the child in an ill state, apparently due to the child's asthma, and needed to nurse him back to health, that the plaintiff spent much time nursing the child back to health, that separation would be unjust and inhumane to the child, and that visitation would be in the best interests of the child. With regard to the specific allegations about the child's health and his asthma, we cannot conclude, without more, that those assertions constitute an allegation that rises to the level of abuse, neglect or abandonment contemplated by *Roth*." In the present matter, although the plaintiff alleges that he played a significant role in caring for the child's "severe health conditions" and does not currently know who is caring for the child, we cannot conclude, without more, that these assertions are akin to abuse, neglect, or abandonment as required by *Roth*. Accordingly, the trial court properly determined that the plaintiff's petition failed to allege the second jurisdictional element set forth in *Roth*, and

properly dismissed the petition for lack of subject matter jurisdiction without an evidentiary hearing.

The judgment is affirmed.

In this opinion the other judges concurred.

ALDIN ASSOCIATES LIMITED PARTNERSHIP *v.* HESS CORPORATION ET AL. (AC 38210)

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

Syllabus

The plaintiff, a franchisee and owner of four gasoline stations, sought to recover damages from the defendant franchisor, H Co., for violations of the Connecticut Petroleum Product Franchise Act (act) (§ 42-133j et seq.), and the Connecticut Unfair Trade Practices Act (CUTPA) (§ 42-110a et seq.), and for breach of the implied covenant of good faith and fair dealing. The plaintiff, which operated the gas stations as H Co.'s franchisee pursuant to written dealer agreements that required the plaintiff to purchase gasoline solely from H Co., alleged in its complaint that H Co. had stifled the plaintiff's ability to compete with other gasoline retail stations, causing it to incur losses in sales volumes and profits, by charging unreasonably high wholesale gasoline prices. Five months after the plaintiff filed a claim for a jury trial, H Co. objected on the ground that the dealer agreements contained express waivers of the plaintiff's right to a jury trial. Approximately one year later, the court conducted an evidentiary hearing and sustained the objection, concluding that the plaintiff had failed to meet its burden of establishing a lack of intent to be bound by the jury trial waivers. A trial to the court commenced approximately two months later, during which the plaintiff argued that it had proved damages based on a summary of operations for its gas stations that listed each station's annual sales volume, profit, and income. The trial court determined that the summary of operations reflected that the plaintiff's profit per gallon during the years in question was less than the eight cents per gallon that H Co. had guaranteed, and, consequently, the plaintiff had sustained a shortfall. The court rendered judgment in favor of H Co. on all counts of the complaint, finding that, even if the issues of liability and causation had been decided in the plaintiff's favor, the plaintiff had not proven damages as to any of its causes of action with a sufficient degree of certainty. On the plaintiff's appeal to this court, *held*:

1. The plaintiff could not prevail on its claim that the trial court improperly sustained H Co.'s objection to its claim for a trial by jury:

   a. It was not clearly erroneous for the trial court to find that the plaintiff had failed to prove, by a preponderance of the evidence, that it did not intend to be bound by the waiver provisions, that court having properly applied the relevant factors and found that the jury trial waiver provisions, which were entered into prior to litigation, were presumptively enforceable: the waivers were not inconspicuously buried in the dealer agreements, the parties' bargaining power was substantially similar, the plaintiff's general partner, who had negotiated and executed the agreements, was a sophisticated business person who made a conscious decision not to retain counsel, and the plaintiff had an opportunity to negotiate the terms of the waiver, and the court's findings with respect to the conspicuousness of the waiver provisions and the equality of the parties' bargaining power were adequately supported by the evidence adduced at the evidentiary hearing and were not clearly erroneous; moreover, although the plaintiff claimed that there was a substantial inequality of bargaining power that weighed against enforcement of the waiver provisions, any pattern of coercive behavior by petroleum product suppliers prior to the enactment of that act had no bearing on whether H Co. engaged in any such conduct in the present case, and the court's finding that the parties enjoyed substantially similar bargaining power during the negotiations of the dealer agreements was not rendered clearly erroneous merely because the waiver provisions were negotiated as part of the franchise agreements.

   b. The jury trial waivers were not void under §§ 42-133*l* and 42-133n of the act, which provide that a franchise agreement cannot waive a franchisee's right to bring an action in Superior Court for a violation of the act; the waivers here did not prevent the plaintiff from bringing an action against H Co., and, by its express terms, § 42-133n (a) merely secures the right of a franchisee to bring an action for violations of the act and is silent as to the franchisee's right to have that action decided by a jury rather than by a judge.

   c. The trial court did not abuse its discretion by failing to overrule H Co.'s objection to the plaintiff's jury trial claim on the ground that the objection was not timely filed, as the plaintiff cited no appellate decision or rule of practice establishing a time limitation on the filing of an objection to a jury trial claim; furthermore, the plaintiff was not unfairly prejudiced with respect to its trial preparation by the timing of H Co.'s objection or the trial court's ruling thereon, as the plaintiff had ample opportunity to obtain an earlier, prompt evidentiary hearing and resolution of the waiver issue, far in advance of the start of trial, but failed to do so.

2. The trial court's finding that the plaintiff had failed to present sufficient evidence to establish its damages with reasonable certainty was clearly erroneous and not supported by the record: for purposes of the counts

of the complaint alleging violations of the act and breach of the implied covenant of good faith and fair dealing, the trial court's finding that the plaintiff had not provided the court with the evidence it would need to compute damages was clearly erroneous, as it was inconsistent with the court's prior statement that the plaintiff's summary of operations reflected a certain amount of lost profits, which obligated the court to find that the plaintiff had proven some damages with reasonable certainty, and the court improperly conflated the question of damages with the question of causation, as the reasoning it used plainly hinged on whether the plaintiff's lost profits and sales volumes were caused by H Co.'s allegedly improper conduct, which was an improper basis for concluding that the plaintiff failed to prove damages with reasonable certainty; moreover, the court's finding that the plaintiff's claim under CUTPA failed because it had not presented sufficient evidence of the amount of ascertainable loss was also clearly erroneous, as a loss of customers, even in the absence of an accompanying monetary value of that loss, constitutes an ascertainable loss for purposes of CUTPA, under which the plaintiff was also entitled to claim punitive damages and attorneys' fees, and to have the court exercise its discretion to award such damages.

Argued February 7—officially released September 19, 2017

Procedural History

Action to recover damages for, inter alia, the named defendant's alleged violation of the Connecticut Petroleum Product Franchise Act, and for other relief, brought to the Superior Court in the judicial district of Hartford, Complex Litigation Docket, where the complaint was withdrawn as to the defendant A. F. Forbes, Inc.; thereafter, the court, *Miller*, *J.*, sustained the named defendant's objection to the plaintiff's claim for a jury trial; subsequently, the matter was tried to the court, *Miller*, *J.*; judgment for the named defendant, from which the plaintiff appealed to this court; thereafter, the court, *Miller J.*, issued an articulation of its decision. *Reversed; further proceedings.*

Richard P. Weinstein, with whom, on the brief, were *Dina S. Fisher* and *Sarah Black Lingenheld*, for the appellant (plaintiff).

Paul D. Sanson, with whom were *Karen T. Staib* and, on the brief, *Patrick M. Fahey*, for the appellee (named defendant).

Opinion

FLYNN, J. The plaintiff franchisee, Aldin Associates Limited Partnership, commenced this three count action against the defendant franchisor, Hess Corporation,[1] alleging that the defendant stifled the plaintiff's ability to compete with other gasoline retail stations, causing it to incur losses in sales volumes and profits, by charging unreasonably high wholesale gasoline prices in violation of the Connecticut Petroleum Product Franchise Act, General Statutes § 42-133j et seq., the implied covenant of good faith and fair dealing, and the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq. After denying the plaintiff's claim for a trial by jury on the ground that the plaintiff had executed valid written waivers of its right to a jury trial, the trial court conducted a bench trial and rendered judgment for the defendant on all three counts, finding that the plaintiff failed to prove its damages with a sufficient degree of certainty. The plaintiff appeals, claiming that the court (1) improperly denied its claim for a trial by jury, and (2) erroneously found that the plaintiff failed to prove damages as to any of its causes of action with a sufficient degree of certainty. We disagree with the plaintiff's claim with regard to the jury trial waivers, but agree that the court's finding that the plaintiff failed to prove damages with the requisite degree of certainty was clearly erroneous. Accordingly, we reverse the judgment of the trial court and remand the case for further proceedings.

The following facts, which are either undisputed or were found by the trial court in its memorandum of

[1] The plaintiff also named A. F. Forbes, Inc., as a defendant, but subsequently withdrew the complaint as to that party. In this opinion we refer to Hess Corporation as the defendant for purposes of simplicity.

decision, and procedural history are relevant to this appeal. The plaintiff acquired three gas stations in August, 2000, and a fourth in December, 2002.[2] The plaintiff operated them as the defendant's franchisee pursuant to written agreements entitled "Dealer Agreement Gasoline Station" (dealer agreements). Each dealer agreement[3] required the plaintiff to purchase gasoline and other products exclusively from the defendant, to be resold by the plaintiff at retail prices. With respect to the defendant's pricing of wholesale gasoline—a hotly contested issue throughout this case—the dealer agreements required the defendant to sell gasoline to the plaintiff at "dealer tankwagon prices," which were to be determined by the defendant on the basis of the prices of competitors in the marketing area of each station at the time of delivery. Each of the dealer agreements also contained a clause providing that the parties "waive any right they may have to a jury trial in any disputes hereunder."

The plaintiff commenced this lawsuit in December, 2010, alleging that, around 2005, the defendant began charging dealer tankwagon prices that were arbitrary, unreasonable, and substantially more expensive than the wholesale gasoline prices it was charging to the plaintiff's competitors. The plaintiff asserted that the increases to dealer tankwagon prices put each of its four stations at a substantial competitive disadvantage because, with higher wholesale prices, the stations could no longer profitably charge retail prices that were cheap enough relative to their competitors' prices to attract customers. The improper pricing, the plaintiff asserted, caused it to incur losses in sales volumes and profits. The plaintiff's three count amended complaint

[2] The first three stations acquired by the plaintiff were located in New Haven, East Haven, and West Haven, and the fourth was located in Groton.

[3] As relevant to this appeal, the terms of each of the four dealer agreements are identical.

alleged that the defendant's conduct violated several provisions of the Connecticut Petroleum Product Franchise Act, specifically, General Statutes § 42-133*l* (f) (5), (6), and (7),[4] the implied covenant of good faith and fair dealing, and CUTPA.

On April 11, 2011, the plaintiff filed a claim for a trial by jury. The defendant objected on the ground that the dealer agreements contained express waivers of the plaintiff's right to a jury trial and that, pursuant to *L & R Realty* v. *Connecticut National Bank*, 246 Conn. 1, 16, 715 A.2d 748 (1998), such waivers are presumptively valid. The court held an evidentiary hearing on October 16, 2012, and found that the plaintiff had failed to carry its burden of proving that the waivers were unenforceable. Accordingly, the court sustained the defendant's objection to the plaintiff's request for a trial by jury and denied the plaintiff's subsequent motion for reconsideration.

The court conducted a bench trial that commenced on December 11, 2012, and concluded on December 10, 2013. Following the parties' submissions of posttrial briefs and proposed findings of fact, the court issued a memorandum of decision on July 20, 2015, finding for the defendant on all counts of the complaint. Specifically, the court found that the plaintiff failed to prove

[4] General Statutes § 42-133*l* (f) provides in relevant part: "No franchisor, directly or indirectly, through any officer, agent or employee, shall do any of the following . . . (5) impose unreasonable standards of performance upon a franchisee; (6) fail to deal in good faith with a franchisee; (7) sell, rent or offer to sell to a franchisee any product or service for more than a fair and reasonable price . . . ." The plaintiff's right to commence a cause of action for violations of these provisions of the Connecticut Petroleum Product Franchise Act derives from General Statutes § 42-133n (a), which provides in relevant part: "Any franchisee may bring an action for violation of sections 42-133*l* or 42-133m in the Superior Court to recover damages sustained by reason of such violation . . . . Such franchisee, if successful, shall be entitled to costs, including, but not limited to, reasonable attorney's fees."

damages with a sufficient degree of certainty. The court rendered a judgment in accordance with that decision, and this appeal followed. Additional facts and procedural history will be set forth where necessary.

I

We first address the plaintiff's claim that the court improperly sustained the defendant's objection to its claim for a jury trial. In support of this claim, the plaintiff argues that (1) the court erroneously concluded, on the basis of the evidence adduced at the October 16, 2012 evidentiary hearing, that the plaintiff failed to demonstrate that it did not intend to waive its jury trial rights, (2) the express jury trial waivers in the dealer agreements were void as a matter of law under § 42-133*l* (j),[5] and (3) the court abused its discretion by failing to deny the defendant's objection to the jury trial claim on grounds of untimeliness. We address these arguments in turn.

A

The plaintiff first argues that the court erred in finding that it failed to carry its burden of demonstrating that it did not intend to be bound by the jury trial waiver provisions. We disagree.

Section 31 of each dealer agreement, entitled "Venue" and located on the last page just the parties' signature lines, provides as follows: "The rights of the parties under this Agreement will be governed by the federal law of the district in which the Station is located. All disputes will be heard in the U.S. District Court and the prevailing party will be entitled to recover its attorneys' fees from the other party. *Both parties waive any right*

[5] General Statutes § 42-133*l* (j) provides: "Any waiver of the rights of a franchisee under sections 42-133m, 42-133n and this section which is contained in any franchise agreement entered into or amended on or after October 1, 1977, shall be void."

they may have to a jury trial in any disputes hereunder."[6] (Emphasis added.)

On April 11, 2011, the plaintiff filed a claim for a trial by jury. The defendant filed an objection asserting that, on the basis of § 31 of the dealer agreements, the plaintiff waived its right to a trial by jury. In a "supplemental reply" dated October 3, 2012, the plaintiff argued that, on the basis of the factors set forth in *L & R Realty* v. *Connecticut National Bank*, supra, 246 Conn. 15, the jury trial waivers were unenforceable because they were not executed knowingly and voluntarily. In support of this argument, the plaintiff submitted an affidavit from David Savin, the plaintiff's general partner who negotiated and executed the dealer agreements, wherein Savin averred that he "did not review the so-called venue paragraph and was not aware of the jury trial waiver," that the plaintiff "was not represented by an attorney to review the agreements," that the plaintiff "did not negotiate any terms of the agreements,"[7] and that he "executed the agreements as they were presented . . . without changes and without any discussion as to the language in the agreements." The plaintiff asserted that an evidentiary hearing was necessary to resolve the issue of whether the waivers were executed knowingly and voluntarily.

The court conducted an evidentiary hearing on October 16, 2012, at which Savin testified for the plaintiff and Michael McAfee, the defendant's manager of retail

[6] Neither party briefed or otherwise took issue with the clause in § 31 of the dealer agreements providing that disputes are governed by federal law and must be heard in United States District Court. Accordingly, any claims regarding such issues are deemed waived.

[7] During his testimony at the October 16, 2012 evidentiary hearing, Savin admitted that he was "able to negotiate one or two amendments" to the dealer agreements, and that he did not recall there being any changes or amendments that he wanted to make but was not allowed to make. In its oral decision, the court explicitly found that there was evidence that certain provisions other than the jury trial waivers had been negotiated.

administration, testified for the defendant. Ruling from the bench, the court sustained the defendant's objection to the jury trial claim. Relying on the *L & R Realty* factors, the court concluded that express contractual jury trial waivers like the ones at issue in the present case are "presumptively enforceable," and that "[t]he evidence . . . has not established any reason why th[e] waiver[s] should not be enforced." In support of this conclusion, the court found: "The waiver[s] . . . [were] not buried in the [dealer] agreement[s]. [They weren't] as conspicuous as everyone might like, but [they are] not buried. [They weren't] designed to be hidden. In any event, it is important to remember that [these were] commercial contract[s] between two parties. I'm not going to say [that the parties] were of exactly equal bargaining power, but they were in substantially similar bargaining power. Neither one was in a position to claim that it could be disadvantaged by the other.

"It's clear that . . . Savin didn't have counsel to review the agreement[s], but that was his choice. . . . I think that [Savin has] more experience reading contracts than most attorneys do in all probability. But there was a conscious decision made by a sophisticated business person not to have counsel review the document[s].

"There is no other evidence which indicates a lack of intent by either party to be bound by this waiver. The evidence that there [were] negotiations between the parties to the dealer agreement[s] . . . supports the defendant, not the plaintiff. If the plaintiff had a problem with the jury trial waiver[s], [they] might well have been negotiated. In any event, other things in the contract were negotiated. [The waivers] could have been negotiated." Accordingly, the court sustained the defendant's objection to the plaintiff's claim for a trial by jury and ordered the case to be tried before the court.

The plaintiff claims that the court erred in concluding that it failed to meet its burden of establishing its lack of intent to be bound by the jury trial waiver provisions. Specifically, the plaintiff argues that the waivers are inconspicuous because they are located within paragraphs misleadingly entitled "Venue," are not in bold lettering or a different typeface, and generally fail to "call attention to the fact that the paragraph contains a waiver of a constitutional right." The plaintiff also appears to assert that, because the Connecticut Petroleum Product Franchise Act was enacted for the purpose of preventing franchisees from being coerced during contract negotiations by franchisors, the defendant, as the franchisor, had substantially more bargaining power during contract negotiations. We are not persuaded.

"[W]hether a party has waived his right to a jury trial presents a question of fact for the trial court," and our review is limited to whether the finding was clearly erroneous.[8] (Internal quotation marks omitted.) *L & R Realty* v. *Connecticut National Bank*, supra, 246 Conn. 8; see also *Perricone* v. *Perricone*, 292 Conn. 187, 208–209, 972 A.2d 666 (2009). "A finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *L & R Realty* v. *Connecticut National Bank*, supra, 8–9.

"The constitution of Connecticut, article first, § 19, provides that [t]he right of trial by jury shall remain

[8] The plaintiff incorrectly asserts that the trial court's decision regarding the enforceability of the jury trial waivers is subject to plenary review. Although "[*t*]*he standard* by which the trial court determines the validity of a jury trial waiver is a question of law that is subject to de novo review," the distinct question of "[*w*]*hether* a party has waived his right to a jury trial presents a question of fact" that we review only for clear error. (Emphasis added; internal quotation marks omitted.) *L & R Realty* v. *Connecticut National Bank*, supra, 246 Conn. 8; see also *Perricone* v. *Perricone*, 292 Conn. 187, 208–209, 972 A.2d 666 (2009).

inviolate. That provision guarantees the right to a jury trial in all cases for which such a right existed at the time of the adoption of that constitutional provision in 1818."[9] (Internal quotation marks omitted.) Id., 9. Ordinarily, although the right to a jury trial may be waived, a waiver cannot be inferred without "reasonably clear evidence of the intent to waive." (Internal quotation marks omitted.) Id., 10. Our Supreme Court has identified the following factors that, generally speaking, bear on the determination of whether a party intended to waive their right to a jury trial: "(1) the conspicuousness of the waiver clause, including (a) its location relative to the signatures of the parties, (b) whether it was buried in the middle of a lengthy agreement, and (c) whether it was printed in a different typeface or font size than the remainder of the contract; (2) whether there was a substantial disparity in bargaining power between the parties to the agreement; (3) whether the party seeking to avoid enforcement was represented by counsel; (4) whether the opposing party had an opportunity to negotiate the terms of the agreement; and (5) whether the opposing party had been fraudulently induced into agreeing specifically to the jury trial waiver." Id., 15.

Because the jury trial waiver provisions at issue in the present case were executed by the parties prior to litigation as part of the dealer agreements, the burden was on the plaintiff to establish that it did not intend to waive its right to a jury trial. "[E]xpress commercial contractual jury trial waivers entered into prior to litigation are presumptively enforceable. In order to rebut

[9] The defendant asserts that the plaintiff has no right to a trial by jury with regard to its causes of action for violations of the Connecticut Petroleum Product Franchise Act and CUTPA because neither of those claims existed when article first, § 19, of the Connecticut Constitution was adopted in 1818. Because we conclude that the express jury trial waivers executed in the dealer agreements are fully enforceable against the plaintiff, we need not address these arguments.

this presumption, the party seeking to avoid the waiver must come forward with evidence that it clearly did not intend to waive the right to a jury trial. Such evidence may be apparent on the face of the agreement, such as where the waiver is in particularly fine print or is buried in the middle of a voluminous document. In addition, the party seeking to avoid enforcement may come forward with evidence that there was an inequality of bargaining power, that he or she was not represented by counsel, or other evidence indicating a lack of intent to be bound by the waiver provision. Once the party seeking to invalidate the waiver has come forward with such evidence, the trial court must hold a hearing at which additional evidence may be received. At this hearing, the party seeking to avoid the waiver carries the burden of proving, by a preponderance of the evidence, the lack of a clear intent to be bound by the waiver provision." Id., 16. The plaintiff therefore bore the burden in this case before the trial court. On appeal, we conclude that the plaintiff has not carried its burden of demonstrating that the court clearly erred in finding that the plaintiff failed to prove its lack of intent to be bound by the jury trial waivers.

The court's decision reflects a proper application of the factors set forth in *L & R Realty*. Specifically, the court found: (1) that the waiver provisions were "not buried in the [dealer] agreements"; (2) that the parties' bargaining power was "substantially similar," albeit not "exactly equal"; (3) that, although Savin did not have an attorney review the dealer agreements, that fact did not militate in favor of avoiding the waiver provisions because Savin was "a sophisticated business person" who made a conscious decision not to retain counsel; and (4) that, because other provisions of the dealer agreements were negotiated, had the plaintiff had "a problem with the jury trial waiver[s], [they] might well have been negotiated."

The plaintiff appears to challenge the court's findings only with regard to the conspicuousness of the jury trial waiver provisions and the equality of the parties' bargaining power. Both findings, however, are supported adequately by the evidence adduced at the October 16, 2012 evidentiary hearing and, therefore, not clearly erroneous. First, although the paragraph that contains the waiver provision in each of the dealer agreements is labeled with the term "Venue," rather than with an explicit reference to the right to a trial by jury, the waiver provisions were not inconspicuous. In each of the four dealer agreements, all of which were executed by Savin, the waiver provisions are located on the last page just above the parties' signature lines and consist of three short sentences, the last of which states in no uncertain terms that "[b]oth parties waive any right they may have to a jury trial in any disputes" arising under the dealer agreements. Therefore, regardless of the length of the dealer agreements, the waiver provisions were not "buried in the middle" of them; *L & R Realty* v. *Connecticut National Bank*, supra, 246 Conn. 15; as the plaintiff contends.

The court's finding that the parties enjoyed "substantially similar" bargaining power also finds adequate support in the record. The plaintiff, although considerably smaller than the defendant, is a large company in its own right with substantial assets and sales revenues. Savin testified, for example, that from 2005 through 2011, the plaintiff generated annual revenues of between $150 million and $200 million. Savin and McAfee also both testified, and the court found, that the plaintiff had an opportunity to negotiate, and successfully did negotiate, other provisions of the dealer agreements, which not only demonstrates that the plaintiff possessed at least some level of bargaining power during contract negotiations, but also suggests that its

failure to negotiate the waiver provisions was a product of its assent to be bound by them.

The plaintiff appears to suggest that there was a substantial inequality of bargaining power, weighing against enforcement of the waiver provisions, because the waivers were contained within petroleum product franchise contracts and such contracts inherently present "coercive opportunities" for franchisors such as the defendant. As evidence for this proposition, the plaintiff argues that our legislature's enactment of the Connecticut Petroleum Product Franchise Act demonstrates the coercive nature of petroleum product franchise contracts. It is true that the Connecticut Petroleum Product Franchise Act was enacted in part "to avoid undue control of the [petroleum] dealer by suppliers . . . and to offset evident abuses within the petroleum industry as a result of inequitable economic power . . . ." General Statutes § 42-133j (a). Any pattern of coercive behavior by petroleum product franchisors prior to the enactment of the Connecticut Petroleum Product Franchise Act, however, says nothing about whether *the defendant* engaged in any such conduct *in the present case*. As previously stated, the court found that the parties enjoyed "substantially similar" bargaining power during negotiations of the dealer agreements. That finding is adequately supported by the record and is not rendered clearly erroneous merely because the waiver provisions were negotiated as part of franchise agreements. The purpose underlying the enactment of the Connecticut Petroleum Product Franchise Act does not alter the result of our application of the *L & R Realty* factors.

Moreover, although it did not explicitly form any part of the court's analysis, we note that the plaintiff does not dispute that the jury trial waiver provisions were contained in all four of the dealer agreements, and that the plaintiff renewed each of the dealer agreements

multiple times after they initially were executed. Savin also admitted that he was given an opportunity to review the agreements before signing them. Put simply, the record shows that Savin had ample opportunity to object to the waiver provisions.

Accordingly, the record provides ample support for the court's finding that the plaintiff failed to prove by a preponderance of the evidence that it did not intend to be bound by the waiver provisions, and we are not left with a definite and firm conviction that a mistake has been made.

B

The plaintiff next contends that the jury trial waiver provisions are void as a matter of law pursuant to §§ 42-133*l* (j) and 42-133n. Section 42-133*l* (j) provides: "Any waiver of the rights of a franchisee under sections 42-133m, 42-133n and this section which is contained in any franchise agreement entered into or amended on or after October 1, 1977, shall be void." Section § 42-133n (a) provides in relevant part that "[a]ny franchisee may bring an action for violation of sections 42-133*l* or 42-133m in the Superior Court to recover damages sustained by reason of such violation . . . ." The plaintiff argues that the jury trial waivers effectively prevented it from exercising its right, guaranteed under § 42-133n (a), to bring an action against the defendant for damages for violations of the Connecticut Petroleum Product Franchise Act, and, therefore, is void under § 42-133*l* (j). We disagree. By its express terms, § 42-133n (a) merely secures the right of a franchisee to "bring an action" for violations of the Connecticut Petroleum Product Franchise Act; it says nothing of a franchisee's right to have that action decided by a jury rather than a judge. The jury trial waivers do not prevent the plaintiff from bringing an action against the defendant for violations of the Connecticut Petroleum Product

Franchise Act. Therefore, § 42-133*l* (j) does not bar the plaintiff from relinquishing its right to a jury trial.

C

Finally, the plaintiff contends that the court abused its discretion by failing to overrule the defendant's objection to the jury trial claim on the ground that the objection was not timely filed and by delaying its ruling on the issue "until immediately before jury selection was to begin." The plaintiff asserts that the court's last minute ruling "caused [it] unfair prejudice and lost time preparing the case for a jury trial." We are not persuaded.

We review the court's failure to overrule the defendant's objection on grounds of untimeliness and unfair prejudice only for an abuse of discretion. This is because such a decision implicates interests of "judicial economy, docket management or courtroom proceedings," considerations that are "particularly within the province of the trial court" to weigh. (Internal quotation marks omitted.) *Kelly* v. *Kelly*, 85 Conn. App. 794, 800, 859 A.2d 60 (2004); see also *West Haven Lumber Co.* v. *Sentry Construction Corp.*, 117 Conn. App. 465, 469–70, 979 A.2d 591 (trial court entitled to broad discretion in discharging its "responsibility to avoid unnecessary interruptions, to maintain the orderly procedure of the court docket, and to prevent any interferences with the fair administration of justice" [internal quotation marks omitted]), cert. denied, 294 Conn. 919, 984 A.2d 70 (2009). "A reviewing court is bound by the principle that [e]very reasonable presumption in favor of the proper exercise of the trial court's discretion will be made." (Internal quotation marks omitted.) *West Haven Lumber Co.* v. *Sentry Construction Corp.*, supra, 470.

We discern no abuse of discretion on the part of the trial court. As to the timeliness of the defendant's objection, the plaintiff filed its claim for a trial by jury

on April 11, 2011, and the defendant filed its objection slightly more than five months later on September 16, 2011. The plaintiff has cited no appellate decision or rule of practice establishing a time limitation on the filing of an objection to a jury trial claim, and this court is not aware of any.

In any case, we disagree that the plaintiff has been unfairly prejudiced by the timing of either the defendant's objection or the court's ruling. To the extent that the claimed delays have caused the plaintiff to "los[e] time preparing the case for a jury trial," we conclude that neither the defendant nor the trial court bear responsibility for that hardship. At the time the defendant initially filed its objection to the jury trial claim on September 16, 2011, no trial date had been scheduled. The plaintiff filed a "reply" a few days later, raising multiple arguments in opposition to the defendant's objection. The plaintiff neglected, however, to raise any argument in its reply as to the enforceability of the waiver provisions pursuant to *L & R Realty*, or to request an evidentiary hearing on the matter. Instead, almost a full year passed without the plaintiff filing a motion for argument or otherwise affirmatively attempting to obtain a timely ruling on the issue. See General Statutes § 51-183b; Practice Book § 11-19. On October 3, 2012, shortly before the start of trial, the plaintiff filed a "supplemental reply" asserting "additional reasons why the defendant's objection cannot be sustained," including that the waivers were not executed knowingly and intelligently. The plaintiff requested an evidentiary hearing pursuant to *L & R Realty* to resolve that issue.[10] Accordingly, the plaintiff

[10] The plaintiff also argued in its supplemental reply that, because trial was scheduled to begin later that month, "[i]nasmuch as an evidentiary hearing is a prerequisite for any sustaining of the defendant's objection, it is prejudicial to the plaintiff, both in terms of its trial preparation and the obvious delay in the commencement of trial that such an evidentiary hearing will necessitate, to now entertain the defendant's objection."

had ample opportunity to obtain an earlier, prompt evidentiary hearing and resolution of the waiver issue, far in advance of the start of trial. We therefore conclude that the court did not prejudice the plaintiff's trial preparation by the way in which it dealt with the defendant's objection to the plaintiff's claim for a jury trial.

II

The plaintiff next claims that the court erroneously concluded that it failed to prove its damages with the requisite degree of certainty. We agree.

As previously set forth, the plaintiff's operative complaint alleges causes of action for violations of the Connecticut Petroleum Product Franchise Act, the covenant of good faith and fair dealing, and CUTPA, each of which stems from the defendant's allegedly improper pricing of dealer tankwagon rates. The dealer agreements required the defendant to sell the plaintiff wholesale gasoline at the defendant's "dealer tankwagon prices in the marketing area of the Station, as determined by [the defendant], for the grades and quantities delivered, in effect at the time of delivery . . . ." The dealer agreements provided no further definition of dealer tankwagon price.

Following the conclusion of the bench trial on December 10, 2013, the plaintiff submitted proposed findings of fact setting forth its theories of liability and damages. Citing the evidence admitted at trial, the plaintiff urged the court to find that, while negotiating the dealer agreements, the defendant represented that it would calculate the dealer tankwagon prices using a method known as "street back pricing." This method, the plaintiff asserted, required the defendant to regularly consider surveys listing the retail gasoline prices that competing dealers were charging in the market areas of each of the plaintiff's four stations. The defendant would then charge the plaintiff a dealer tankwagon

price cheap enough to allow it to maintain retail prices at the bottom of the market for each location, enabling the plaintiff to turn a profit of eight cents per gallon of gasoline sold.[11] The plaintiff further contended that, around 2005, after a few years of this course of dealing, the defendant abandoned the "street back pricing" method and began charging dealer tankwagon prices that were arbitrary and unreasonable, as evidenced by the fact that the defendant's dealer tankwagon prices increased while retail prices being charged by the plaintiff's competitors remained relatively constant. The plaintiff further asserted that, as a result of these price increases, it was required to raise its retail prices, which inhibited its ability to attract customers and caused it to experience a drop in profits and overall sales volumes.

To prove damages, the plaintiff relied primarily on two documents—a "summary of operations," which listed each station's annual sales volume, profit, and income from 2001 through 2011, and a "damage analysis," which concluded that the defendant's improper pricing of dealer tankwagon rates caused it to incur $2,784,000 in damages from 2005 through 2011. To arrive at that number, the plaintiff subtracted its annual income from 2005 through 2011 from $603,000, which was the plaintiff's approximate average annual income in 2003 and 2004,[12] before the defendant allegedly had begun to improperly price its dealer tankwagon charges.[13] The plaintiff asserted that the apporixmate

[11] The plaintiff also argued that maintaining its status as "low man on the street" was critical to its ability to compete because, unlike other gas stations, the plaintiff's stations lacked modern features and other amenities typically attractive to customers, such as easy roadway access, public restrooms, and convenience stores.

[12] The plaintiff did not rely upon its earnings and sales volumes during 2001 and 2002, presumably because those numbers did not account for the income generated by the fourth gas station, which the plaintiff did not acquire until December, 2002.

[13] The summary of operations reflects that the plaintiff generated a net income of $428,498 in 2005, $162,109 in 2006, $228,330 in 2007, $190,475 in 2008, $198,210 in 2009, $64,409 in 2010, and $165,882 in 2011. The sum of

sum of those differences—$2,784,000—reflects the additional income that it *would have generated* from 2005 through 2011 had the defendant charged reasonable dealer tankwagon prices throughout that time.

The court issued a memorandum of decision on July 20, 2015, finding for the defendant on all three counts of the operative complaint. At the outset, the court stated that it was opting to decide the case on the "issue of whether the plaintiff has proven its claim for damages well enough for the court to award them, if [the court] found for the plaintiff on one or more of the issues regarding liability." After briefly reciting the historical facts of the case, including the parties' disputes regarding the proper method for determining dealer tankwagon prices and whether the defendant, in fact, had guaranteed the plaintiff a profit of eight cents per gallon, the court stated that the plaintiff's summary of operations was "by far the single most important evidence presented in this case," and noted that the defendant did not dispute the accuracy of the numbers contained therein. The court found that the summary of operations reflected certain "critical facts," including the number of gallons of gasoline sold by the plaintiff from 2001 to 2011 and that the plaintiff's overall average profit per gallon over that period was less than the allegedly guaranteed eight cent profit margin. The court used those figures to determine that from 2001 to 2011 the plaintiff had a "hardly substantial" "shortfall" of $452,777.34.

The court stated that these figures "show[ed] the plaintiff's allegations of 'price gouging' in a much different light" because, from 2001 through 2011, the plaintiff "was . . . getting its eight cent [profit per gallon] or a number very close to it." The court then explained that the plaintiff's complaints over the defendant's determination of dealer tankwagon prices were based upon the

the approximate differences between each of those figures and $603,000 is $2,784,000.

plaintiff's belief that the defendant "was keeping it from making something more than the eight cents per gallon that it claims it was guaranteed." The court then found: "Even if the plaintiff could convince the court that [the defendant] had overcharged it for gasoline and thereby caused [the plaintiff] to lose money, the plaintiff simply has not provided the court with the evidence it would need to compute such damages."

The court then observed that, for at least two reasons, the plaintiff failed to prove that the defendant "caused . . . losses which could be determined with reasonable certainty . . . ." First, the court reasoned that the plaintiff's four stations "offer[ed] . . . potential customers a low price per gallon but not much else," which meant that, although the plaintiff might lose business when its retail prices increase, "it will also lose business to customers who need a gas station with a rest room or one of any number of other amenities, regardless of the price . . . ." This dynamic, the court stated, "would obviously be hard to measure . . . ." Second, the court posited that competing retailers frequently offer generous price discounts to customers, and that the plaintiff's stations "are not likely to compete successfully with stations [that] can give a customer [thirty cents] per gallon or more off the price of a tank of gas." The court stated that, although other examples abound, "the point is clear: [P]rice is very important and [the plaintiff] often still won't be able to compete on price with some stations [that] can give buyers price and other things they want."

The court further observed that, although "[t]here may be ways to measure the extent to which a gas retailer can lose money despite a low price . . . the plaintiff has not given any such information to the court. Similarly, a gas station which suddenly obtains the ability to charge significantly less for the same product may not see an equivalent increase in sales because of

the price drop. There may be something else about the station which makes drivers not want to go there so much that they will forgo some potential savings in order to fill their gas tanks somewhere else." Accordingly, the court found that it "could not evaluate the plaintiff's claimed damages accurately enough to award damages to the plaintiff, if it found in favor of the plaintiff."

The defendant thereafter filed a motion for articulation, seeking clarification on the following question: "In concluding that [the plaintiff] had failed to prove its claim for damages, did the . . . court determine [that the] plaintiff had failed to demonstrate causation . . . in that the plaintiff failed to prove that [the defendant's] actions caused the plaintiff's asserted decline in profitability?" The defendant argued that the court's analysis was "arguably ambiguous" because, while purporting to resolve the case solely on the basis of damages, it also included findings that related to the element of causation, particularly the two examples of other factors that potentially could have impacted the profitability of the plaintiff's four gas stations. In response to the defendant's motion for articulation, the court stated: "The short answer to [the defendant's] question [of whether the court had determined that the plaintiff failed to prove causation] is 'no.' This court found for the [defendant] because . . . the plaintiff had not presented enough evidence on damages to allow the court to award them, even if the court had decided the issues of liability and causation in the plaintiff's favor."

On appeal, the plaintiff claims that the court improperly found that the evidence adduced at trial was insufficient to establish its damages with the requisite degree of certainty. The plaintiff asserts that the summary of operations document, the accuracy of which was not disputed at trial, reflects with sufficient precision the decreases in profits and overall sales volumes it began

experiencing in 2005 when the defendant started improperly pricing dealer tankwagon charges. Indeed, the plaintiff notes that the court specifically found in its memorandum of decision that the summary of operations demonstrated that the plaintiff suffered a "shortfall" of $452,777.34 in profits from between 2001 and 2011. The plaintiff asserts that this finding alone, despite being based on incorrect math and a misunderstanding of its theory of damages,[14] demonstrates that "at least some" of its claimed damages could be calculated with reasonable certainty and requires a reversal of the court's judgment. (Emphasis omitted.) We agree and conclude that the court clearly erred (1) in finding that the plaintiff failed to establish damages with reasonable certainty for purposes of the counts alleging violations of the Connecticut Petroleum Product Franchise Act and covenant of good faith and fair dealing, and (2) in finding that the plaintiff failed to establish an ascertainable loss for purposes of CUTPA.

A

We begin by addressing the plaintiff's claim that the court improperly found that it failed to prove damages with the requisite degree of certainty for purposes of its claims alleging violations of the Connecticut Petroleum Product Franchise Act and the covenant of good faith and fair dealing.[15]

[14] The plaintiff argues that the court's calculation of the $452,777.34 "shortfall" was incorrect because it (1) considered the profit per gallon that the plaintiff generated from 2001 through 2004, before the defendant began to price dealer tankwagon charges improperly, thereby "dilut[ing]" the disparity between the plaintiff's actual profit margin and the eight cent margin during the period at issue, and (2) failed to take into account the plaintiff's lost sales volumes.

[15] CUTPA requires proof of an ascertainable loss rather than damages in the traditional sense. See part II B of this opinion. Accordingly, although the trial court did not do so in its memorandum of decision, we address CUTPA separately from the Connecticut Petroleum Product Franchise Act and the covenant of good faith and fair dealing.

"The legal principles that govern our review of damage awards are well established. It is axiomatic that the burden of proving damages is on the party claiming them. . . . Damages are recoverable only to the extent that the evidence affords a sufficient basis for estimating their amount in money with reasonable certainty. . . . [T]he court must have evidence by which it can calculate the damages, which is not merely subjective or speculative . . . but which allows for some objective ascertainment of the amount. . . . This certainly does not mean that mathematical exactitude is a precondition to an award of damages, but we do require that the evidence, with such certainty as the nature of the particular case may permit, lay a foundation [that] will enable the trier to make a fair and reasonable estimate. . . . Evidence is considered speculative when there is no documentation or detail in support of it and when the party relies on subjective opinion. . . . The trial court's determination that damages have not been proved to a reasonable certainty is reviewed under a clearly erroneous standard." (Citations omitted; internal quotation marks omitted.) *Weiss* v. *Smulders*, 313 Conn. 227, 253–54, 96 A.3d 1175 (2014).

"[W]hether the decision of the trial court is clearly erroneous . . . involves a two part function: where the legal conclusions of the court are challenged, we must determine whether they are legally and logically correct and whether they find support in the facts set out in the memorandum of decision; where the factual basis of the court's decision is challenged we must determine whether the facts set out in the memorandum of decision are supported by the evidence or whether, in light of the evidence and the pleadings in the whole record, those facts are clearly erroneous. . . . In a case tried before a court, the trial judge is the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony. . . . On appeal, we will give the

evidence the most favorable reasonable construction in support of the verdict to which it is entitled." (Internal quotation marks omitted.) *Gianetti* v. *Norwalk Hospital*, 304 Conn. 754, 780, 43 A.3d 567 (2012). Moreover, we do not "examine the record to determine whether the trier of fact could have reached a conclusion other than the one reached. Rather, we focus on the conclusion of the trial court, as well as the method by which it arrived at that conclusion, to determine whether it is legally correct and factually supported." (Internal quotation marks omitted.) *Chebro* v. *Audette*, 138 Conn. App. 278, 284, 50 A.3d 978 (2012).

In the present case, we conclude that the court's finding that the plaintiff failed to present sufficient evidence to establish its damages with reasonable certainty was clearly erroneous. In its memorandum of decision, the court stated that the plaintiff's complaints about the dealer tankwagon prices were based upon the plaintiff's belief that the price increases were preventing it from realizing a profit of eight cents per gallon. Crediting the plaintiff's summary of operations, which was not disputed in terms of its mathematical accuracy, the court found that, from 2001 through 2011, the plaintiff's average profit was less than the allegedly guaranteed eight cents, resulting in a "shortfall" of $452,777.34 over that period. Thus, the court was able to determine, on the basis of the plaintiff's theory of liability and damages as the court understood them to be, the lost profits that the plaintiff incurred.[16] Having made that finding, we conclude that the court was obligated to find that, at the very least, the plaintiff had proven $452,777.34 of its damages with reasonable certainty.

[16] The defendant asserts that the court was not calculating the plaintiff's lost profits when it noted the "shortfall" of $452,777.34. Regardless of whether the court was calculating the plaintiff's lost profits, however, the court's finding indicated that it was *able*, on the basis of the evidence adduced at trial, to determine the lost profits sustained by the plaintiff as a result of the defendant's alleged improper pricing.

"Damages are recoverable . . . *to the extent that* the evidence affords a sufficient basis for estimating their amount in money with reasonable certainty." (Emphasis added; internal quotation marks omitted.) *Weiss* v. *Smulders*, supra, 313 Conn. 253–54. Despite this finding, however, the court concluded that, "[e]ven if the plaintiff could convince the court that [the defendant] overcharged it for gasoline and thereby caused [the plaintiff] to lose money, the plaintiff simply has not provided the court with the evidence it would need to compute such damages." Because this conclusion cannot be reconciled or found consistent with the court's prior statement that the plaintiff's summary of operations reflected losses in profits of $452,777.34, it is not legally and logically supported by the record and, consequently, it is clearly erroneous.[17]

Moreover, in concluding that the plaintiff failed to adduce sufficient evidence of damages, the court improperly conflated the question of damages with the question of causation. The clearly erroneous standard requires the reviewing court to "focus on the conclusion of the trial court, *as well as the method by which it arrived at that conclusion*, to determine whether it is legally correct and factually supported." (Emphasis added; internal quotation marks omitted.) *Chebro* v. *Audette*, supra, 138 Conn. App. 284. Critically, the court explicitly stated that its decision was based solely on the plaintiff's failure to prove damages with reasonable certainty, and that it had assumed, arguendo, that the

[17] As previously noted; see footnote 14 of this opinion; the plaintiff asserts that, in determining that the summary of operations reflected a $452,777.34 "shortfall," the court failed to take into account the plaintiff's losses in sales volumes and used faulty math. To resolve the present appeal, however, we need not determine whether the plaintiff has proved the full extent of its claimed damages with reasonable certainty. Accordingly, we do not address whether the court clearly erred in failing to conclude that the plaintiff proved its full damages claim in the amount of $2,784,000 with reasonable certainty.

plaintiff had proven the elements of liability and causation. Indeed, in response to the defendant's motion for articulation, in which the defendant acknowledged that the court's analysis also included findings relevant to the element of causation, the court reiterated that its decision only included findings on the issue of damages and that it had assumed for purposes of argument that the plaintiff had proven "the issues of liability and causation . . . ."

Despite disclaiming any findings relevant to causation, however, the court's reasoning plainly hinged not on whether the plaintiff had presented evidence from which its damages could be calculated with reasonable certainty, as is the sole question in a strict damages analysis, but on whether the plaintiff's losses in profits and sales volumes were *caused* by the defendant's alleged improper conduct as opposed to some other factor. For instance, the court stated that the plaintiff "has not met its burden to prove that the defendant *caused* it losses which could be determined with reasonable certainty," and then posited two reasons for this: (1) that it was "hard to measure" which of the plaintiff's customers were lost as a result of the defendant's pricing as opposed to the plaintiff's lack of amenities or other attractive features, and (2) that the plaintiff's stations are "not likely to compete" with other stations offering loyalty programs and attractive discounts. (Emphasis added.) The court concluded that "[t]here may be something else about the station which makes drivers not want to go there so much that they will forgo some potential savings in order to fill their tanks somewhere else."

These factors are relevant only to the question of causation, and, therefore, are improper bases for concluding that the plaintiff failed to proffer evidence upon which its damages could be calculated with reasonable certainty. To be sure, courts have at times treated the

damages element as *encompassing* a causation requirement, rather than analyzing damages and causation as distinct elements. In breach of contract cases, for instance, "[a]lthough this court has intimated that causation is an additional element [of a breach of contract action] . . . proof of causation more properly is classified as part and parcel of a party's claim for . . . damages." (Citation omitted.) *Meadowbrook Center, Inc.* v. *Buchman*, 149 Conn. App. 177, 186, 90 A.3d 219 (2014); see also *Neiditz* v. *Morton S. Fine & Associates, Inc.*, 199 Conn. 683, 689 n.3, 508 A.2d 438 (1986) (observing that, in tort action, "the plaintiffs are entitled to recover all damages *proximately caused* by the defendant's negligent performance of the contract" [emphasis added]).

Indeed, the plaintiff's causes of action for violations of the Connecticut Petroleum Product Franchise Act and covenant of good faith and fair dealing are no different—both require proof of some causal relationship between the plaintiff's losses and the defendant's alleged misconduct. See General Statutes § 42-133n (a) (providing that "[a]ny franchisee may bring an action for violation of [the Connecticut Petroleum Product Franchise Act] . . . to recover damages sustained *by reason of* such violation" [emphasis added]); *Pikulski* v. *Waterbury Hospital Health Center*, 269 Conn. 1, 7 n.4, 848 A.2d 373 (2004) ("[i]t is axiomatic . . . that in every tort action, the fact finder may award economic damages only if the plaintiff has proven those damages to a reasonable certainty *and has shown that the defendant had proximately caused the damages*" [emphasis added; internal quotation marks omitted]). Yet, even if causation properly is considered to be part of the damages analysis in a particular case, the court in the present case removed causation from the equation by explicitly indicating in its memorandum of decision, and again in its response to the defendant's motion for articulation, that it was not issuing a finding on

causation and, indeed, that it had assumed, for purposes of its analysis, that causation had been proven. Because causation explicitly formed no part of the court's decision, we conclude that the court reached its determination that the plaintiff failed to provide the court with a reasonable basis for calculating damages only by improperly conflating that issue with the question of causation. Accordingly, the court's finding with regard to the calculability of the plaintiff's damages was clearly erroneous.

The defendant argues that the plaintiff's damages theory was fatally speculative because the plaintiff was required "to prove that the lost profits to which it claims to be entitled resulted from [the defendant's] allegedly unfair pricing *and no other market factors*," and failed to do so. (Emphasis in original.) The defendant then lists a multitude of market factors that, it asserts, the plaintiff failed to eliminate as potential causes of its losses in profits and sales volumes. Again, these arguments relate to the question of causation, not damages, and the court explicitly stated both that it had not issued findings relevant to causation, and that its decision was predicated on the assumption that causation had been proven. Affirming the court's decision on this basis effectively would require us to find facts that the court explicitly declined to find. "It is well settled that this court cannot find facts, nor, in the first instance, draw conclusions of facts from primary facts found, but can only review such findings to see whether they might legally, logically and reasonably be found." (Internal quotation marks omitted.) *Appliances, Inc.* v. *Yost*, 186 Conn. 673, 676–77, 443 A.2d 486 (1982); see also *New England Custom Concrete, LLC* v. *Carbone*, 102 Conn. App. 652, 661, 927 A.2d 333 (2007). Fidelity to this principle requires us to avoid delving into whether other market factors could have caused the plaintiff's losses. Instead, we must assume, as the trial court did, that

causation had been proven, and confine our inquiry to the narrow question of whether the plaintiff adduced evidence upon which its damages could be calculated with reasonable certainty.

Finally, the defendant argues that, although the plaintiff presented evidence of what the defendant *actually* charged in terms of dealer tankwagon prices, it failed to present evidence of what the defendant reasonably *should have charged*. This additional variable, the defendant asserts, is essential for an adequate damages calculation. Even if we were to agree that the plaintiff failed to present evidence of what a proper dealer tankwagon price would have been, the result of our analysis would remain the same. We reiterate that "mathematical exactitude is [not] a precondition to an award of damages . . . ." (Internal quotation marks omitted.) *Weiss* v. *Smulders*, supra, 313 Conn. 254. Instead, we merely "require that the evidence, with such certainty as the nature of the particular case may permit, lay a foundation [that] will enable the trier to make a fair and reasonable estimate." (Internal quotation marks omitted.) Id. Because, as we have stated, the court could not have concluded reasonably that the plaintiff's evidence failed to meet this standard, the court's finding with regard to damages was clearly erroneous.

B

The plaintiff's CUTPA claim is particularly unsuited to be decided at trial solely on the basis of whether it adequately had proved the amount of its claimed damages, assuming that liability and causation had been proved. The court ruled against the plaintiff's claim that the defendant's 2005 change in its course of dealing with the plaintiff with respect to its method of calculating the dealer tankwagon prices was an unfair trade practice in violation of CUTPA because the plaintiff had not proved damages.

The court specifically stated in both its memorandum of decision and in response to the defendant's motion for articulation that it was not deciding causation issues. To decide the plaintiff's CUTPA claim, however, the court necessarily had to first decide a causation issue, namely, whether the defendant had improperly caused the plaintiff to lose customers by changing its method of calculation of dealer tankwagon prices, and that this change constituted an unfair trade practice under § 42-110g (a).

Leaving aside for the moment the court's finding that there had been a "shortfall" of $452,777.34 in what the plaintiff might otherwise have expected to generate in profits, the plaintiff was entitled to claim punitive damages and attorney's fees under CUTPA even if it had not proved a fixed amount of ascertainable dollar loss. "[Section] 42-110g (a) affords a cause of action to [a]ny person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment of a method, act or practice prohibited by section 42-110b . . . . [L]oss has a broader meaning than the term damage. . . . As a consequence, [u]nder CUTPA, there is no need to allege or prove the amount of the ascertainable loss. . . . The plaintiff's failure adequately to prove damages, therefore, does not dispose of the CUTPA claim." (Citations omitted; internal quotation marks omitted.) *Beverly Hills Concepts, Inc.* v. *Schatz & Schatz, Ribicoff & Kotkin*, 247 Conn. 48, 78–79, 717 A.2d 724 (1998), quoting *Catucci* v. *Ouellette*, 25 Conn. App. 56, 60, 592 A.2d 962 (1991), and *Hinchliffe* v. *American Motors Corp.*, 184 Conn. 607, 614, 440 A.2d 810 (1981).

The plaintiff's summary of operations, which the court credited at trial, showed that the plaintiff began to experience a decrease in sales volumes around 2005 at the time the defendant allegedly had begun pricing dealer tankwagon charges without use of what the

plaintiff termed "street back pricing" that had been in effect for several years. Volume of sales of gasoline in a retail gasoline station is dependent on the number of gasoline customers who purchase gasoline for their vehicles at that station. Because a loss of customers, even in the absence of an accompanying monetary value of that loss, constitutes an ascertainable loss for purposes of CUTPA; see *Service Road Corp.* v. *Quinn*, 241 Conn. 630, 643–44, 698 A.2d 258 (1997); the court's finding that the CUTPA claim failed because the plaintiff failed to present sufficient evidence of the amount of an ascertainable loss was clearly erroneous.

Furthermore, a plaintiff who brings a cause of action alleging an unfair trade practice in violation of CUTPA has the right to claim punitive damages and attorney's fees if the case is proved. See General Statutes § 42-110g (a) and (d); *Lenz* v. *CNA Assurance Co.*, 42 Conn. Supp. 514, 515, 630 A.2d 1082 (1993). Indeed, the plaintiff claimed both punitive damages and attorney's fees in the present case. Whether a trial court awards them and in what amount is left to its discretion. See General Statutes § 42-110g (a). If the court found that the plaintiff had proved that the defendant had engaged in an unfair trade practice and that the unfair trade practice had caused the plaintiff a loss of customers in violation of CUTPA, then the plaintiff was entitled to have the court exercise its discretion to determine whether such an award of punitive damages and attorney's fees were warranted. As the court in *Lenz* v. *CNA Assurance Co.*, supra, 515, pointed out, the purpose of awarding punitive damages under CUTPA is to deter future unfair trade practices. See *Lenz* v. *CNA Assurance Co.*, supra, 515.

The judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

In this opinion the other judges concurred.

PRESIDENTIAL VILLAGE, LLC *v.* TONYA PERKINS (AC 38459)

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

Syllabus

The plaintiff landlord sought, by way of summary process, to regain possession of certain federally subsidized premises that it had leased to the defendant. The plaintiff had provided the defendant with a federal pretermination notice based on the defendant's nonpayment of her total rental obligation, which constituted material noncompliance with the terms of her lease. The notice included a chart detailing a month-to-month breakdown of the amount of rent that the defendant owed to the plaintiff. After the defendant failed to tender any payment to the plaintiff within the time period specified in the pretermination notice, the plaintiff served the defendant with a notice to quit possession of the premises and, thereafter, brought this summary process action, seeking immediate possession thereof. In response, the defendant filed a motion to dismiss the action on the ground that the plaintiff's pretermination notice was defective, and, therefore, the trial court lacked subject matter jurisdiction over the action. The trial court granted the defendant's motion to dismiss and rendered judgment in favor of the defendant, from which the plaintiff appealed to this court. *Held* that the trial court improperly dismissed the summary process action on the ground that the plaintiff's federal pretermination notice was defective and, therefore, that it lacked subject matter jurisdiction over the action: the pretermination notice sufficiently complied with the applicable federal regulations and requirements (24 C.F.R. §§ 247.3 and 247.4) governing the termination of a federally subsidized tenancy based on nonpayment of rent, as the pretermination notice provided adequate notice that the defendant's tenancy was being terminated on the ground of material noncompliance with the lease based on her nonpayment of rent, and it set forth that ground with enough specificity to enable the defendant to prepare a defense to the summary process action; moreover, this court disagreed with the trial court's findings that the purpose of the pretermination notice was to provide the defendant with an opportunity to cure her noncompliance with the lease and that the notice did not comply with the applicable specificity requirements of the federal regulations because it included nonrent charges, as the regulations contained no language pertaining to an opportunity to cure and the inclusion of certain additional nonrent charges did not render the pretermination notice fatally defective.

Argued February 14—officially released September 19, 2017

Procedural History

Summary process action brought to the Superior Court in the judicial district of Hew Haven, Housing

Session, where the court, *Ecker*, *J.*, granted the defendant's motion to dismiss and rendered judgment for the defendant, from which the plaintiff appealed to this court. *Reversed; further proceedings.*

Hugh D. Hughes, with whom was *David E. Schancupp*, for the appellant (plaintiff).

Amy Eppler-Epstein, for the appellee (defendant).

Opinion

DiPENTIMA, C. J. The plaintiff, Presidential Village, LLC, appeals from the judgment of the trial court dismissing its summary process action against the defendant, Tonya Perkins, for lack of subject matter jurisdiction.[1] On appeal, the plaintiff claims that the court improperly granted the defendant's motion to dismiss because the court determined that the federal pretermination notice[2] was defective, and the defective notice deprived the court of subject matter jurisdiction to hear the case. Because its decision mistakenly rests primarily on its determination that the federal termination notice was defective under the requirements of General Statutes § 47a-23, we reverse the judgment of the trial court.

The record reveals the following relevant facts and procedural history. On March 2, 2010, the defendant

[1] Originally, this appeal was one of three summary process actions, *Renaissance Management Co.* v. *Mills*, Superior Court, judicial district of New Haven, Housing Session, Docket No. CV-14-0117624-S (September 28, 2015), *How WH, LLC* v. *Robinson*, Superior Court, judicial district of New Haven, Housing Session, Docket No. CV-15-0119932-S (September 28, 2015), and *Presidential Village, LLC* v. *Perkins*, Superior Court, judicial district of New Haven, Housing Session, Docket No. CV-15-0118752-S (September 28, 2015), that were consolidated on appeal. The two other appeals were withdrawn prior to oral argument. We, therefore, only address *Presidential Village, LLC*, in this appeal.

[2] This appeal concerns the federal termination notice pursuant to 24 C.F.R. § 247. The validity of the plaintiff's state statutory notice to quit pursuant to General Statutes § 47a-23 is not at issue in the present case.

leased an apartment from the plaintiff. The dwelling unit is located in New Haven and was subsidized by the United States Department of Housing and Urban Development (department). According to the department's model lease agreement entered into by the parties, the defendant's lease term began on March 2, 2010, ended on February 28, 2011, and continued thereafter from month-to-month. At the time the defendant signed the lease, she agreed to pay a rent of $377 on the first day of each month, which was subject to change during the lease term in accordance with the amount the department made available monthly on behalf of the defendant.

On January 14, 2015, the plaintiff sent a federal pretermination notice[3] to the defendant based on her nonpayment of rent in January, 2015, at which time the defendant's monthly rent was $1402.[4] The notice addressed to the defendant stated:

"RE: PAST DUE RENT

Inv. No	Inv. Date	Due Date	Inv. Amount	Balance
	08/27/2013	08/27/2013	$1,797.56	$1,797.56
10	09/01/2013	09/11/2013	$93.00	$93.00
CHFA201321	10/01/2013	10/11/2013	$93.00	$93.00
2014-1232	11/01/2014	11/11/2014	$1,402.00	$1,402.00
2014-1340	12/01/2014	12/11/2014	$1,402.00	$1,402.00
2014-1455	01/01/2015	01/11/2015	$1,402.00	$1,402.00

Total Rental Obligation: **$6,189.56**"

[3] As the trial court noted, "[i]n the present context, the term 'pretermination notice' refers to the notice that must be provided, under federal law, before a landlord is permitted to initiate eviction proceedings against a tenant who occupies federally subsidized housing." Therefore, the reference to pretermination notice herein, is the termination notice required by federal law.

[4] Although the defendant also failed to pay rent from August, 2013 to October, 2013, and from November, 2014 to December, 2014, both parties agree that the plaintiff sought to terminate the defendant's lease based solely on her failure to pay rent in January, 2015. See General Statutes § 47a-23 (d) (landlord may terminate month-to-month tenancy for nonpayment of rent only for current month and immediately preceding month).

Immediately following this table are four paragraphs of text:

"You have violated the terms of your lease in that you failed to pay your rent, in the total rental obligation of **$6,189.56**. Your failure to pay such rent constitutes a material noncompliance with the terms of your lease.

"We hereby notify you that your lease agreement may be subject to termination and an immediate eviction . . . proceeding initiated by our office. We value our tenants and request that you immediately contact our office, regarding full payment of your rental obligations. Your rental obligations will include the delinquent rent, late fees, utilities, legal fees, and any other eviction proceeding sundry cost[s].

"You have the right within ten days after receipt of this notice or within ten days after the date following the date this notice was mailed whichever is earlier to discuss the proposed termination of your tenancy with your landlord's agent . . . .

"If you remain in the premises on the date specified for termination, we may seek to enforce the termination by bringing judicial action at which time you have a right to present a defense."

The defendant did not discuss the possible termination of her tenancy with the plaintiff's agent during the ten day period nor did she tender any payment to the plaintiff within that time. Accordingly, on January 29, 2015, the plaintiff served the defendant with a notice to quit possession of the premises and, thereafter, in February, 2015, brought a summary process action for nonpayment of rent, seeking immediate possession of the premises.

In response to the plaintiff's summary process complaint, the defendant filed a motion to dismiss on the ground that the pretermination notice was defective, and, therefore, the court lacked subject matter jurisdiction. The alleged defects included the plaintiff's "failure

to specify accurately the amount that must be paid by [the] defendant to cure the default underlying the threatened eviction." Specifically, the defendant alleged that the pretermination notice "inaccurately—and misleadingly—states that she will be evicted unless she promptly pays the landlord *$6189.56* in 'total rental obligations,' when, in truth, she would have avoided eviction for nonpayment of rent, under well established Connecticut law, by tendering a cure amount of only *$2804* . . . ." (Emphasis in original; footnote omitted.)

In response, the plaintiff argued that the pretermination notice was not defective. To support its argument, the plaintiff asserted that there was "nothing defective about a pretermination notice that lists the total financial obligations owed by [the] defendant to [the] plaintiff." The plaintiff further contended that "a federal pretermination notice fully complies with the law if it includes the specific information supporting the landlord's right to termination; a notice does not become defective simply because it contains more information than strictly necessary."

On September 28, 2015, the trial court, *Ecker*, *J.*, issued a memorandum of decision granting the defendant's motion to dismiss the summary process action for lack of subject matter jurisdiction because the pretermination notice was defective. The plaintiff then filed this appeal. Additional facts will be set forth as necessary.

We begin our analysis by identifying the legal principles governing summary process actions. "Summary process is a special statutory procedure designed to provide an expeditious remedy. . . . It enable[s] landlords to obtain possession of leased premises without suffering the delay, loss and expense to which, under the common-law actions, they might be subjected by tenants wrongfully holding over their terms. . . . Summary process statutes secure a prompt hearing and final determination. . . . Therefore, the statutes relating to

summary process must be narrowly construed and strictly followed.

"[B]efore a landlord may pursue its statutory remedy of summary process, the landlord must prove compliance with all of the applicable preconditions set by state and federal law for the termination of the lease." (Citations omitted; internal quotation marks omitted.) *Housing Authority* v. *DeRoche*, 112 Conn. App. 355, 361–62, 962 A.2d 904 (2009).

We now turn to the applicable standard of review. "A motion to dismiss . . . properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court. . . . A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . [O]ur review of the trial court's ultimate legal conclusion and resulting [decision to] grant . . . the motion to dismiss [is] de novo." (Internal quotation marks omitted.) *Beecher* v. *Mohegan Tribe of Indians of Connecticut*, 282 Conn. 130, 134, 918 A.2d 880 (2007). Mindful of these principles and guided by our standard of review, we address the specific claim raised by the plaintiff on appeal.

The plaintiff claims that the court improperly dismissed the summary process action because the court determined that the federal pretermination notice was defective. With respect to this claim, the plaintiff argues that its pretermination notice complied with the applicable federal regulations governing the termination of a federally subsidized tenancy based on nonpayment of rent. We note that the adequacy of a federal pretermination notice based on nonpayment of rent is an area of the law that rarely has been addressed by the appellate courts of this state. Nevertheless, applying established principles of summary process law, we conclude that the trial court improperly dismissed the action because

the federal plaintiff's pretermination notice sufficiently complies with the federal requirements.

In its memorandum of decision, the court determined that the plaintiff's pretermination notice was defective because it was "misleading in at least two respects. First, $6189.56 is not the amount that [the defendant] would have needed to pay to avoid the termination of [the defendant's] tenancy for nonpayment of rent under Connecticut law. . . . Second, the plaintiff's notice uses the term 'rental obligations' as a synonym for 'rent,' as in, 'you failed to pay your rent in the total rental obligation of $6,189.56.' This is not true, as a matter of law. . . . The plaintiff concedes that the $6189.56 figure includes charges for attorney's fees and expenses, as well as late charges. It is no secret among most landlords (nor even, perhaps, sophisticated tenants) that the term 'rent' is a term of art in housing law. . . . 'Rent' under [§ 8 of the United States Housing Act of 1937, 42 U.S.C. § 1437f et seq. (Section 8)][5] means the amount that may be charged for the right to occupy the dwelling unit, period—it cannot include charges for late payments, utilities, attorney's fees, property damage, or any other item. . . . The plaintiff's pretermination notice lumps together rent and nonrent items in a single category ('total rental obligation'), and then impermissibly defines that obligation as 'rent.' ('[Y]ou

[5] The trial court observed: "Section 8 refers to the Housing Act of 1937, although what are now called Section 8 programs were not created until almost forty years later, with the enactment of the Housing and Community Development Act of 1974. Section 8, as amended, is codified at 42 U.S.C. § 1437f et seq. There are many different Section 8 programs in existence. The specific program at issue in the present case . . . is a project based program. In general, the Section 8 rental assistance programs can be categorized as either tenant based or project based. There are various programs within each of these two categories, and the variations themselves have spawned subvariations and permutations. . . . The Department of Housing and Urban Development . . . has issued publications intended to provide guidance regarding occupancy and termination issues in connection with various Section 8 programs."

failed to pay your rent, in the total rental obligation of $6,189.56.') The misleading phrase ('rental obligation') is repeated throughout the pretermination notice, and its definition continues to expand to include items that federal law says cannot be treated as rent." (Citations omitted; footnote omitted.) The court granted the defendant's motion to dismiss the plaintiff's summary process action on the basis of those defects, including its noncompliance with state law.

We emphasize that the trial court's primary concern regarding the alleged defective nature of the pretermination notice was based on its finding that the notice failed to comply with both the state requirements and the federal requirements. Although the pretermination notice must comply with the federal requirements pursuant to 24 C.F.R. § 247, there is nothing in those federal requirements that mandates that the notice also comply with the state requirements governing the notice to quit under § 47a-23. See 24 C.F.R. §§ 247.3 and 247.4. The only notice at issue in this case was the federal pretermination notice. We, therefore, emphasize that the dipositive issue in this appeal is whether the pretermination notice complies with the federal requirements, namely, 24 C.F.R. § 247.

We begin by setting forth the relevant legal principles that govern the termination of a federally subsidized tenancy. When a defendant is a tenant of federally subsidized housing, federal law must be followed. *Farley* v. *Philadelphia Housing Authority*, 102 F.3d 697, 698 (3d Cir.1996) (in exchange for receiving federal subsidies, local public housing authorities required to operate in compliance with United States Housing Act). The federal regulations pertinent to this case are set forth in 24 C.F.R. §§ 247.3 and 247.4.

Pursuant to 24 C.F.R. § 247.3, to terminate a tenancy in federally subsidized housing, the federal regulations require adequate notice detailing the grounds for termination. See *Housing Authority* v. *Martin*, 95 Conn. App.

802, 808, 898 A.2d 245 ("[u]nder federal law, 42 U.S.C. § 1437d (*l*) . . . a landlord is required to issue a pretermination notice before commencing a summary process action"), cert. denied, 280 Conn. 904, 907 A.2d 90 (2006). Pursuant to the federal regulations, a landlord may terminate a federally subsidized tenancy on the ground of "[m]aterial noncompliance with the rental agreement . . . ." 24 C.F.R. § 247.3. "The term material noncompliance with the rental agreement includes [inter alia] . . . [n]on-payment of rent or any other financial obligation due under the rental agreement (including any portion thereof) beyond any grace period permitted under State law, except that the payment of rent *or any other financial obligation due under the rental agreement* after the due date, but within the grace period permitted under State law, constitutes a minor violation." (Emphasis altered.) 24 C.F.R. § 247.3 (c).

In applying 24 C.F.R. § 247.3 to the present case, we conclude that the plaintiff's pretermination notice provided adequate notice detailing the ground for termination. Specifically, the pretermination notice states that the plaintiff was proposing to terminate the defendant's tenancy based on nonpayment of rent. As nonpayment of rent constitutes a material noncompliance with the rental agreement under 24 C.F.R. § 247.3, the plaintiff's pretermination notice set forth a sufficient ground to terminate the defendant's federally subsidized tenancy. See 24 C.F.R. § 247.3. Because we conclude that the plaintiff's purpose for termination of the defendant's tenancy complies with 24 C.F.R. § 247.3, we next analyze whether the contents of the pretermination notice also complies with the federal requirements pursuant to 24 C.F.R. § 247.4.

The requirements for a valid pretermination notice are contained in 24 C.F.R. § 247.4, which provides that the pretermination notice must "be in writing and shall: (1) State that the tenancy is terminated on a date specified therein; (2) state the reasons for the landlord's

action with enough specificity so as to enable the tenant to prepare a defense; (3) advise the tenant that if he or she remains in the leased unit on the date specified for termination, the landlord may seek to enforce the termination only by bringing a judicial action, at which time the tenant may present a defense; and (4) be served on the tenant in the manner prescribed by paragraph (b) of this section." Pursuant to § 247.4 (e), the specificity requirement is satisfied "[i]n any case in which a tenancy is terminated because of the tenant's failure to pay rent," where the notice states "the dollar amount of the balance due on the rent account and the date of such computation . . . ."[6] 24 C.F.R. § 247.4 (e).

We conclude that the contents of the plaintiff's pretermination notice substantially complies with the applicable federal requirement pursuant to 24 C.F.R. § 247.4. In particular, the pretermination notice reflects that the ground for terminating the defendant's tenancy, i.e., material noncompliance with the lease based on nonpayment of rent, was set forth with enough specificity to enable her to prepare a defense to the judicial action. See 24 C.F.R. § 247.4 (a). The pretermination notice provides the dollar amount of the balance due on the rent account, i.e., $6189.56, and the date of such computation, as required by 24 C.F.R. § 247.4 (e) to satisfy the specificity requirement in nonpayment of rent cases. The pretermination notice also provides a chart that illustrates the amount the defendant owed in past due rent, breaking down that amount for each month of past due rent. The chart includes the specific amount of past due rent from August, 2013 to October, 2013, and from November, 2014 to December, 2014, and January, 2015, which was the month upon which the plaintiff was seeking to terminate the defendant's tenancy. As the federal regulations permit the plaintiff to terminate

[6] The date of the computation of the dollar amount of the balance due on the rent account is not challenged in the present case.

the defendant's federally subsidized tenancy on the ground of a material noncompliance, which includes the nonpayment of rent due and any other financial obligations under the rental agreement, the month-to-month breakdown of the amount of past due rent that the defendant owes to the plaintiff was set forth with enough specificity to enable her to prepare a defense to the termination action. See 24 C.F.R. § 247.4 (a).

The court's memorandum of decision indicates two reasons that the pretermination notice was in fact defective. For the reasons that follow, we disagree with both contentions.

First, the trial court's decision expressly stated that the purpose of the pretermination notice was "to provide the Section 8 tenant with an opportunity to cure the noncompliance that otherwise will result in termination of the tenancy."[7] There is no support for the court's interpretation within the federal regulations governing the pretermination notice. In particular, 24 C.F.R. § 247.4 (a) expressly provides that the pretermination notice must "state the reasons for the landlord's action with enough specificity so as to enable the tenant to *prepare a defense* . . . ." (Emphasis added.) Thus, an explicit requirement of 24 C.F.R. § 247.4 (a) is for the pretermination notice to enable the tenant to prepare a defense to the judicial action.[8] Notably, the language

[7] Specifically, the trial court noted in its memorandum of decision: "Both parties readily acknowledge that one of the fundamental purposes served by the federal requirement of a pretermination notice is to provide the Section 8 tenant with an opportunity to cure the noncompliance that otherwise will result in termination of the tenancy." As discussed subsequently in this opinion, we reach a contrary conclusion.

[8] There is a significant distinction between an opportunity to cure and an opportunity to prepare a defense. An opportunity to cure provides the tenant a route to avoid the initiation of a summary process action. See *Housing Authority* v. *DeRoche*, supra, 112 Conn. App. 361–62; see also *Housing Authority* v. *Martin*, supra, 95 Conn. App. 813–14. Once the summary process action is initiated, however, the payment of past due sums will not prevent the eviction if the landlord chooses to proceed with the action. See *Housing Authority* v. *DeRoche*, supra, 361–62 An opportunity to prepare a

of 24 C.F.R. § 247.4 (a) *does not* require that the pretermination notice inform the tenant of the amount necessary to cure the breach of the lease. In fact, there is no language within the federal regulations pertaining to the opportunity to cure. Therefore, as "judicial appraisal of a landlord's compliance with . . . federal requirements for [notice] of termination must reflect the purpose that the [notice] . . . was meant to serve"; *Jefferson Garden Associates* v. *Greene*, 202 Conn. 128, 145, 520 A.2d 173 (1987); we are convinced that the plaintiff's pretermination notice sufficiently complied with 24 C.F.R. § 247.4 as it provided enough specificity for the reasons of termination to enable the defendant to prepare a defense.

The trial court also concluded that the pretermination notice did not comply with the federal regulations' specificity requirement because it included nonrent charges, i.e., late fees and attorney's fees.[9] In its decision, the trial court explicitly relied on *Housing Authority & Urban Redevelopment Agency* v. *Taylor*, 171 N.J. 580, 595, 796 A.2d 193 (2002), noting that "[r]ent under Section 8 means the amount that may be charged for the right to occupy the dwelling unit, period—it cannot include charges for late payments, utilities, attorney's fees, property damage, or any other item." (Internal quotation marks omitted.) It continued by noting: "The fundamental purpose of the federal housing assistance programs is to make housing available to low-income tenants, and federal law strictly regulates the maximum rent payable by the tenant. See 42 U.S.C. § 1437a (a)

defense, in contrast, assumes that a summary process action will be initiated. See 24 C.F.R. § 247.

[9] Before the trial court, the plaintiff's counsel conceded to the improper inclusion of nonrent charges in the pretermination notice. Specifically, the trial court's memorandum of decision provided: "[The] plaintiff's counsel explained that the $1323.80 charge was for attorney's fees and costs relating to a prior, unsuccessful action, and never should have been charged to [the defendant]. The parties do not agree whether the balance of the first listed item ($1797.56 - 1323.80 = $497.56) represents unpaid rent or something else."

(1) (establishing the well-known 30 [percent] formula, which typically fixes rent at 30 [percent] of a family's adjusted gross income). This formula only works if the term rent has a stable and uniform meaning." (Internal quotation marks omitted.) In following *Taylor*, the court concluded that the inclusion of late fees, utilities, legal fees and any other eviction proceeding sundry cost stated in the pretermination notice was prohibited from being considered as part of the tenant's "rent" under federal law.

We disagree with the trial court's reliance on *Taylor*. Specifically, *Taylor* addresses the ability to recover late fees, attorney's fees and utility fees under 42 U.S.C.A § 1437a (a) (1) (known as the Brooke Amendment), which limits the amount of rent that public housing tenants can be charged. *Housing Authority & Urban Redevelopment Agency* v. *Taylor*, supra, 171 N.J. 583. In *Taylor*, the public housing authority sought to evict a tenant for nonpayment of rent as well as additional amounts that it included in the category of rent, which consisted of late fees, utility fees, and attorney's fees. Id., 594 (specifically discussing amount of rent that public housing tenants can be charged under 42 U.S.C.A. § 1437a [a] [1]). The Supreme Court of New Jersey, however, concluded that "federal law strictly defines and limits the amount of rent that a public housing authority may charge its tenants," and, therefore, the public housing authority "may not recover attorney's fees and late charges as additional rent in a summary dispossess proceeding." Id., 595. Thus, the additional charges that were "not tenant rent due under the lease" could not "be considered or treated as rent, and therefore [could not] serve as the basis for a summary dispossess action *for nonpayment of rent*." (Emphasis added.) Id.

We note that *Taylor* does not address the adequacy of a pretermination notice under 24 C.F.R. §§ 247.3 and

247.4. Rather, *Taylor* focuses solely on 42 U.S.C.A § 1437a (a) (1), which limits the amount of rent that public housing tenants can be charged. Id., 583. In the present case, the pretermination notice included sums that constitute other financial obligations due under the lease, the nonpayment of which constitutes material noncompliance with the lease agreement. We fail to see how the inclusion of that information rendered the notice inadequate.

Even if we were to agree with the trial court, that the analysis in *Taylor* of what constitutes rent bears upon the adequacy of the pretermination notice, however, we would conclude that the inclusion of these additional nonrent charges did not render the pretermination notice fatally defective. See *Jefferson Garden Associates* v. *Greene*, supra, 202 Conn. 142, 145 (deficiency in federal termination notice required under 24 C.F.R. § 247 was minor deviation from language of federal regulations and did not deprive court of subject matter jurisdiction over summary process action).

For the foregoing reasons, the trial court improperly concluded that the pretermination notice was defective and, therefore, deprived the court of subject matter jurisdiction to hear the case.

The judgment is reversed and the case is remanded for further proceedings according to law.

In this opinion the other judges concurred.

JEFFREY F. GOSTYLA *v.* BRYAN CHAMBERS
(AC 38943)

Alvord, Keller and Lavery, Js.

Syllabus

The plaintiff sought to recover damages from the defendant for negligence in connection with personal injuries he had sustained in a motor vehicle collision, in which his vehicle was struck by a vehicle driven by the

defendant. In his answer, the defendant admitted that he acted negligently, but left the plaintiff to his proof with regard to the issue of causation. Prior to trial, the defendant disclosed a biomechanical engineer, M, as an expert witness. The parties conducted a videotaped deposition of M, and M testified, inter alia, that the motor vehicle accident was not, to a reasonable degree of scientific and biomechanical certainty, the cause of the plaintiff's injuries. Thereafter, the trial court denied the plaintiff's motion in limine to exclude the portion of M's testimony in which M opined that the collision did not cause the plaintiff's injuries, and the videotaped deposition of M, including M's testimony regarding causation, was played for the jury at trial. Following the trial, the jury returned a verdict for the defendant. Subsequently, the court denied the plaintiff's motion to set aside the verdict and rendered judgment for the defendant in accordance with the jury's verdict, from which the plaintiff appealed to this court. *Held*:

1. The trial court abused its discretion in admitting M's testimony concerning causation, as M's testimony that this specific plaintiff's injuries were not caused by the collision exceeded his expertise in biomechanics and should have been excluded: although M, as a biomechanical engineer, was qualified to provide his opinion as to the amount of force generated by the collision and the types of injuries likely to result from exposure to that amount of force, M was not a medical doctor, and he did not possess the reasonable qualifications required to offer a medical opinion regarding the cause of specific injuries to a particular plaintiff, which would have required the expertise and specialized training of a medical doctor; furthermore, the fact that M formulated his opinion in part through reviewing a subset of the plaintiff's medical records and other documents related to the accident did not alter the analysis because the record did not reflect that M possessed the medical training necessary to identify the plaintiff's individual tolerance level and preexisting medical conditions, both of which could have had an effect on what injuries resulted from the accident.
2. Although the trial court improperly admitted M's causation testimony, the plaintiff failed to provide this court with an adequate record to determine whether the admission of M's testimony was harmful; the plaintiff provided this court with only minimal excerpts from the trial proceedings, none of which contained the testimony of any witness other than M, the parties' summations, or the trial court's instructions to the jury, which precluded this court from evaluating the effect of the evidentiary impropriety in the context of the totality of the evidence adduced at trial.

Argued April 26—officially released September 19, 2017

Procedural History

Action to recover damages for personal injuries sustained by the plaintiff as a result of the defendant's

alleged negligence, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Elgo*, *J.*, denied the plaintiff's motion to preclude certain evidence; thereafter, the matter was tried to a jury; verdict for the defendant; subsequently, the court denied the plaintiff's motion to set aside the verdict and rendered judgment in accordance with the verdict, from which the plaintiff appealed to this court. *Affirmed.*

Martin McQuillan, for the appellant (plaintiff).

John W. Mills, for the appellee (defendant).

Opinion

LAVERY, J. In this negligence action stemming from a motor vehicle collision, the plaintiff, Jeffrey F. Gostyla, appeals from the judgment of the trial court, rendered after a jury trial, in favor of the defendant, Bryan Chambers. The plaintiff claims that he is entitled to a new trial because the court improperly allowed one of the defendant's expert witnesses, a biomechanical engineer, to provide opinion testimony on a matter that went beyond the purview of his expertise in biomechanics, namely, whether the plaintiff's personal injuries were caused by the collision. Although we agree that the challenged testimony was improper, the plaintiff has not provided us with an adequate record to determine whether the error was harmful. Accordingly, we affirm the judgment of the trial court.

The following facts and procedural history are pertinent to this appeal. In 2013, the plaintiff commenced this negligence action seeking compensatory damages for personal injuries he sustained as a result of a motor vehicle collision that occurred on May 19, 2011. In his amended complaint, the plaintiff alleged that he was operating his vehicle behind the defendant's dump truck

when the defendant suddenly stopped and began driving his truck in reverse, colliding with the plaintiff's vehicle and pushing it several feet. The plaintiff further alleged that, as a result of the defendant's negligence, he sustained, inter alia, knee and hip injuries and a core muscle injury in his abdomen that required surgery.[1] In his answer, the defendant admitted that he acted negligently, but left the plaintiff to his proof with regard to the issue of causation.

Prior to trial, the defendant disclosed Calum McRae, a biomechanical engineer, as an expert witness. Because McRae would be unavailable to testify at trial, the parties conducted a videotaped deposition of him on July 24, 2015. The plaintiff did not object to McRae being considered an expert in the field of biomechanics. During his direct examination, McRae explained that biomechanical engineers use fundamental principles of physics and engineering to determine the amount of force necessary to cause certain kinds of injuries and whether a particular situation generated that level of force. McRae testified that, after reviewing a multitude of documents relevant to the plaintiff's injuries and the collision,[2] he was able to determine that the collision caused the plaintiff to experience, at the very most, a g-force of 2.3, slightly less than the force a person would experience from "sitting down quickly" in a chair. McRae admitted, however, that he was not qualified to contest the accuracy of the diagnoses of the plaintiff's

[1] More particularly, the plaintiff's injuries included (1) a freeing of the anterior superior acetabular labrum and incomplete attachment of the ligamentum teres in his left hip, (2) a meniscal tear in his left knee, and (3) tears of the rectus abdominis and abductor longus in his left groin area.

[2] Specifically, McRae testified that he reviewed the plaintiff's medical records, the police and accident reports showing minimal damage to the plaintiff's vehicle, the characteristics of the plaintiff and the vehicles involved in the collision, the position of the plaintiff's body within his vehicle at the time of the collision, and other relevant facts revealed by the plaintiff's deposition testimony and responses to discovery requests.

injuries. The defendant's counsel then asked: "[B]ased upon a reasonable degree of scientific and biomechanical certainty, was the motor vehicle accident in question here today the cause of the [p]laintiff's injuries?" Over the plaintiff's objection, McRae answered: "No, sir, it was not." During cross-examination, McRae admitted that he was not a medical doctor and did not have experience treating patients for injuries. When asked whether biomechanical engineers are not qualified to render medical opinions regarding the precise cause of a specific injury to a specific individual, McRae replied: "Well, sir, biomechanical engineers provide biomechanical opinions, not medical opinions, sir. And in that respect, they opine specifically on individuals."

Thereafter, the plaintiff filed a motion in limine seeking to exclude, inter alia, the portion of McRae's testimony in which he opined that the collision did not cause the plaintiff's injuries. The plaintiff asserted that McRae was not qualified to render such an opinion because he was not a medical doctor and did not have experience diagnosing or treating injuries. The court heard argument on the plaintiff's motion at a pretrial hearing on September 1, 2015. After ordering a brief recess to review, inter alia, the transcript of McRae's video deposition, the court ruled that McRae's causation testimony was admissible because it was "relevant for the purpose [for which] it [was] being offered," and was "not a medical opinion regarding causation, but one based on biomechanical engineering." The court also noted that the plaintiff's counsel had an opportunity to highlight McRae's purported lack of qualifications to opine on the issue of causation during cross-examination.

At trial, the defendant played McRae's video deposition for the jury, including the portion in which McRae opined that the plaintiff's injuries were not caused by the collision. Following the trial, the jury returned a

verdict for the defendant. The court denied the plaintiff's motion to set aside the verdict and rendered a judgment for the defendant. This appeal followed.

The plaintiff claims that the court improperly admitted McRae's opinion testimony on the issue of causation because McRae, as a biomechanical engineer, was not qualified to render such an opinion. Although we conclude that the court abused its discretion in admitting McRae's causation testimony, the plaintiff is not entitled to a new trial because he has failed to provide us with an adequate record to determine whether the error had any effect on the outcome of the trial.

I

We begin by determining whether McRae's opinion testimony that the plaintiff's injuries were not caused by the collision was improperly admitted. "[T]he trial court has wide discretion in ruling on the admissibility of expert testimony and, unless that discretion has been abused or the ruling involves a clear misconception of the law, the trial court's decision will not be disturbed. . . . In determining whether there has been an abuse of discretion, the ultimate issue is whether the court could reasonably conclude as it did."[3] (Internal quotation marks omitted.) *Vitali* v. *Southern New England Ear, Nose, Throat & Facial Plastic Surgery Group, LLP*, 153 Conn. App. 753, 756–57, 107 A.3d 422 (2014).

[3] The plaintiff incorrectly asserts that a plenary standard of review applies to his claim. "To the extent a trial court's admission of evidence is based on an interpretation of the Code of Evidence, [the] standard of [appellate] review is plenary. . . . [On the other hand, an appellate court] review[s] the trial court's decision to admit evidence, if premised on a correct view of the law . . . for an abuse of discretion." (Internal quotation marks omitted.) *State* v. *Wright*, 107 Conn. App. 85, 88–89, 943 A.2d 1159, cert. denied, 287 Conn. 914, 950 A.2d 1291 (2008). The court's ruling that McRae's causation testimony was admissible turned on whether McRae was qualified to provide that testimony, rather than on an interpretation of the Code of Evidence. Accordingly, the abuse of discretion standard applies.

"Expert testimony should be admitted when: (1) the witness has a special skill or knowledge directly applicable to a matter in issue, (2) that skill or knowledge is not common to the average person, and (3) the testimony would be helpful to the court or jury in considering the issues. . . . [T]o render an expert opinion the witness must be qualified to do so and there must be a factual basis for the opinion." (Internal quotation marks omitted.) *Weaver* v. *McKnight*, 313 Conn. 393, 405–406, 97 A.3d 920 (2014). "[I]f any reasonable qualifications can be established, the objection goes to the weight rather than to the admissibility of the evidence." (Internal quotation marks omitted.) Id., 408.

The plaintiff argues that, despite McRae's admitted qualifications to testify as an expert in biomechanical engineering, his opinion testimony about whether the collision caused the plaintiff's injuries was improper because it went beyond his expertise in biomechanics. It is well settled that trial courts have discretion to permit expert witnesses to render opinions as to certain matters but not others. See, e.g., *Sherman* v. *Bristol Hospital, Inc.*, 79 Conn. App. 78, 86, 828 A.2d 1260 (2003) (trial court did not abuse its discretion by concluding that expert was qualified to testify as to standard of care but not as to issue of causation). "[B]ecause a witness qualifies as an expert with respect to certain matters or areas of knowledge, it by no means follows that he or she is qualified to express expert opinions as to other fields." *Nimely* v. *New York*, 414 F.3d 381, 399 n.13 (2d Cir. 2005). Therefore, "[t]he issue with regard to expert testimony is not the qualifications of a witness in the abstract, but whether those qualifications provide a foundation for a witness to answer a specific question." (Internal quotation marks omitted.) *Smelser* v. *Norfolk Southern Railway Co.*, 105 F.3d 299, 305 (6th Cir. 1997).

Our research discloses no Connecticut authority addressing the qualifications of biomechanical engineers to render opinions on the issue of causation. Decisions from other courts, however, consistently have recognized that, although biomechanical engineers are qualified to testify about the amount of force generated by a collision and the likely effects of that force on the human body, they are not qualified to render opinions about whether a collision caused or contributed to a particular individual's specific injuries because they are not medical doctors. For instance, in *Smelser*, the Sixth Circuit Court of Appeals held that the trial court had improperly admitted opinion testimony from a biomechanical engineer regarding the causes of the plaintiff's injuries, which purportedly stemmed from a motor vehicle accident, because such testimony went "beyond [his] expertise in biomechanics." Id., 305. The court concluded that the engineer was qualified to "[describe] the forces generated in the . . . collision, and [to testify] in general about the types of injuries those forces would generate." Id. As to specific causation, however, the court held that the engineer "is not a medical doctor who had reviewed [the plaintiff's] complete medical history, and his expertise in biomechanics did not qualify him to testify about the cause of [the plaintiff's] specific injuries." Id.; see also *Rodriguez* v. *Athenium House Corp.*, Docket No. 11 Civ. 5534 (LTS), 2013 WL 796321, *4 (S.D.N.Y. March 5, 2013) ("this district has held that biomechanical engineers are not qualified to testify as to whether [an] accident caused or contributed to any of [the] plaintiff's injuries, as this would amount to a medical opinion" [internal quotation marks omitted]); *Bowers* v. *Norfolk Southern Corp.*, 537 F. Supp. 2d 1343, 1377 (M.D. Ga. 2007) ("As a biomechanical engineer, he is qualified to render an opinion in this case as to general causation, but not as to specific causation. That is, [he] may testify as to the

effect of locomotive vibration on the human body and the types of injuries that may result from exposure to various levels of vibration. However, he may not offer an opinion as to whether the vibration in [the] [p]laintiff's locomotive caused [the] [p]laintiff's injuries."), aff'd, 300 Fed. Appx. 700 (11th Cir. 2008); *Yarchak* v. *Trek Bicycle Corp.*, 208 F. Supp. 2d 470, 501 and n.14 (D.N.J. 2002) (admitting testimony from consultant on biomechanics in part because he "does not purport to offer testimony regarding the specific medical causation of the [p]laintiff's impotence," and agreeing that consultant would be unqualified to provide such testimony); *Combs* v. *Norfolk & Western Railway Co.*, 256 Va. 490, 496–97, 507 S.E.2d 355 (1998) (biomechanical engineer was "competent to render an opinion on the compression forces placed on [the plaintiff's] spine at the time of the incident," but not to state an opinion regarding "what factors cause a human disc to rupture and whether [the plaintiff's] twisting movement to catch the toilet could have ruptured his disc").

Under the circumstances of the present case and in light of the foregoing authorities, we conclude that the trial court abused its discretion in admitting McRae's causation testimony. As a biomechanical engineer, McRae was qualified to provide his opinion as to the amount of force generated by the May 19, 2011 collision and the types of injuries likely to result from exposure to that amount of force. His testimony that *this specific plaintiff's* injuries were not caused by the collision, however, exceeded his expertise in biomechanics and should have been excluded. Opinion testimony regarding the cause of specific injuries "requires the identification and diagnosis of a medical condition, which demands the expertise and specialized training of a medical doctor." *Bowers* v. *Norfolk Southern Corp.*, supra, 537 F. Supp. 2d 1377. McRae's causation testimony was, therefore, a medical opinion, not a biomechanical one. Because, as he readily admitted, he was

not a medical doctor and did not have experience diagnosing or treating injuries, he did not possess the "reasonable qualifications" required to offer such an opinion. See *Weaver* v. *McKnight*, supra, 313 Conn. 408.

That McRae formulated his opinion in part through reviewing a subset of the plaintiff's medical records and other documents related to the accident; see footnote 2 of this opinion; does not alter our analysis. Regardless of his access to these materials, the record does not reflect that he possessed the medical training necessary to identify the plaintiff's "individual . . . tolerance level and [preexisting] medical conditions," both of which "could have [had] an effect on what injuries result[ed] from [the] accident . . . ." *Smelser* v. *Norfolk Southern Railway Co.*, supra, 105 F.3d 305; see also *Day* v. *RM Trucking, Inc.*, Docket No. 3:11CV400-J-25 (HLA), 2012 WL 12906568, *1 (M.D. Fla. August 31, 2012) ("biomechanical engineers ordinarily are not permitted to give opinions about the precise cause of a specific injury" because they are not trained to "identify the different tolerance levels and preexisting medical conditions of individuals" [internal quotation marks omitted]). Accordingly, the trial court could not reasonably have concluded that McRae was qualified to testify about the cause of the plaintiff's injuries. The court abused its discretion in failing to exclude the testimony.

II

Despite our conclusion that McRae's causation testimony was improperly admitted, the plaintiff is not entitled to a new trial because he has not provided us with an adequate record to evaluate whether the error was harmful. "[B]efore a party is entitled to a new trial because of an erroneous evidentiary ruling, he or she has the burden of demonstrating that the error was harmful. . . . The harmless error standard in a civil case is whether the improper ruling would likely affect

the result. . . . When judging the likely effect of such a trial court ruling, the reviewing court is constrained to make its determination on the basis of the printed record before it. . . . In the absence of a showing that the [improper ruling] would have affected the final result, its exclusion is harmless." (Internal quotation marks omitted.) *Desrosiers* v. *Henne*, 283 Conn. 361, 366, 926 A.2d 1024 (2007).

As the appellant in the present case, the plaintiff bore the burden of providing this court with an adequate record for review. See Practice Book § 61-10 (a). "[I]t is incumbent upon the appellant to take the necessary steps to sustain [her] burden of providing an adequate record for appellate review. . . . [A]n appellate tribunal cannot render a decision without first fully understanding the disposition being appealed. . . . Our role is not to guess at possibilities, but to review claims based on a complete factual record developed by a trial court." (Internal quotation marks omitted.) *Chester* v. *Manis*, 150 Conn. App. 57, 61, 89 A.3d 1034 (2014).

The plaintiff has failed to meet this burden. He has provided this court with only three excerpts from the trial transcript: (1) the parties' arguments and the trial court's ruling on, inter alia, the plaintiff's motion in limine to exclude McRae's causation testimony; (2) the trial testimony from September 4, 2015, at which McRae's videotaped deposition was played for the jury; and (3) the parties' arguments on the plaintiff's motion to set aside the verdict. The plaintiff has failed to provide this court with the transcripts of any other witness' oral testimony and, other than the parties' arguments in their briefs, there is no indication which witnesses testified at trial. In support of their arguments on the issue of harmful error, the parties rely on, inter alia, the testimony from the following additional witnesses

who evidently testified at trial: (1) the plaintiff; (2) William Meyers, the plaintiff's treating physician, who supposedly testified that the plaintiff's core muscle injury was caused by the accident; (3) Christopher Lena, the plaintiff's other treating physician, who the plaintiff claims testified that his knee and hip injuries were caused by the accident; and (4) Alan Daniels, the defendant's medical expert, who purportedly testified that the plaintiff's core muscle injury was not caused by the accident.[4] The plaintiff has not provided us with transcripts of the oral testimony provided by any of these witnesses.[5] Nor have we been provided with transcripts of the parties' summations or the trial court's instructions to the jury.

Without these materials, it is impossible for us to "evaluate the effect of the evidentiary impropriety in the context of the totality of the evidence adduced at trial."[6] (Internal quotation marks omitted.) *Hayes* v. *Camel*, 283 Conn. 475, 489, 927 A.2d 880 (2007); see

[4] The appendix filed in support of the defendant's brief includes the transcript of Daniels' videotaped deposition, but not the excerpt of the *trial transcript* in which the deposition was played for the jury. In any event, even if we were to assume that the deposition transcript accurately reflects the testimony played for the jury, the record would still be inadequate to evaluate whether the evidentiary error was harmful.

[5] The fact that these expert medical witnesses completed reports that were admitted into evidence as exhibits does not cure this problem. We have no way of knowing the extent to which their reports were consistent with their testimony at trial. Moreover, the findings recorded in the reports do not reflect what was elicited from those witnesses during cross-examination.

[6] Ordinarily, an analysis of the likely impact of an evidentiary impropriety on the outcome of a trial "includes a review of: (1) the relationship of the improper evidence to the central issues in the case, particularly as highlighted by the parties' summations; (2) whether the trial court took any measures, such as corrective instructions, that might mitigate the effect of the evidentiary impropriety; and (3) whether the improperly admitted evidence is merely cumulative of other validly admitted testimony. . . . The overriding question is whether the trial court's improper ruling affected the jury's perception of the remaining evidence." (Citations omitted; internal quotation marks omitted.) *Hayes* v. *Camel*, 283 Conn. 475, 489–90, 927 A.2d 880 (2007).

Desrosiers v. *Henne*, supra, 283 Conn. 367–68; *Ryan Transportation, Inc.* v. *M & G Associates*, 266 Conn. 520, 531, 832 A.2d 1180 (2003); *Chester* v. *Manis*, supra, 150 Conn. App. 62–63. Accordingly, the plaintiff has failed to provide us with an adequate record to determine whether the admission of McRae's causation testimony was harmful, and we decline to order a new trial.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* MATTHEW PUGH (AC 39688)

Lavine, Keller and Pellegrino, Js.

Syllabus

Convicted, after a jury trial, of the crimes of murder and burglary in the first degree, the defendant appealed. The defendant's conviction stemmed from his alleged murder of his former girlfriend in her home. At trial, the trial court admitted testimony from M, pursuant to the applicable rule of evidence (§ 8-3 [2]), concerning statements made by the victim during a telephone conversation on the day of the murder relating to the unexpected presence of the defendant, her former boyfriend, at her door. W, a Milford police detective, also testified, without objection, that, to verify the defendant's statements regarding his whereabouts on the day of the murder, he and other police investigators spoke with individuals from various car dealerships that the defendant claimed to have visited, all of whom stated that they had no recollection of the defendant visiting on that day. *Held*:

1. The trial court did not abuse its discretion by admitting, pursuant to the spontaneous utterance exception to the rule against hearsay, M's testimony regarding the statements that he overheard the victim make while they were on the telephone on the day of the murder; the record supported that court's finding that the victim's statements were made in such close connection to a startling occurrence and under such circumstances as to negate the opportunity for deliberation and fabrication, as the subject statements were spontaneous and unreflective, and made in response to the startling occurrence of the defendant's unexpected and unwanted appearance at the victim's door, the victim made the statements as the subject events unfolded, which negated the opportunity for deliberation or fabrication, M testified that the victim was annoyed and surprised when she made the statements, and there was

testimony that the victim feared the defendant and that he was the only person the victim referred to as her "ex-boyfriend."

2. The defendant could not prevail on his unpreserved claim that the trial court violated his constitutional right to confrontation by admitting W's testimony regarding the defendant's alleged whereabouts on the day of the murder, which he claimed constituted inadmissible testimonial hearsay; even if the admission of the challenged testimony was improper, the state met its burden of proving that any error was harmless beyond a reasonable doubt, as the testimony was cumulative of unchallenged testimony that had been presented to the jury and was consistent with the state's theory of the case, all of which provided a firm basis for the jury to doubt the defendant's version of events on the day of the victim's murder, and the state presented a strong case against the defendant by demonstrating that he had devised a plan to kill the victim, that he was in the area of or inside her home at approximately the time of her death, and that a distinct type of tape, to which he had access, was used in connection with her murder.

3. This court found unavailing the defendant's claim that the trial court committed plain error by failing to dismiss, sua sponte, the charge of burglary in the first degree, which he alleged had been brought beyond the applicable statute of limitations: the defendant was not entitled to reversal of his burglary conviction under the plain error doctrine, as he waived a statute of limitations affirmative defense by failing to raise it at trial and, therefore, was barred from raising such a defense on appeal; furthermore, the defendant did not provide this court with any controlling authority indicating that it was the responsibility of the trial court, sua sponte, to dismiss a criminal charge that had been brought beyond the applicable statute of limitations.

Argued April 10—officially released September 19, 2017

Procedural History

Substitute information charging the defendant with the crimes of murder and burglary in the first degree, brought to the Superior Court in the judicial district of Ansonia-Milford and tried to the jury before *Markle, J.*; verdict and judgment of guilty, from which the defendant appealed. *Affirmed.*

Damian Gunningsmith, with whom, on the brief, was *John L. Cordani, Jr.*, for the appellant (defendant).

Matthew A. Weiner, assistant state's attorney, with whom, on the brief, was *Kevin D. Lawlor*, state's attorney, for the appellee (state).

Opinion

LAVINE, J. The principal issue in this appeal is whether the trial court improperly admitted into evidence, under the spontaneous utterance exception to the rule against hearsay, statements made by the victim relating to the unexpected presence of her former boyfriend, the defendant Matthew Pugh, whom she feared. The defendant appeals from his conviction, following a jury trial, of murder in violation of General Statutes § 53a-54a (a) and burglary in the first degree in violation of General Statutes § 53a-101 (a) (2). On appeal, the defendant claims that the trial court: (1) abused its discretion by admitting into evidence statements made by the victim pursuant to the spontaneous utterance exception to the rule against hearsay; (2) erroneously admitted into evidence testimonial hearsay in violation of his rights under the confrontation clause of the sixth amendment to the federal constitution by permitting a police investigator to testify as to certain witness statements regarding the defendant's claimed whereabouts on the day of the murder; and (3) committed plain error when it did not dismiss, sua sponte, the burglary in the first degree charge, which had been brought beyond the applicable statute of limitations. We affirm the judgment of the trial court.

By way of long form information, the state charged the defendant with murder and burglary in the first degree. These charges stemmed from the death of Alexandra Duscay, the victim, whose body was found by her mother, Linda Duscay, in their Milford home at approximately 4:30 p.m. on May 19, 2006. An autopsy revealed that the victim died as a result of blunt force trauma and stab wounds to her head. Following the jury's verdict of guilty on both counts, the trial court sentenced the defendant to a term of imprisonment of sixty years on the murder conviction and a concurrent sentence of twenty years on the burglary conviction,

for a total effective sentence of sixty years to serve. This appeal followed. Additional facts will be set forth as necessary.

I

We begin with the defendant's first claim challenging the trial court's admission of the victim's statements under the spontaneous utterance exception to the rule against hearsay. Specifically, the defendant challenges the testimony of Jermaine Morton, who testified that the victim stated, during a telephone call on May 19, 2006, that her "ex-boyfriend" was at the door and "what are you doing here? You were supposed to call first." The defendant argues that the "nonviolent" arrival of a former boyfriend is not the type of startling event that would shock and overwhelm the senses and that statements made in relation to that event are not free from the opportunity to deliberate or fabricate.[1] We disagree.

The following additional facts, which the jury reasonably could have found, and procedural history are relevant to the resolution of the defendant's claim. The victim met the defendant when she was a teenager. The two became romantically involved, and the victim considered the defendant her boyfriend. Although the defendant was sentenced to prison in 1998, he and the victim continued to communicate with one another.

During the defendant's incarceration, however, the victim began to distance herself from him, finding the

[1] The defendant also argues that the court committed *legal error* by "bootstrapping" hearsay evidence into an exception to the hearsay rule when it relied on the contents of the victim's statements as proof that the statements fit within the parameters of a spontaneous utterance, namely, in determining whether a startling event occurred. We decline to review this particular claim because it was not distinctly raised at trial. See, e.g., *State* v. *Rosado*, 134 Conn. App. 505, 516 n.3, 39 A.3d 1156 (declining to review defendant's claim, raised for first time on appeal, that certain evidence fell within identification exception to hearsay rule), cert. denied, 305 Conn. 905, 44 A.3d 181 (2012); see also Practice Book §§ 5-2, 5-5, and § 60-5.

relationship stressful. She ultimately decided to end the relationship just prior to the defendant's release from prison in 2004. Soon after the defendant was released on August 6, 2004, the victim told her brother, Erik Terranova, that she feared the defendant. Nicole Williamson, a close friend of the victim, also testified that the victim even worried that the defendant might be hiding in the bushes when she returned home at night. According to family and friends, the defendant was the only individual whom the victim referred to as her "ex-boyfriend."

At approximately 12:30 p.m. on May 19, 2006, the victim, while at home in Milford, placed a call to Morton, whom she had been dating for a few weeks. At trial, the state called Morton to testify regarding the statements he overheard the victim make during this phone call. In an offer of proof made outside of the presence of the jury, Morton testified that, during their conversation, "she told me to hold on, and she said someone was at her door. I could actually hear her in the background say *what are you doing here? You were supposed to call first*. She got back on the phone. She told me not to—she would call me right back. She called me back about ten to twenty—five to twenty minutes, or whatever, and after that she didn't say anything. She just talked about—we had another regular conversation. She didn't sound hurt or she didn't sound anything like that, so I didn't take alarm of anything, so."[2] (Emphasis added.) After reviewing the written statement that he gave to police on May 19, 2006, Morton further testified that the victim informed him that her

[2] After providing this testimony, the court asked Morton, "what exactly did you hear her say?" In response, Morton stated: "Well, she told me to hold on because someone was at her door. I could hear her in the background saying *what are you doing here? You were supposed to actually call first.* So, that's when she got back on the phone and she told me I'll call you right back. She called me back; we talked. She didn't say anything happened or nothing like that. That is basically it." (Emphasis added.)

"ex-boyfriend" was the individual at the door.[3] The court asked Morton to describe the "nature" of the victim's statements, and Morton testified that the victim was "annoyed" and "surprised that [the defendant] was there."

Over the defendant's objection, the court admitted Morton's testimony recounting the victim's statements, concluding that the statements: (1) followed the startling event of an unannounced appearance of an individual; (2) related to that appearance; (3) demonstrated the victim's direct observation of the individual's appearance; and (4) were reliable because they were made under circumstances during which the declarant did not have time to fabricate her observations.

Before we address the defendant's claim, we set forth the applicable legal principles. "An out-of-court statement offered to prove the truth of the matter asserted is hearsay and is generally inadmissible unless an exception to the general rule applies. . . . Among the recognized exceptions to the hearsay rule is the spontaneous utterance exception, which applies to an utterance or declaration that: (1) follows some startling occurrence; (2) refers to the occurrence; (3) is made by one having the opportunity to observe the occurrence; and (4) is made in such close connection to the occurrence and under such circumstances as to negate the opportunity for deliberation and fabrication by the declarant. . . . [T]he ultimate question is whether the utterance was spontaneous and unreflective and made under such circumstances as to indicate absence of opportunity for contrivance and misrepresentation. . . . Whether an utterance is spontaneous and made under circumstances that would preclude contrivance and misrepresentation is a preliminary question of fact to be decided

[3] Morton's testimony was admitted in accordance with *State* v. *Whelan*, 200 Conn. 743, 752, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S. Ct. 597, 93 L. Ed. 2d 598 (1986). On appeal, the defendant does not challenge the admission of Morton's testimony in accordance with *Whelan*.

by the trial judge. . . . The trial judge exercises broad discretion in deciding this preliminary question, and that decision will not be reversed on appeal absent an unreasonable exercise of discretion." (Citations omitted; footnote omitted; internal quotation marks omitted.) *State* v. *Wargo*, 255 Conn. 113, 127–28, 763 A.2d 1 (2000); see also Conn. Code Evid. § 8-3 (2).

To be admissible as a spontaneous utterance, "[t]he event or condition must be sufficiently startling so as to produce nervous excitement in the declarant and render [the declarant's] utterances spontaneous and unreflective." (Internal quotation marks omitted.) *State* v. *Kirby*, 280 Conn. 361, 374, 908 A.2d 506 (2006); see also *Perry* v. *Haritos*, 100 Conn. 476, 483–85, 124 A. 44 (1924) (statement deemed trustworthy because it "is made under the immediate and uncontrolled domination of the senses" [internal quotation marks omitted]). In reviewing the defendant's claim, we bear in mind that "whether a statement is truly spontaneous as to fall within the spontaneous utterance exception [is] . . . reviewed with the utmost deference to the trial court's determination." *State* v. *Saucier*, 283 Conn. 207, 219, 926 A.2d 633 (2007).

It appears that the defendant is challenging both the first and fourth elements of a spontaneous utterance, namely, whether the victim's statement "followed some startling occurrence" and whether her statement was "made in such close connection to the occurrence and under such circumstances as to negate the opportunity for deliberation and fabrication by the declarant." *State* v. *Wargo*, supra, 255 Conn. 127. On the basis of our review of the record, we conclude that the trial court did not abuse its discretion by admitting Morton's testimony regarding the statements that he overheard the victim make while on the phone.

Connecticut courts have had numerous opportunities to assess the types of "startling events" that can generate the kind of nervous excitement or uncontrolled outbursts captured by the spontaneous utterance exception to the rule against hearsay.[4] At the outset, we appreciate the fact that the unannounced presence of an individual at one's door, in and of itself, may not appear to be among the usual set of circumstances envisioned when evaluating whether a statement is, or is not, admissible as a spontaneous utterance. Although this court has previously suggested that certain events lack the "trauma necessary to negate the opportunity for deliberation and fabrication"; (internal quotation marks omitted) *State* v. *McNair*, 54 Conn. App. 807, 813, 738 A.2d 689, cert. denied, 251 Conn. 913, 739 A.2d 1249 (1999); "the application of the exception entails a uniquely fact bound inquiry." *State* v. *Westberry*, 68 Conn. App. 622, 628, 792 A.2d 154, cert. denied, 260 Conn. 923, 797 A.2d 519 (2002). Thus, whether a statement qualifies as a spontaneous utterance requires a case-by-case assessment of the particular facts and circumstances surrounding the subject statement. See, e.g., *State* v. *Kirby*, supra, 280 Conn. 375. In other words, context is crucial.

With that in mind, we conclude that the record clearly supports the trial court's finding that the victim's statements were "made in such close connection to [a startling] occurrence and under such circumstances as to

[4] See, e.g., *State* v. *Slater*, 285 Conn. 162, 179, 939 A.2d 1105 (declarant raped at knifepoint), cert. denied, 553 U.S. 1085, 128 S. Ct. 2885, 171 L. Ed. 2d 822 (2008); *State* v. *Kirby*, supra, 280 Conn. 376 (declarant assaulted, tied up, and kidnapped); *State* v. *Wargo*, supra, 255 Conn. 126–27 (children watched house burn after father killed their mother); *Perry* v. *Haritos*, supra, 100 Conn. 483–85 (declarant driver hit pedestrian with vehicle); *State* v. *Serrano*, 123 Conn. App. 530, 537–38, 1 A.3d 1277 (2010) (declarant observed assault with blunt object), cert. denied, 300 Conn. 909, 12 A.3d 1005 (2011); *State* v. *Nelson*, 105 Conn. App. 393, 407, 937 A.2d 1249 (declarant robbed, burned, beaten, threatened with murder, tied up, and driven around), cert. denied, 286 Conn. 913, 944 A.2d 983 (2008); *State* v. *Thomas*, 98 Conn. App. 384, 387–88, 909 A.2d 57 (2006) (declarant discovered murder weapon),

negate the opportunity for deliberation and fabrication . . . .'' *State* v. *Wargo*, supra, 255 Conn. 127. At the time that the state proffered Morton's testimony, the state presented ample evidence from the victim's family that the victim feared the defendant. Her close friend, Williamson, testified that the victim was concerned that the defendant might be hiding in the bushes when she returned home. Morton also described the victim as being ''annoyed'' and ''surprised'' when she made the subject statements. Under the circumstances of the present case, the trial court did not abuse its discretion by concluding that the defendant's unexpected and unwanted appearance at the victim's doorstep startled her.[5]

Additionally, the court heard testimony that the defendant was the only person the victim referred to as her ''ex-boyfriend,'' and the victim made these statements as the defendant was at her door. Thus, the record supports a finding that the victim made these statements as events unfolded, negating the opportunity to deliberate or fabricate. See *State* v. *Silver*, 126 Conn. App. 522, 526, 535–36, 12 A.3d 1014 (declarant's recorded statement to 911 dispatcher made as he

cert. denied, 281 Conn. 906, 916 A.2d 47 (2007); *State* v. *Westberry*, 68 Conn. App. 622, 626–32, 792 A.2d 154 (declarant heard gunshots and saw victim ''hit the ground''), cert. denied, 260 Conn. 923, 797 A.2d 519 (2002).

[5] We find support for this conclusion in *State* v. *Reynolds*, 152 Conn. App. 318, 347–48, 97 A.3d 999, cert. denied, 314 Conn. 934, 102 A.3d 85 (2014), in which this court held that the victim's statements to a 911 operator regarding the unexpected appearance of a former boyfriend were spontaneous utterances. Although the defendant correctly observes that *Reynolds* involved the appearance of a former boyfriend who was acting violently, that distinguishing feature is not dispositive of the present case. ''[T]he application of the exception entails a uniquely fact bound inquiry.'' *State* v. *Westberry*, supra, 68 Conn. App. 628. In the present case, even if the defendant did not behave in a violent manner, his sudden appearance at the victim's doorstep overwhelmed her senses based on her fear of the defendant and her expectation that he would call first. Thus, his appearance was sufficiently unnerving to be considered a ''startling event.''

observed erratic driver crash into center median and flee), cert. denied, 300 Conn. 931, 17 A.3d 68 (2011); *State* v. *Torelli*, 103 Conn. App. 646, 662, 931 A.2d 337 (2007) (declarant startled by erratic driver and his statements "were made in the course of an ongoing urgent situation").

We conclude that the court did not abuse its discretion in determining that the victim's statements were spontaneous, unreflective, and made in response to a startling occurrence that overwhelmed her senses.[6]

II

The defendant next claims that the court violated his right to confrontation under the sixth amendment to the federal constitution when it admitted testimonial hearsay into evidence.[7] More specifically, he argues that the testimony of a detective from the Milford Police Department (department) was inadmissible testimonial hearsay under *Crawford* v. *Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). The state argues that the record is inadequate to determine whether the hearsay statements were testimonial in nature and that,

[6] Even if we were to assume that the trial court erred in admitting the victim's statements, the defendant would not be entitled to a new trial, as he failed to demonstrate that the nonconstitutional evidentiary error substantially affected the verdict. See, e.g., *State* v. *Edwards*, 325 Conn. 97, 133, 156 A.3d 506 (2017) (noting that defendant bears burden of demonstrating nonconstitutional evidentiary error harmful). Although the victim's statements to Morton placed the defendant at the victim's home hours before her mother discovered her body, the defendant has not challenged on appeal the introduction of other evidence placing him in close proximity to her home around the time of her murder. See part II of this opinion. The victim's statements to Morton merely corroborated such unchallenged circumstantial evidence that connected the defendant to the victim's murder.

[7] The sixth amendment to the United States constitution provides in relevant part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." The defendant does not provide a separate argument under the Connecticut constitution.

regardless, any error in admitting the challenged testimony was harmless beyond a reasonable doubt.[8] Because we agree that the error, if any, was harmless, we need not address the state's argument that the record is inadequate to review the defendant's claim.

The following facts, which the jury reasonably could have found, and procedural history are relevant to the defendant's claim. After his release from prison in 2004, the defendant began a romantic relationship with Charise Trotman. The defendant lived with Trotman and her teenaged daughter, Chamira Trotman-Adams, in Hamden on May 19, 2006.

During their inquiry into the circumstances of the victim's death, investigators from the department questioned the defendant about his whereabouts on May 19, 2006. The investigators first questioned the defendant at approximately 5:30 p.m. that evening. In response to their questions, the defendant said that he had been at Chromalloy, his place of employment, all day and denied visiting Milford that day. He later informed the investigators that he left Chromalloy early to check on Adams, who had been suspended from school, arrived home just before 10 a.m., lifted weights until about 11 a.m., and then went car shopping around the greater Hamden, New Haven, and Milford vicinities. Although Adams was at home in Hamden when the defendant claimed to have returned, she did not see or hear him.

[8] The state, relying on *State* v. *Benedict*, 313 Conn. 494, 505–508, 98 A.2d 42 (2014), also argues that we should not review the defendant's confrontation claim. Specifically, the state argues that, "by waiting until appeal to raise his confrontation claim, the defendant ambushes the state." According to the state, *Benedict* "cast[s] doubt on the vitality of [*State* v. *Smith*, 289 Conn. 598, 960 A.2d 993 (2008)]." As the state concedes, our Supreme Court has not overruled *Smith*. In accordance with that decision, unpreserved claims that the trial court violated the defendant's right to confrontation are reviewable under *State* v. *Golding*, 213 Conn. 239–40, 567 A.2d 823 (1989), when an adequate record exists. See *State* v. *Smith*, supra, 289 Conn. 620–21.

The state called Steven Wydra, a detective in the department, during its case-in-chief to testify regarding the investigation of the victim's murder. According to Wydra, his team visited various car dealerships and used car lots in the Hamden and New Haven areas, noting that "[e]veryone we talked to at the car dealerships said that they had no recollection of someone matching [the defendant's] description [visiting on May 19, 2006]." The state did not call as witnesses the individuals at the car dealerships. Wydra later confirmed the substance of this testimony in response to questions posed by the state regarding a follow-up interview with the defendant that took place on May 26, 2006. Shortly after Wydra testified regarding his discussions with the individuals at the car dealerships, the following exchange took place:

"[The Prosecutor]: Did you also speak with [the defendant] regarding the used car lots that he had been visiting that afternoon?

"[Wydra]: Yes. I had explained to him that *we had gone to these car lots and they said that they had not seen him*. So I asked him again—actually, I asked if he would actually go with us to the car lots and *show us which car lots because there were like three or four of them on the corners that he talked about*.

"[The Prosecutor]: So did he assist you in doing that? Did he bring you out and say hey, this is where I was?

"[Wydra]: No, he did not." (Emphasis added.)

On appeal, the defendant claims that admitting Wydra's testimony that "[e]veryone we talked to at the car dealerships said that they had no recollection of someone matching [the defendant's] description [visiting on May 19, 2006]" violated his right to confrontation. The defendant concedes that he did not object to the introduction of the challenged testimony and,

therefore, seeks review under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified in *In re Yasiel R.*, 317 Conn. 773, 780–81, 120 A.3d 1188 (2015). "[A] defendant can prevail on a claim of constitutional error not preserved at trial only if *all* the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness beyond a reasonable doubt. In the absence of any one of these conditions, the defendant's claim will fail. The appellate tribunal is free, therefore, to respond to the defendant's claim by focusing on whichever condition is most relevant in the particular circumstances." (Emphasis in original; footnote omitted.) *State* v. *Golding*, supra, 213 Conn. 239–40.

Even if we assume, which we do not, that a violation of the defendant's right to confrontation exists on this record based on the challenged portion of Wydra's testimony, we conclude that the state has met its burden of proving that any error was harmless beyond a reasonable doubt. "It is well established that a violation of the defendant's right to confront witnesses is subject to harmless error analysis . . . . The state bears the burden of proving that the error is harmless beyond a reasonable doubt. . . . Whether such error is harmless in a particular case depends upon a number of factors, such as the importance of the witness' testimony in the prosecution's case, *whether the testimony was cumulative*, *the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points*, the extent of cross-examination otherwise permitted, and, of course, *the overall strength of the prosecution's case*. . . . Most importantly, we must examine the impact of the evidence on the trier of fact and the result of the trial. . . . If the evidence may

have had a tendency to influence the judgment of the jury, it cannot be considered harmless." (Citations omitted; emphasis added; internal quotation marks omitted.) *State* v. *Smith*, 289 Conn. 598, 628, 960 A.2d 933 (2008). "[A]s we have often noted, proof beyond a reasonable doubt does not mean proof beyond *all* possible doubt . . . ." (Emphasis in original; internal quotation marks omitted.) *State* v. *Sinclair*, 173 Conn. App. 1, 10, 162 A.3d 43, cert. granted on other grounds, 326 Conn. 904, A.3d (2017).

The jury reasonably could have found the following relevant facts. While investigating the crime scene on May 19, 2006, investigators observed black tape on the victim's face. Frank Gall, a detective from the department, determined that a company named "Permacel" manufactured the tape found on the victim's face, and described it as being "somewhat out of the ordinary." Notably, Chromalloy used Permacel tape due to its durable qualities. Tests by forensic trace evidence experts also revealed that the tape on the victim's face possessed "similar physical and instrumental characteristics" to tape seized from the defendant's residence on May 26, 2006. Of particular significance, prior to the victim's death, the defendant informed his cousin, Anthony Pugh, that he "wanted to kill [the victim]" and planned to use tape and other "stuff from work" so that there would be no evidence left behind.

The state introduced evidence of the defendant's whereabouts prior to the victim's death. Andrew Weaver, a sergeant from the Hartford Police Department, testified for the state regarding "call data record mapping."[9] Using cell phone data from the defendant's phone records on May 19, 2006, Weaver determined that the defendant was in close proximity to the victim's

[9] According to Andrew Weaver, "[c]all data record mapping is when you actually take the call data record or the record of your phone calls and we can visualize that on a map. We can show where you were or where your handset was when you utilized your cellular carrier service to either place or receive a phone call."

Milford home hours before her mother found her body. Additionally, Michael Shuckerow, a neighbor of the victim at the time of her death, testified that he saw a vehicle similar to one owned by the defendant parked on the victim's street and driving near her address on May 18 and 19, 2006, between 12 p.m. and 2 p.m. on both days. Shuckerow also made an in-court identification of the defendant as the individual operating the vehicle that he observed. Nicholas Yang, a forensic science examiner, also testified as a witness for the state regarding certain DNA evidence taken from the crime scene. Yang testified that the DNA evidence collected from the bathroom sink and toilet in the victim's home was either consistent with the defendant's DNA profile, or that his DNA profile could not be eliminated as a contributor.

On the basis of our review of the record, we conclude that the challenged testimony was cumulative of Wydra's subsequent testimony and also corroborated other testimony presented to the jury.[10] The *sole* testimony that the defendant claims violated his right to

[10] The defendant testified on his own behalf. On cross-examination, he testified as follows with respect to his visits to used car dealerships on May 19, 2006.

"Q. And I believe that you testified on direct examination that you—that you did not talk with any salesmen, right?

"A. No, no salesmen.

"Q. Okay. I believe your testimony was you didn't want anybody bothering you, correct?

"A. No, I was just looking.

"Q. Okay. And yes or no, did anybody come out and say 'hey, there's a beauty right there; would you like to know how many miles are on it'?

"A. No. It was damp outside.

"Q. Nobody said that?

"A. No, it was damp outside. Nobody was out there.

"Q. So nobody came out to see you, correct?

"A. Nobody was out there.

"Q. Right. Nobody at any of these car dealerships, nobody at any car—used car dealership, of the five that you went to, not one did somebody come out and say 'hey, can I help you with that'?"

confrontation is Wydra's statement that "[e]veryone we talked to at the car dealerships said that they had no recollection of someone matching [the defendant's] description [visiting on May 19, 2006]." The defendant does not challenge Wydra's testimony that "I had explained to [the defendant] that *we had gone to these car lots and they said that they had not seen him*." (Emphasis added.) The challenged testimony is thus essentially cumulative of unchallenged testimony before the jury. Additionally, Wydra's testimony was consistent with the state's theory of the case and the testimony of Adams, Weaver, and Shuckerow, all of which provided a firm basis for the jury to doubt the defendant's version of events on May 19, 2006.

Finally, the state presented a strong case against the defendant, even if some of the evidence was circumstantial. See, e.g., *State* v. *Edwards*, 325 Conn. 97, 137, 156 A.3d 506 (2017) ("[i]t is immaterial to the probative force of the evidence that it consists, in whole or in part, of circumstantial rather than direct evidence" [internal quotation marks omitted]). Because the victim's autopsy revealed that she died as a result of multiple stab wounds and blunt trauma to her head, the critical issue for the state was to establish the identity of the perpetrator. The state presented a strong case identifying the defendant as the perpetrator by demonstrating that he devised a plan to kill the victim, that he was in the area of or inside her home at approximately the time of her death, and that a distinct type of tape, to which he had access, was used in connection with her death.[11]

[11] We are also unpersuaded by the defendant's argument that admitting Wydra's testimony was not harmless beyond a reasonable because the prosecutor repeatedly referenced it during closing argument. See, e.g., *State* v. *Thompson*, 266 Conn. 440, 456, 832 A.2d 626 (2003) (improperly admitted testimony deemed harmless, in part, because "the state's attorney did not emphasize or rely upon the testimony during closing argument"). Although the prosecutor referred to Wydra's testimony regarding the various car dealerships and used car lots that Wydra and his team visited, the prosecu-

Having reviewed the record in its entirety, we conclude that Wydra's testimony that "[e]veryone we talked to at the car dealerships said that they had no recollection of someone matching [the defendant's] description [visiting on May 19, 2006]" had no discernible effect on the outcome of the trial. This testimony was largely cumulative, not essential to the state's case, and paled in comparison to other evidence connecting the defendant to the victim's murder. We conclude that any impropriety in admitting the challenged testimony was harmless beyond a reasonable doubt, and, accordingly, the defendant's claim fails under the fourth prong of *Golding*.

III

The defendant's final claim is that the trial court committed plain error when it did not dismiss, sua sponte, the burglary in the first degree charge, which had been brought beyond the applicable statute of limitations. In response, the state argues that the statute of limitations is an affirmative defense that must be pleaded and proven by the defendant at trial. We agree with the state.

The following facts and procedural history are relevant to this claim. The charge of burglary in the first degree stemmed from the victim's murder on May 19, 2006. A warrant for the defendant's arrest issued on August 24, 2012, and the defendant was arrested on September 5, 2012. Because burglary in the first degree is a class B felony, the five year statute of limitations applied and the charge against the defendant should have been brought by May 19, 2011. See General Statutes §§ 53a-35a (6), 53a-101 (c), and 54-193 (b).[12]

tor's comments, when read in context, were in reference to the prosecutor's broader argument that the cumulative effect of the evidence presented at trial revealed that the defendant's entire story was false, not simply his statements to police that he visited various car dealerships and used car lots.

[12] The record does not reflect why the state chose to pursue the burglary in the first degree charge after the statute of limitations had run. We note,

"[An appellant] cannot prevail under [the plain error doctrine] . . . unless he demonstrates that the claimed error is *both* so clear *and* so harmful that a failure to reverse the judgment would result in manifest injustice." (Emphasis in original; internal quotation marks omitted.) *State* v. *McClain*, 324 Conn. 802, 812, 155 A.3d 209 (2017); see Practice Book § 60-5. Moreover, "a clear and obvious mistake on the part of the trial court is a prerequisite for reversal under the plain error doctrine . . . ." *State* v. *Coward*, 292 Conn. 296, 307, 972 A.2d 691 (2009).

The defendant concedes that he did not raise at trial a statute of limitations defense to the burglary in the first degree charge. Having failed to assert this defense at trial, the defendant is deemed to have waived such defense and is, therefore, barred from raising it on appeal. See, e.g., *State* v. *Coleman*, 48 Conn. App. 260, 268–69, 709 A.2d 590 (1998) (defendant waived statute of limitations defense by not raising it at trial and, therefore, defendant barred from raising it on appeal), aff'd, 251 Conn. 249, 741 A.2d 1 (1999), cert. denied, 529 U.S. 1061, 120 S. Ct. 1570, 146 L. Ed. 2d 473 (2000); see also *State* v. *Middlebrook*, 51 Conn. App. 711, 713 n.4, 725 A.2d 351 ("statute of limitations is not a jurisdictional bar to prosecution; it is an affirmative defense, which must be raised and can be waived"), cert. denied, 248 Conn. 910, 731 A.2d 310 (1999); Practice Book §§ 41-2

however, that the state, on April 15, 2008, requested that "a reward be posted" in connection with the victim's murder because "the police [had] not been able to develop sufficient evidence to arrest anyone." On April 22, 2008, Governor M. Jodi Rell approved the state's request in accordance with General Statutes § 54-48. Thereafter, on June 19, 2008, Anthony Pugh "informed police that his cousin, [the defendant], indicated that he wanted to kill [the victim] and would use items from work including tape, smocks and booties in order to avoid detection." Notwithstanding Anthony Pugh's June 19, 2008 statement, an arrest warrant was not issued until August 24, 2012. Thus, it appears that the investigation into the victim's death remained dormant for a period of time.

and 41-4.[13] Moreover, the defendant has not provided us with any controlling authority, and we are unaware of any, indicating that it is the responsibility of *the trial court*, sua sponte, to dismiss criminal charges that are brought beyond the applicable statute of limitations. Cf. *State* v. *Crawford*, 202 Conn. 443, 451, 521 A.2d 1034 (1987) (defendant bears burden of proving statute of limitations affirmative defense); *State* v. *Woodtke*, 130 Conn. App. 734, 740, 25 A.3d 699 (2011) (same).[14] Having failed to raise his statute of limitations defense at trial, we are compelled to conclude, in light of our case law and applicable rules of practice, that the defendant is not entitled to reversal of his conviction for burglary

[13] Practice Book § 41-2 provides that "[a]ny defense, objection or request capable of determination without a trial of the general issue may be raised only by a pretrial motion made in conformity with this chapter." "This broad provision makes clear that *any* defense, objection, or request capable of determination without trial must be raised by pre-trial motion in conformity with this Chapter." (Emphasis in original.) D. Borden & L. Orland, 4 Connecticut Practice Series; Criminal Procedure, (4th Ed. 2007) § 41-2, p 345.

Practice Book § 41-4 provides in relevant part that "[f]ailure by a party, at or within the time provided by these rules, to raise defenses . . . that must be made prior to trial shall constitute a waiver thereof, but a judicial authority, for good cause shown, may grant relief from such waiver . . . ."

[14] We are unpersuaded by the defendant's argument and reliance on *State* v. *Marrero*, 66 Conn. App. 709, 785 A.2d 1198 (2001) and *State* v. *Kulmac*, 230 Conn. 43, 644 A.2d 887 (1994), that waiver does not apply in the present case. In *Marrero*, this court held that it was plain error for the trial court not to provide an adequate instruction on a "drug-dependent person" within the meaning of General Statutes §§ 21a-278 and 21a-278a. See *State* v. *Marrero*, supra, 720–24. Central to that decision, however, was this court's observation that, when instructing the jury, "[i]t is the *function of the court* to state the rules of law and to explain the law to be applied to the facts of the case . . . ." (Emphasis added.) Id., 723. In *Kulmac*, our Supreme Court held that it was not plain error to convict the defendant of various sexual assault and risk of injury of a child offenses when it was unclear whether General Statutes § 53a-69 barred the challenged offenses. *State* v. *Kulmac*, supra, 78. The court in *Kulmac* did not squarely address the argument raised by the state in the present case, which is that the defendant waived his statute of limitations defense by failing to raise or prove it at trial. Compare id., 76–78, with *State* v. *Coleman*, supra, 48 Conn. App. 268–69. Both *Marrero* and *Kulmac*, therefore, are legally and factually distinguishable from the present case.

in the first degree under the plain error doctrine in this proceeding.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* DORAINE REED (AC 37726)

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

Syllabus

Convicted of the crime of harassment in the second degree, the defendant appealed to this court. The defendant's conviction stemmed from an incident in which she made a threatening statement during a telephone call to a legal secretary at a law firm with which she had been engaged in a billing dispute. On appeal, the defendant claimed, inter alia, that the evidence was insufficient to support her conviction, contending that the verbal content of her telephone call could not form the substantive basis for her conviction because she lacked fair warning that *State* v. *Moulton* (310 Conn. 337), which was decided several months after she placed the telephone call, would broaden the scope of the second degree harassment statute (§ 53a-183 [a] [3]) to proscribe unprotected harassing speech. *Held*:

1. The evidence was sufficient to support the defendant's conviction: the case law prior to *Moulton* having limited the scope of § 53a-183 (a) (3) to conduct and not speech, *Moulton* did not apply to the present case, as the defendant lacked fair warning that she could be prosecuted for harassment in the second degree under § 53a-183 (a) (3) on the basis of the verbal content of her telephone call, and, contrary to the state's claim, even though the appeal in *Moulton* was pending when the defendant made the telephone call, she could not reasonably have foreseen the expansion of the scope of § 53a-183 (a) (3) in that case; nevertheless, the state presented sufficient evidence concerning the circumstances of the defendant's telephone call from which the jury reasonably could have found that the defendant, in referencing a notorious mass shooting incident during the call, intended to harass, annoy or alarm the employees of the firm so that they would take her and her billing complaint more seriously; moreover, pursuant to § 53a-183 (a) (3), the defendant's conduct in placing a single telephone call to the law firm was sufficient to constitute harassment in the second degree when, as in the present case, it was made with an intent to harass, annoy or alarm, as it was clear from the statutory language that the legislature sought to punish each telephone call made with the requisite intent, regardless of the

number of times, if any, the victim was actually harassed, annoyed or alarmed.

2. The trial court improperly failed to provide the jury with a limiting instruction concerning its consideration of the verbal content of the defendant's telephone call, and, because the error was not harmless beyond a reasonable doubt, a new trial was warranted: the state's evidence of the defendant's intent and conduct, although sufficient, was not overwhelming and focused on the defendant's language, and the jury, which reasonably could have found that the mere placing of the call met the definition of harassment under § 53a-183 (a) (3), also could have relied on the defendant's speech as the basis for her conviction, especially given the state's closing argument, which focused on the verbal content of the defendant's call rather that the act of calling itself; moreover, because the jury did not receive an instruction on the law governing the defendant's speech as it pertained to the elements of harassment in the second degree, which the defendant requested and was entitled to, the jury could have been misled into finding the defendant guilty on the basis of her speech.

Argued May 24—officially released September 19, 2017

Procedural History

Substitute information charging the defendant with the crimes of threatening in the second degree and harassment in the second degree, brought to the Superior Court in the judicial district of Fairfield, geographical area number two, and tried to the jury before *Kavanewsky, J.*; verdict and judgment of guilty of harassment in the second degree, from which the defendant appealed to this court. *Reversed; new trial.*

Maria L. Vogel-Short, certified legal intern, with whom was *James B. Streeto*, senior assistant public defender, for the appellant (defendant).

Mitchell S. Brody, senior assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, and *Nicholas J. Bove, Jr.*, senior assistant state's attorney, for the appellee (state).

Opinion

DiPENTIMA, C. J. The defendant, Doraine Reed, appeals from the judgment of conviction, rendered after

a jury trial, of harassment in the second degree in violation of General Statutes § 53a-183 (a) (3).[1] On appeal, the defendant claims that (1) the evidence was insufficient to support her conviction and (2) the court improperly instructed the jury. We disagree with the defendant that the evidence was insufficient to support her conviction. We agree, however, that the court improperly instructed the jury and that this error was not harmless beyond a reasonable doubt. Accordingly, we reverse the judgment of the trial court and remand the case for a new trial.

The jury reasonably could have found the following facts. The defendant was engaged in a billing dispute with the law firm that had been representing her, Rosenberg and Press (firm), and was dissatisfied with the way she had been treated. On March 6, 2013, the defendant called the firm. During the call, she complained that on the previous day, the firm's office manager, Osnat Rosenberg, had been rude to her and the firm had "disrespected" her. She then said that Adam Lanza[2] had also been disrespected, and unless the firm learned how to treat its clients, someone—even she, herself—might do something similar to the firm.

This frightened Brittany Mancini, the legal secretary who answered the call, and she immediately notified Osnat Rosenberg. Together, they decided to call the police, who arrived at the firm between thirty and forty minutes later to take statements. Mancini appeared nervous and scared as she was recounting the telephone conversation to the responding officer.

[1] General Statutes § 53a-183 (a) provides in relevant part: "A person is guilty of harassment in the second degree when . . . (3) with intent to harass, annoy or alarm another person, he makes a telephone call, whether or not a conversation ensues, in a manner likely to cause annoyance or alarm."

[2] The parties stipulated to the historical fact that, on December 14, 2012, Adam Lanza fatally shot twenty children and six adults at Sandy Hook Elementary School in Newtown.

The defendant subsequently was arrested and charged with threatening in the second degree in violation of General Statutes § 53a-62 (a) (1) and harassment in the second degree in violation of § 53a-183 (a) (3). After a trial on August 6, 2014, the jury returned a verdict of not guilty with respect to the threatening charge and a verdict of guilty with respect to the harassment charge. On September 5, 2014, the court sentenced the defendant to sixty days of incarceration. This appeal followed. Additional facts will be set forth as necessary.

I

The defendant first claims that the evidence presented at trial was insufficient to support her conviction of harassment in the second degree.[3] Specifically, she argues that the state failed to adduce sufficient evidence to prove that (1) she intended to harass, annoy, or alarm someone at the firm, and (2) a single telephone call made to a commercial establishment during business hours was likely to cause annoyance or alarm within the meaning of § 53a-183 (a) (3). These arguments assume that the verbal content of the defendant's telephone call could not form the substantive basis for her conviction because *State* v. *Moulton*, 310 Conn. 337, 78 A.3d 55 (2013), which broadened the scope of § 53a-183 (a) (3) to proscribe constitutionally unprotected harassing speech, does not govern the present case.[4]

[3] We consider these claims first because, if successful, the defendant would be entitled to a judgment of acquittal. "[A] reviewing court must address a defendant's insufficiency of the evidence claim, if the claim is properly briefed and the record is adequate for the court's review, because resolution of the claim may be dispositive of the case and a retrial may be a 'wasted endeavor.' " *State* v. *Padua*, 273 Conn. 138, 179, 869 A.2d 192 (2005). In the present case, the claim is properly briefed and the record is adequate for review.

[4] *Moulton* was argued in our Supreme Court on September 18, 2012, and officially released on October 29, 2013. See *State* v. *Moulton*, supra, 310 Conn. 339. The conduct at issue in the present case occurred on March 6, 2013.

Although we agree with the defendant that *Moulton* is inapplicable, we disagree that the state presented insufficient evidence to support her conviction.

A

We first address the applicability of *Moulton* to the present case. The defendant argues that she had no fair warning that *Moulton* would expand the scope of § 53a-183 (a) (3) to proscribe harassing speech and, thus, she could not be convicted on the basis of the verbal content of her telephone call, even if such content was not protected under the state and federal constitutions. In response, the state first contends that it presented sufficient evidence to prove harassment in the second degree regardless of whether *Moulton* applies. Alternatively, the state contends that the certified question that was to be decided by our Supreme Court in *Moulton* should have forewarned the defendant of the impending change in the law and, therefore, her speech, which the state argues comprised a constitutionally unprotected true threat, could form the basis for a harassment conviction. We agree with the defendant that *Moulton* cannot control and that the verbal content of her telephone call cannot form the substantive basis for her harassment conviction.[5]

We begin by summarizing the relevant facts and procedural history of *Moulton*. The defendant in that case was a postal worker who was on leave from her job. Id., 343. She called the United States post office branch at which she worked and asked to speak to the postmaster, but spoke instead to the branch's supervisor of customer service, to whom she expressed frustration

[5] Accordingly, we need not reach the implicit question of whether the verbal content of the defendant's telephone call comprised a constitutionally unprotected true threat. If *Moulton* had applied, the verbal content of the defendant's telephone call could be the substantive basis for her conviction only to the extent that it is not constitutionally protected.

over various employment matters. Id., 343–44. She referenced a then-recent workplace shooting at a post office in California, in which a postal worker killed several people. Id., 343. The supervisor alerted the postmaster, postal inspectors, and the police. Id., 344. The *Moulton* defendant was arrested and eventually convicted of, inter alia, harassment in the second degree. Id. She appealed her conviction to this court. Id. Relying on a line of precedent limiting § 53a-183 (a) (3) to actions and not speech, we reversed her conviction and ordered that a judgment of acquittal be rendered. Id., 344–45. Our Supreme Court granted certification to appeal. Id., 341.

After examining the relevant jurisprudence and applying tools of statutory interpretation and construction, our Supreme Court concluded that the scope of § 53a-183 (a) (3) was not so narrow. See id., 362–63. The Supreme Court ruled that the legislature had intended to allow a jury to consider harassing and alarming speech as well as conduct, except that "the court must instruct the jury on the difference between protected and unprotected speech whenever the state relies on the content of a communication as substantive evidence of a violation of § 53a-183 (a)." Id., 363. At the same time, however, our Supreme Court concluded that this was an unforeseeable expansion of the purview of § 53a-183 (a) (3), and, therefore, that the defendant's harassment conviction could not stand.[6] Id., 363–67.

In addressing the foreseeability of the change it announced, *Moulton* provides the appropriate standard

[6] As a result, our Supreme Court affirmed this court's reversal of the trial court's judgment, in which this court ordered a new trial on the charge of breach of the peace in the second degree. Our Supreme Court then held that the form of this court's judgment was improper insofar as we had directed the trial court to render judgment of not guilty on the charge of harassment in the second degree, and remanded the case to this court with direction to remand the case to the trial court with direction to render judgment dismissing the charge of harassment in the second degree. *State* v. *Moulton*, supra, 310 Conn. 370.

for its applicability to the present case. "We have recognized that the judicial construction of a statute can operate like an ex post facto law and thus violate a criminal defendant's right to fair warning as to what conduct is prohibited. . . . [A] judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction. . . . [Thus], when [a] court construes a statute, it is explaining its understanding of what the statute has meant continuously since the date when it became law. . . . In determining whether a judicial construction of a statute effectively operates as a prohibited ex post facto law, [t]he question . . . is whether [the] decision was so unforeseeable that [the defendant] had no fair warning that it might come out the way it did. . . . Put differently, [t]he key test in determining whether the due process clause precludes the retrospective application of a judicial decision . . . is whether the decision was sufficiently foreseeable . . . that the defendant had fair warning that the interpretation given the relevant statute by the court would be applied in his case." (Citations omitted; internal quotation marks omitted.) Id., 365–66.

In the present case, as in *Moulton*, the defendant lacked fair warning that she could be prosecuted for harassment under § 53a-183 (a) (3) on the basis of the verbal content of her telephone call. Until the release of *Moulton* several months *after* the defendant placed her telephone call, our case law had been decisive in limiting the scope of the statute to conduct and not speech.[7] The defendant was entitled to rely on that

[7] See *State* v. *LaFontaine*, 128 Conn. App. 546, 558, 16 A.3d 1281 (2011) (concluding there was insufficient evidence to support conviction of harassment in second degree where state conceded its evidence " 'rested entirely' " on content of speech); *State* v. *Bell*, 55 Conn. App. 475, 481, 739 A.2d 714 (rejecting contention that statute had chilling effect on speech because § 53a-183 [a] [3] "merely prohibits purposeful harassment by use of the telephone and does not involve first amendment concerns"), cert. denied, 252 Conn. 908, 743 A.2d 619 (1999), overruled in part by *State* v. *Moulton*,

construction of the statute; thus, the content of her speech cannot be the substantive basis for a conviction of harassment in the second degree. See id., 363–66; see also *State* v. *Book*, 155 Conn. App. 560, 569 n.7, 109 A.3d 1027 (noting that defendant was not "properly placed on notice of the change in the law" where his trial occurred before *Moulton*), cert. denied, 318 Conn. 901, 122 A.3d 632 (2015), cert. denied, U.S. , 136 S. Ct. 2029, 195 L. Ed. 2d 219 (2016).

The state, however, claims that the pendency of *Moulton* before our Supreme Court—and that court's ultimate use of ordinary tools of statutory construction—forewarned the defendant that § 53a-183 (a) (3) could have been reinterpreted to reach the verbal content of a telephone call when such content was a true threat.[8]

310 Conn. 337, 362, 78 A.3d 55 (2013); see also *State* v. *Anonymous (1978-4)*, 34 Conn. Supp. 689, 695–96, 389 A.2d 1270 (declining to provide judicial gloss of "fighting words" on ground that § 53a-183 [a] [3] does not implicate speech), cert. denied sub nom. *State* v. *Gormley*, 174 Conn. 803, 382 A.2d 1332 (1978), overruled in part by *State* v. *Moulton*, 310 Conn. 337, 351–63, 78 A.3d 55 (2013); *Gormley* v. *Director, Connecticut State Dept. of Probation*, 632 F.2d 938, 941–42 (2d Cir.) ("Clearly the Connecticut statute regulates conduct, not mere speech. What is proscribed is the making of a telephone call, with the requisite intent and in the specified manner." [Emphasis omitted.]), cert. denied, 449 U.S. 1023, 101 S. Ct. 591, 66 L. Ed. 2d 485 (1980)); accord *State* v. *Murphy*, 254 Conn. 561, 568–69, 757 A.2d 1125 (2000) (construing § 53a-183 [a] [2], which uses nearly identical terms, not to regulate letters' content but rather harassing mailing thereof), overruled in part on other grounds by *State* v. *Moulton*, 310 Conn. 337, 362, 78 A.3d 55 (2013).

[8] See *State* v. *Courchesne*, 296 Conn. 622, 726, 998 A.2d 1 (2010) ("because this court routinely relies on settled principles of statutory interpretation to ascertain the meaning of an ambiguous statute, our reasoned application of those ordinary tools of construction no doubt will result in an interpretation of the statute at issue that is both foreseeable and defensible for purposes of due process"); *State* v. *Miranda*, 260 Conn. 93, 109–10, 794 A.2d 506 ("[T]ools of statutory construction demonstrated that by reference to the law as it then existed, it was neither unexpected nor indefensible to impose a common-law duty on the defendant to protect the victim under the facts of this case and to impose criminal liability for his failure to so act. We therefore agree with the state that this court's recognition of a common-law duty and the application of [General Statutes] § 53a-59 [a] [3] were reasonably foreseeable and did not deprive the defendant of due process in accordance with the standard articulated in *Bouie* [v. *Columbia*,

The state's argument is unavailing because *Moulton* itself answers this question: Our harassment jurisprudence had been unequivocal about the scope of the statutory proscription from its inception up through *Moulton*, never acknowledging or admitting ambiguity in the statute's inapplicability to speech. *State* v. *Moulton*, supra, 310 Conn. 366–67 and 367 n.25. We therefore do not agree that the defendant reasonably could have foreseen an outcome our Supreme Court ruled unforeseeable. See id., 367 n.25.

Because we determine that *Moulton* was an unforeseeable expansion of the scope of § 53a-183 (a) (3), the verbal content of the defendant's telephone call cannot be a substantive basis for her harassment conviction. With that in mind, we turn now to the defendant's arguments concerning her insufficiency of the evidence claim.

B

We begin our analysis by setting forth our well established standard of review. "A defendant who asserts an insufficiency of the evidence claim bears an arduous burden." (Internal quotation marks omitted.) *State* v. *Rodriguez*, 146 Conn. App. 99, 110, 75 A.3d 798, cert. denied, 310 Conn. 948, 80 A.3d 906 (2013). "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

378 U.S. 347, 84 S. Ct. 1697, 12 L. Ed. 2d 894 (1964)]."), cert. denied, 537 U.S. 902, 123 S. Ct. 224, 154 L. Ed. 2d 175 (2002).

and inferred facts underlying those conclusions need not be proved beyond a reasonable doubt. . . . If it is reasonable and logical for the jury to conclude that a basic fact or an inferred fact is true, the jury is permitted to consider the fact proven and may consider it in combination with other proven facts in determining whether the cumulative effect of all the evidence proves the defendant guilty of all the elements of the crime charged beyond a reasonable doubt. . . .

"Moreover, it does not diminish the probative force of the evidence that it consists, in whole or in part, of evidence that is circumstantial rather than direct. . . . It is not one fact, but the cumulative impact of a multitude of facts which establishes guilt in a case involving substantial circumstantial evidence. . . . In evaluating evidence, the [finder] of fact is not required to accept as dispositive those inferences that are consistent with the defendant's innocence. . . . The [finder of fact] may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical. . . .

"Finally, [a]s we have often noted, proof beyond a reasonable doubt does not mean proof beyond all possible doubt . . . nor does proof beyond a reasonable doubt require acceptance of every hypothesis of innocence posed by the defendant that, had it been found credible by the [finder of fact], would have resulted in an acquittal. . . . On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the [finder of fact's] verdict of guilty." (Internal quotation marks omitted.) *State* v. *Bush*, 325 Conn. 272, 285–86, 157 A.3d 586 (2017).

To obtain a conviction of harassment in the second degree, the state must prove beyond a reasonable doubt

that the accused, "with intent to harass, annoy or alarm another person . . . makes a telephone call, whether or not a conversation ensues, in a manner likely to cause annoyance or alarm." General Statutes § 53a-183 (a) (3). In this case, there is no dispute that the defendant placed a telephone call to the firm on March 6, 2013. The defendant contends, however, that she (1) lacked the specific intent to harass, annoy, or alarm, and (2) did not call the firm in a manner likely to cause annoyance or alarm.

The state presented the following evidence during the trial. The firm previously had represented the defendant in another matter. At some point, the firm sent a letter to the defendant, informing her of a purported billing discrepancy related to that matter. In response, on March 5, 2013, the day before the incident at issue, the defendant called the firm to resolve the discrepancy, which she believed was an accounting error. She spoke to the firm's office manager, Osnat Rosenberg, who was married to the firm's managing attorney, Max Rosenberg.

On March 6, 2013, the defendant called the firm again. Mancini answered, at which point the defendant identified herself. Mancini was familiar with the defendant's voice because the defendant often called and visited the firm's office. The defendant asked to speak directly to Max Rosenberg. Mancini informed the defendant that Max Rosenberg was busy conducting interviews and would be unable to return telephone calls until the next day. The defendant retorted that she hoped he was interviewing candidates to replace his wife. The defendant said she did not like Osnat Rosenberg and wanted her fired. She claimed that Osnat Rosenberg and the firm had mistreated and "disrespected" her. She said that "Adam Lanza, the shooter of the Sandy Hook shooting, was disrespected" and that "he shot the kids in

that school because he was disrespected." The defendant went on to say that if the firm did not learn how to respect its clients, somebody, even the defendant, herself, could come in and "show [the firm] a lesson like Adam Lanza did . . . ."

1

The defendant first argues that the state failed to adduce sufficient evidence to prove that she intended to harass, annoy, or alarm someone at the firm. Specifically, she contends that the state's evidence showed only that "her intent was to complain about her bill and about the behavior of the staff, she was calling to discuss a legitimate business issue, and her conduct was not harassment, but commercial communication. . . . There was no intent to do anything other than talk to her attorney." (Citations omitted.) This, she argues, did not constitute the specific intent required by the statute. Construing the evidence in the light most favorable to sustaining the conviction, we are not persuaded.

Harassment in the second degree is a specific intent crime. *State* v. *Kantorowski*, 144 Conn. App. 477, 488, 72 A.3d 1228, cert. denied, 310 Conn. 924, 77 A.3d 141 (2013). "There is no conceptual distinction among acts intended 'to harass,' 'to annoy,' and 'to alarm' . . . ." *State* v. *Marsala*, 43 Conn. App. 527, 540, 684 A.2d 1199 (1996), cert. denied, 239 Conn. 957, 688 A.2d 329 (1997). Our Supreme Court has summarized the nearly identical intent language of our disorderly conduct statute[9] to mean that "the predominant intent is to cause what a reasonable person operating under contemporary community standards would consider a disturbance to or

[9] "A person is guilty of disorderly conduct when, *with intent to cause inconvenience, annoyance or alarm*, or recklessly creating a risk thereof, such person . . . (2) by offensive or disorderly conduct, annoys or interferes with another person . . . ." (Emphasis added.) General Statutes § 53a-182 (a).

impediment of a lawful activity, a deep feeling of vexation or provocation, or a feeling of anxiety prompted by threatened danger or harm. In order to sustain a conviction for disorderly conduct, the state must begin by demonstrating that the defendant had such a state of mind." *State* v. *Indrisano*, 228 Conn. 795, 810–11, 640 A.2d 986 (1994).

"A person acts intentionally with respect to a result . . . when his conscious objective is to cause such result . . . . General Statutes § 53a-3 (11) . . . . [T]he question of intent is purely a question of fact. . . . [T]he state of mind of one accused of a crime is often the most significant and, at the same time, the most elusive element of the crime charged. . . . Because it is practically impossible to know what someone is thinking or intending at any given moment, absent an outright declaration of intent, a person's state of mind is usually [proven] by circumstantial evidence . . . ." (Citations omitted; internal quotation marks omitted.) *State* v. *Buhl*, 321 Conn. 688, 715, 138 A.3d 868 (2016). In the case of harassment, "we must infer [intent] from the reaction of the victim and the circumstances of each call." *State* v. *Marsala*, supra, 43 Conn. App. 537.

Even before *Moulton*, "[e]vidence of the language used in an alleged violation of the harassment statute [was] relevant to show the intent of the accused in making the telephone call as well as the likelihood of its causing annoyance or alarm." *State* v. *Lewtan*, 5 Conn. App. 79, 83, 497 A.2d 60 (1985); accord *State* v. *Buhl*, supra, 321 Conn. 719–20 (applying *State* v. *Lewtan*, supra, 83, in consideration of violation of § 53a-183 [a] [2]); *State* v. *Murphy*, 254 Conn. 561, 569, 757 A.2d 1125 (2000) ("fact finder may consider the language used in the communication in determining whether the state has proven the elements of the offense, namely, that the defendant intended to harass,

annoy or alarm, and that he did so in a manner likely to cause annoyance or alarm"), overruled in part on other grounds by *State* v. *Moulton*, 310 Conn. 337, 362, 78 A.3d 55 (2013).

In the present case, the jury reasonably could have found that the circumstances of the defendant's telephone call evinced a predominant conscious objective to harass, annoy, or alarm. Prior to the call at issue, the defendant was notorious among the firm's employees because of her constant calls and visits. Those other calls, though frequent, apparently were made in a good faith effort to resolve a billing dispute and passed without incident.

The March 6, 2013 call, however, was patently different. This time, the defendant sought out Max Rosenberg directly. When the defendant was informed of his unavailability, she made disparaging remarks about Osnat Rosenberg and the firm, and then evoked the Sandy Hook shootings.[10] The jury reasonably could have concluded that, angry and frustrated though the defendant may have been, this was not a sudden outburst, but rather an implementation of a premeditated retort intended to frighten the employees at the firm into cooperation concerning her bill. As a result, the jurors reasonably could have found, on the basis of the evidence presented at trial, the reasonable inferences drawn therefrom, and their own common sense and life experiences, that the defendant's intent when placing the March 6, 2013 telephone call was not simply to resolve a billing discrepancy but, rather, to harass, annoy, or alarm the members of the firm so that they would finally take her and her billing complaint more seriously.

[10] At trial, the parties entered into a stipulation that the Sandy Hook shooting occurred on December 14, 2012. Mancini also testified that "it was only months after the shooting, the massacre, if you will, so it was very prominent in everybody's minds . . . ."

We recognize that a jury reasonably could conclude from the evidence presented at trial that when the defendant placed her call, she intended only to resolve the billing discrepancy, not to harass, annoy, or alarm the members of the firm. When reviewing a sufficiency claim, however, "we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the jury's verdict of guilty." (Internal quotation marks omitted.) *State* v. *Silva*, 285 Conn. 447, 454, 939 A.2d 581 (2008). Mindful as we are that in determining the sufficiency of the evidence, we construe the evidence in the light most favorable to sustaining the verdict and consider its cumulative effect, we determine that there was sufficient evidence adduced at trial to support the defendant's conviction of harassment in the second degree.

2

The defendant next argues that the state failed to adduce sufficient evidence to prove that a single telephone call made to a commercial establishment during business hours was likely to cause annoyance or alarm within the meaning of § 53a-183 (a) (3). Specifically, the defendant contends that the state's evidence demonstrated only that she placed "a single telephone call during business hours to the office of an attorney retained by the defendant," and that this "could not constitute harassment in the second degree . . . ." We are not persuaded.

Again, a person is guilty of harassment in the second degree when, with the requisite intent, that person "makes a telephone call, whether or not a conversation ensues, in a manner likely to cause annoyance or alarm." General Statutes § 53a-183 (a) (3). Annoyance is defined as "vexation; a deep effect of provoking or

disturbing . . . .'' *State* v. *Indrisano*, supra, 228 Conn. 810. '' 'Alarm' is defined as . . . 'fear: fill[ed] with anxiety as to threatening danger or harm . . . .' Webster's Third New International Dictionary [1993].'' *State* v. *Cummings*, 46 Conn. App. 661, 673, 701 A.2d 663, cert. denied, 243 Conn. 940, 702 A.2d 645 (1997). ''[T]he legislature intended . . . 'annoyance or alarm,' to be that perceived to be as such by a reasonable person operating under contemporary community standards.'' *State* v. *LaFontaine*, 128 Conn. App. 546, 554, 16 A.3d 1281 (2011).

Typically, telephone harassment involves multiple telephone calls or calls placed at inconvenient locations or hours. See, e.g., *State* v. *Therrien*, 117 Conn. App. 256, 259–60, 978 A.2d 556 (defendant placed threatening calls to complainant's personal cellular telephone during work hours), cert. denied, 294 Conn. 913, 983 A.2d 275 (2009); *State* v. *Lemay*, 105 Conn. App. 486, 488–89, 938 A.2d 611 (defendant repeatedly, anonymously called complainant and made banging noises), cert. denied, 286 Conn. 915, 945 A.2d 978 (2008); *State* v. *Bell*, 55 Conn. App. 475, 477, 739 A.2d 714 (defendant placed forty-five phone calls), cert. denied, 252 Conn. 908, 743 A.2d 619 (1999), overruled in part on other grounds by *State* v. *Moulton*, 310 Conn. 337, 362, 78 A.3d 55 (2013); *State* v. *Marsala*, supra, 43 Conn. App. 529 (defendant called complainant twenty-five times in early morning hours); *State* v. *Marsala*, 1 Conn. App. 647, 648–49, 474 A.2d 488 (1984) (defendant made threatening calls to complainant at her home, at night, and broke her window); *Gormley* v. *Director, Connecticut State Dept. of Probation*, 632 F.2d 938, 940–41 (2d Cir.) (defendant called complainant's workplace to harass her), cert. denied, 449 U.S. 1023, 101 S. Ct. 591, 66 L. Ed. 2d 485 (1980).

Those examples notwithstanding, the plain language of the statute specifies that even one telephone call

made in a manner likely to cause annoyance or alarm is enough to constitute the actus reus of harassment. "[T]he phrase 'a telephone call,' coupled with the phrase, 'likely to cause annoyance,' shows that the legislature intended to punish each telephone call made with the requisite intent to harass, annoy or alarm regardless of the number of times, if any, the victim was actually harassed, annoyed or alarmed. . . . [T]he phrase 'likely to cause annoyance or alarm' shows that the effect on the listener is not relevant. Instead, the statute is concerned with the conduct of the individual making the telephone call. Additionally, the phrase 'a telephone call' shows the legislature's intent to punish for a single telephone call. Therefore, an individual violates § 53a-183 (a) (3) each time the individual makes a telephone call with the intent to harass, alarm and annoy the victim in a manner likely to cause annoyance or alarm regardless of the number of times the victim actually became alarmed or annoyed, if any, and regardless of how close in time the calls were made or whether the victim was actually harassed, annoyed or alarmed." *State* v. *Marsala*, 93 Conn. App. 582, 589, 889 A.2d 943 (analyzing statute in context of defendant's double jeopardy claim), cert. denied, 278 Conn. 902, 896 A.2d 105 (2006).

Nevertheless, a jury may hear the effect on the listener to the extent that it evinces the likelihood that the call caused annoyance or alarm. See *State* v. *Lewtan*, supra, 5 Conn. App. 83–84 ("Evidence of the language used in an alleged violation of the harassment statute is relevant to show the intent of the accused in making the telephone call as well as the likelihood of its causing annoyance or alarm. . . . The witness was testifying as to his observation of the child relative to telephone calls made to the family home by the defendant. These observations were relevant to show that the calls were, in the words of the statute, likely to

cause annoyance or alarm." [Citations omitted; internal quotation marks omitted.]); accord *State* v. *Murphy*, supra, 254 Conn. 569 ("fact finder may consider the language used in the communication in determining . . . that the defendant intended to harass, annoy or alarm, and that he did so in a manner likely to cause annoyance or alarm"); see also *State* v. *Adgers*, 101 Conn. App. 123, 127, 921 A.2d 122 ("a jury considering the response of 'a person of common intelligence' may receive evidence of the particular circumstances surrounding a particular communication"), cert. denied, 283 Conn. 903, 927 A.2d 915 (2007).

In the present case, the defendant's telephone call was the latest in a series of frequent calls and visits. The defendant called again and referenced the Sandy Hook shootings and their perpetrator, implying that she or someone like her could "show [the firm] a lesson . . . ." She caused Mancini to be "nervous" and "in fear for [her] physical well-being." Construing this evidence in the light most favorable to sustaining the conviction, we conclude that the jury reasonably could have found that the defendant placed a telephone call in a manner likely to cause annoyance or alarm.

We therefore determine that upon the facts construed in favor of sustaining the conviction, and upon the inferences reasonably drawn therefrom, the jury reasonably could have concluded that the cumulative force of the evidence established that the defendant was guilty beyond a reasonable doubt of harassment in the second degree.

II

The defendant next claims that the court improperly instructed the jury, and that this error was not harmless. Specifically, she contends that the court erred in failing to provide her requested instruction limiting the jury's consideration of the verbal content of her telephone

call.[11] The state concedes that the court erred, but argues that the error was harmless beyond a reasonable doubt.[12] We agree with the defendant that the trial court erred in failing to provide a limiting instruction and that such error was not harmless beyond a reasonable doubt.

"We begin with the well established standard of review governing the defendant's challenge[s] to the trial court's jury instruction. Our review of the defendant's claim requires that we examine the [trial] court's entire charge to determine whether it is reasonably possible that the jury could have been misled by the omission of the requested instruction. . . . While a request to charge that is relevant to the issues in a case and that accurately states the applicable law must be honored, a [trial] court need not tailor its charge to the precise letter of such a request. . . . If a requested charge is in substance given, the [trial] court's failure to give a charge in exact conformance with the words of the request will not constitute a ground for reversal. . . . As long as [the instructions] are correct in law, adapted to the issues and sufficient for the guidance of the jury . . . we will not view the instructions as improper. . . . Additionally, we have noted that [a]n [impropriety] in instructions in a criminal case is reversible . . . when it is shown that it is reasonably possible

[11] The defendant also claims that the court erred in failing to provide a necessary judicial gloss of the terms of § 53a-183 (a) (3). Because we conclude that the trial court erred in failing to give a limiting instruction and that this error was not harmless, we need not reach this final claim.

[12] In its brief, the state acknowledges that if pre-*Moulton* law applies, then the trial court erred in failing to grant the defendant's request to charge. The state also concedes that there would have been error even if *Moulton* had applied because the court failed to instruct the jury as to the difference between protected speech and unprotected true threats in the context of the harassment charge. In part I A of this opinion, we determined that *Moulton* announced an unforeseeable change in our law and therefore cannot apply in the present case. Accordingly, we need not reach the question of whether the court should have charged the jury as to constitutional free speech protections in the context of the harassment charge.

for [improprieties] of constitutional dimension or reasonably probable for nonconstitutional [improprieties] that the jury [was] misled." (Internal quotation marks omitted.) *State* v. *Baltas*, 311 Conn. 786, 808–809, 91 A.3d 384 (2014).

The court charged the jury with respect to harassment in the second degree as follows: "So, the defendant is charged in count two with harassment in the second degree. The statute defining this offense reads in pertinent part as follows:

"A person is guilty of harassment in the second degree when, with intent to harass, annoy, or alarm another person, she makes a telephone call, whether or not conversation ensues, in a manner likely to cause annoyance or alarm. For you to find the defendant guilty of this charge, the state must prove the following elements beyond a reasonable doubt.

"The first element is that the defendant intended to harass, annoy, or alarm another person. Again, a person acts intentionally with respect to a result when her conscious objective is to cause such a result. You will recall my earlier instructions concerning how you may go about determining what a person's intention was,[13] and you should apply those instructions here.

[13] The court had instructed the jury previously that "[a] person acts 'intentionally' with respect to a result when her conscious objective is to cause such result. . . .

"[W]hat a person's intention was is usually a matter to be determined by inference. No person is able to testify that they looked into another's mind and saw therein a certain knowledge or certain purpose or intention to do harm to another. Because direct evidence of the defendant's state of mind is rarely available, intent is generally proved by circumstantial evidence. The only way a jury can ordinarily determine what a person's intention was at any given time is by determining what the person's conduct was, and what the circumstances were surrounding that conduct, and from that, infer what her intention was.

"To draw such an inference is the proper function of a jury, provided, of course, that the inference drawn complies with the standards for inferences as explained in connection with my instruction on circumstantial evidence. The inference is not a necessary one. You are not required to infer a particular

"Harass means to trouble, worry, or torment. Annoy means to [irritate], vex, or bother, as by a repeated action. Alarm means to make suddenly afraid, anxious, or violent.

"The second element is that the defendant made a telephone call in the manner that was likely to cause annoyance or alarm. It does not matter whether the defendant had a conversation with another person; it only matters that she made the telephone call in the manner that was likely to cause annoyance or alarm.

"In summary, the state must prove beyond a reasonable doubt that the defendant intended to harass, annoy, or alarm another person and she made a telephone call to another person in a manner that was likely to cause annoyance or alarm." (Footnote omitted.)

The defendant contends that the court erred in failing to provide her requested instruction limiting the jury's consideration of the verbal content of her telephone call. On the day before trial, the defendant submitted a request to charge, which contained the following language: "You are to examine only whether the act of the calling and causing the ringing of the telephone was harassing, and to look to the speech only for the intent in physically making the telephone call. LEGAL AUTHORITY: Connecticut Selected Jury Instructions Criminal, § 6.7-7; *State* v. *Moulton*, 120 Conn. [App. 330, 339, 991 A.2d 728] (2010) [aff'd in part, 310 Conn. 337, 78 A.3d 55 (2013)]; see also *State* v. *LaFontaine*, 128 Conn. App. 546, 555–58 [16 A.3d 1281] (2011)."[14] The

intent from the defendant's conduct or statements, but it's an inference that you may draw if you find it is reasonable and logical. I again remind you that the burden of proving intent beyond a reasonable doubt is on the state."

[14] The defendants in both *Moulton* and *LaFontaine* challenged the application of § 53a-183 (a) (3) to their conduct as unconstitutional. See *State* v. *LaFontaine*, supra, 128 Conn. App. 555; *State* v. *Moulton*, supra, 120 Conn. App. 334–35. These specific, as-applied, constitutional challenges are less expansive in scope than the evidentiary challenge in *Lewtan*, in which the defendant claimed that speech was not relevant. Compare *State* v. *Moulton*, supra, 120 Conn. App. 339 ("[*t*]*he jury should have been instructed* to

state concedes, and we agree, that the court should have included the requested language.[15] We turn therefore to our harmlessness analysis.

We conclude that this error was not harmless beyond a reasonable doubt. The state's evidence of the defendant's intent and conduct, though sufficient, was not overwhelming and focused in not insignificant part upon the defendant's actual language. Although the jury reasonably could have found that the mere placing of the call met the definition of harassment under § 53a-183 (a) (3), it also could have relied upon her speech as the basis for its verdict of guilty. This is all the more likely in light of the state's closing argument, which focused primarily on the verbal content of the defendant's call rather than on the act of calling itself: "Basically, this is a case about a phrase," and, "we're here because of nine words . . . ."[16] Properly instructed, it

examine *only* whether the act of calling and causing the ringing of the telephone was harassing, and to look to the speech *only* for the intent in physically making the telephone call" [emphasis added]), and *State* v. *LaFontaine*, supra, 128 Conn. App. 555–58 (same), with *State* v. *Lewtan*, supra, 5 Conn. App. 83 ("[e]vidence of the language used in an alleged violation of the harassment statute is *relevant* to show the intent of the accused in making the telephone call *as well as the likelihood of its causing annoyance or alarm*" [emphasis added]). Elsewhere, both *Moulton* and *LaFontaine* acknowledge the broader general relevance of speech evidence in harassment cases. See *State* v. *LaFontaine*, supra, 128 Conn. App. 555; *State* v. *Moulton*, supra, 120 Conn. App. 352.

The defendant's claim in the present case is one of constitutional error in failing to provide the requested limiting instruction with respect to the jury's consideration of the element of specific intent. This is more analogous to the claims in *Moulton* and *LaFontaine* than the evidentiary claim in *Lewtan*. We are satisfied, therefore, that the defendant's request to charge complied with Practice Book § 42-18 and accurately stated the law.

[15] On the day of trial, the state also submitted a request to charge. Its request does not contain the language the defendant requested.

[16] We note that, at trial, the state was attempting to prove not only harassment in the second degree, but also threatening in the second degree. As a result, its case necessarily incorporated the defendant's speech even though it did not depend entirely thereon. See *State* v. *Moulton*, supra, 310 Conn. 341 ("the state conceded that its case was predicated entirely on the defendant's speech"); *State* v. *LaFontaine*, supra, 128 Conn. App. 552 ("the

is reasonably possible that a jury would have found that the defendant did not commit harassment by calling the law firm.

The defendant requested and was entitled to a proper instruction on the law governing her speech as it pertained to the elements of harassment in the second degree. The jury did not receive such an instruction, and therefore could have been misled into finding the defendant guilty on the basis of her speech. Accordingly, we cannot conclude that the court's failure to instruct the jury in such a manner was harmless error.

The judgment is reversed and the case is remanded for a new trial.

In this opinion the other judges concurred.

AMICA MUTUAL INSURANCE COMPANY *v.* BRYAN PIQUETTE ET AL.
(AC 38846)

Sheldon, Beach and Harper, Js.

Syllabus

The plaintiff insurance company sought a declaratory judgment to determine the scope of coverage provided under an automobile insurance policy it had issued to the defendant B. The defendant P and his wife, the defendant R, previously had commenced a negligence action against B in connection with an automobile accident in which B's automobile collided with a motorcycle operate by P, pursuant to which P sought damages for bodily injury and R sought damages for loss of consortium. The declaration section of the insurance policy provided liability limits for bodily injury of a certain amount per person, and a separate limit per accident. R maintained that her loss of consortium claim should be considered separately from P's bodily injury claim for the purpose of the per person limitation. The plaintiff thereafter brought the present declaratory judgment action seeking a determination of the proper scope

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state concedes that its evidence of the harassing manner of the defendant's phone call 'rested entirely' on the content of the speech"). With respect to the threatening charge, the court properly instructed the jury that only physical threats and true threats are punishable ipso facto.

of coverage provided by the policy. Subsequently, the plaintiff filed a motion for summary judgment, and in support thereof, relied on *Izzo* v. *Colonial Penn Ins. Co.* (203 Conn. 305), which held that, under the terms of the insurance policy at issue in that case, an uninjured spouse's claim for loss of consortium is derivative of the injured spouse's claim for bodily injury and, therefore, does not trigger a separate per person limit under the terms of that policy. The trial court granted the plaintiff's motion for summary judgment and rendered judgment thereon, from which R appealed to this court. R claimed that *Izzo* was inapplicable because the policy language at issue here differed from that in *Izzo* and that any ambiguity should be construed in favor of coverage. *Held* that the trial court properly rendered summary judgment in favor of the plaintiff and correctly applied *Izzo* to the present case; although the policy here provided coverage for damages "arising out of" bodily injury, whereas the policy at issue in *Izzo* provided coverage for damages "because of" bodily injury, the slight differences in policy language between those policies did not create an ambiguity that required the policy in the present case to be construed against the plaintiff as the drafter, as both policies referred to claims that flow from and are derivative of the bodily injury sustained by another person, the derivative nature of the loss of consortium claim, which is inextricably attached to the claim of the injured spouse, required coverage under the same per person limitation as the injury from which it flowed under the policy language in the present case, and, therefore, in the absence of policy language providing per person coverage for a broader category of claims or expressly providing separate coverage for loss of consortium claims, R's claim for loss of consortium was encompassed in the per person liability limitation applicable to P's bodily injury claim from which it arose.

Argued April 20—officially released September 19, 2017

Procedural History

Action for a declaratory judgment to determine the scope of coverage under an automobile insurance policy for damages sustained by the named defendant et al. arising from an automobile accident involving the plaintiff's insured, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Scholl*, *J.*, granted the plaintiff's motion for summary judgment and rendered judgment thereon, from which the defendant Rebecca Piquette appealed to this court. *Affirmed*.

Allan M. Rothenberg, with whom, on the brief, was *P. Jo Anne Burgh*, for the appellant (defendant Rebecca Piquette).

Philip T. Newbury, Jr., with whom was *Julia E. Lavine*, for the appellee (plaintiff).

Opinion

HARPER, J. The defendant Rebecca Piquette[1] appeals from the trial court's summary judgment rendered in favor of the plaintiff, Amica Mutual Insurance Company, in this declaratory judgment action brought to determine the proper scope of coverage provided by an automobile insurance policy issued by the plaintiff. The critical question in this appeal is whether, under the terms of an automobile insurance contract providing coverage for bodily injury, a loss of consortium claim is entitled to a separate per person liability limitation from the principal bodily injury claim of another person from which the loss of consortium claim arises. The defendant argues that the trial court's ruling was improper because the language of the policy at issue is ambiguous and the matter should be remanded for further proceedings to determine the scope of the policy. For the reasons that follow, we conclude that the resolution of this appeal is controlled by our Supreme Court's decision in *Izzo* v. *Colonial Penn Ins. Co.*, 203 Conn. 305, 524 A.2d 641 (1987), and, accordingly, affirm the judgment of the trial court, which properly applied *Izzo*.

The following undisputed facts and procedural history give rise to the present appeal. At all relevant times, an individual named Rebecca Bahre[2] was the holder of

[1] The named defendant, Bryan Piquette, settled his claim with the plaintiff during the pendency of this appeal. Bryan Piquette is therefore not participating in this appeal and all references to the defendant refer to his wife, Rebecca Piquette.

[2] Bahre is also named as a defendant in this matter, but did not enter an appearance and is not participating in this appeal.

an automobile insurance policy issued by the plaintiff. The declaration section of this policy provided liability limits for bodily injury of $100,000 per person and a total limit of $300,000 per accident for bodily injury. The policy further provided that this limit of liability is the plaintiff's "maximum limit of liability for all damages including damages for care, loss of services or death, arising out of bodily injury sustained by any one person in any one auto accident."

On June 27, 2012, this policy was in effect when a vehicle operated by Bahre collided with a motorcycle operated by the defendant's husband, Bryan Piquette (husband). As a result of this collision, Piquette suffered physical injuries. The defendant was not present at the time of the collision and did not witness it. On July 23, 2013, by service of process, the defendant and her husband commenced an action against Bahre, raising claims for bodily injury suffered by the defendant's husband and for loss of consortium suffered by the defendant as a result of her husband's physical injuries. On December 4, 2013, Bahre, with her insurer, offered to settle all claims for a total sum of $100,000, inclusive of all costs and interest. This amount represented the full per person limit of coverage for bodily injury. Through counsel, the defendant and her husband counteroffered to settle the matter for a total sum of $200,000. The counteroffer was based on the assertion that the defendant's loss of consortium claim was entitled to a separate per person limit of $100,000 from the $100,000 per person limit covering her husband's bodily injuries.

Thereafter, the plaintiff commenced the present declaratory judgment action to determine the proper scope of coverage provided by the policy. The plaintiff asserted that a claim for loss of consortium is derivative of the bodily injury claim brought by the defendant's husband, who was directly and physically injured in

the collision, and, therefore, the loss of consortium claim is not entitled to a separate per person limit of liability. Accordingly, the plaintiff asserted that its maximum liability under the policy for the defendant's loss of consortium claim *and* her husband's corresponding bodily injury claim was a total of $100,000.

On July 29, 2015, the plaintiff moved for summary judgment on the ground that there was no genuine issue of material fact regarding the scope of the policy under its unambiguous terms, and that the plaintiff was entitled to judgment as a matter of law. The plaintiff relied on *Izzo* v. *Colonial Penn Ins. Co.*, supra, 203 Conn. 305, which held that, under the terms of the insurance policy at issue in that case, an uninjured spouse's claim for loss of consortium is derivative of the injured spouse's claim for bodily injury, and, therefore, does not trigger a separate per person limit under the terms of that policy. The plaintiff argued that the policy language in the present case is substantially the same as that presented in *Izzo*, and, accordingly, that *Izzo* was controlling. The defendant responded that the policy language in the present case was ambiguous and substantively distinguishable from the language in *Izzo*, and that summary judgment, therefore, was inappropriate.

On January 14, 2016, the trial court granted summary judgment for the plaintiff. The court concluded that the policy language was not ambiguous or substantively distinguishable from the language in *Izzo*. Accordingly, the trial court concluded that it was bound by our Supreme Court's holding in *Izzo* that the policy language did not create a separate per person limitation of liability for one spouse's claim for loss of consortium that was derivative of an injured spouse's claim for bodily injury. This appeal followed.

On appeal, the defendant argues that the trial court erred in granting summary judgment for the plaintiff.

She argues that significant differences exist between the policy language at issue here and the policy language construed in *Izzo*, such that *Izzo* is inapplicable. She argues that wording of the policy is ambiguous and, as such, the policy should be construed against the plaintiff, in favor of coverage, in accordance with established principles of insurance contract interpretation. The plaintiff responds that the trial court properly concluded that this matter is controlled by *Izzo* and properly granted summary judgment. We agree with the plaintiff.

We begin with the standard of review. "Summary judgment shall be rendered forthwith if the pleadings, affidavits, and 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." (Internal quotation marks omitted.) *Dairyland Ins. Co.* v. *Mitchell*, 320 Conn. 205, 210, 128 A.3d 931 (2016). Disputes over insurance coverage are well suited to summary judgment because the interpretation of an insurance contract is a question of law. See, e.g., *Lexington Ins. Co.* v. *Lexington Healthcare Group, Inc.*, 311 Conn. 29, 37, 84 A.3d 1167 (2014); *Interface Flooring Systems, Inc.* v. *Aetna Casualty & Surety Co.*, 261 Conn. 601, 614, 804 A.2d 201 (2002). Our review of a trial court's conclusions of law is plenary and we must determine whether the conclusions reached by the trial court are legally and logically correct and find support in the facts in the record. *Dairyland Ins. Co.* v. *Mitchell*, supra, 210.

Similarly, "[c]onstruction of a contract of insurance presents a question of law for the court which this court reviews de novo. . . . An insurance policy is to be interpreted by the same general rules that govern the construction of any written contract. . . . In accordance with those principles, [t]he determinative question is the intent of the parties, that is, what coverage the

. . . [insured] expected to receive and what the [insurer] was to provide, as disclosed by the provisions of the policy. . . . If the terms of the policy are clear and unambiguous, then the language, from which the intention of the parties is to be deduced, must be accorded its natural and ordinary meaning. . . . Under those circumstances, the policy is to be given effect according to its terms. . . . When interpreting [an insurance policy], we must look at the contract as a whole, consider all relevant portions together and, if possible, give operative effect to every provision in order to reach a reasonable overall result." (Internal quotation marks omitted.) *National Grange Mutual Ins. Co.* v. *Santaniello*, 290 Conn. 81, 88–89, 961 A.2d 387 (2009).

"In determining whether the terms of an insurance policy are clear and unambiguous, [a] court will not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity. . . . Similarly, any ambiguity in a contract must emanate from the language used in the contract rather than from one party's subjective perception of the terms. . . . As with contracts generally, a provision in an insurance policy is ambiguous when it is reasonably susceptible to more than one reading. . . . Under those circumstances, any ambiguity in the terms of an insurance policy must be construed in favor of the insured because the insurance company drafted the policy. . . . This rule of construction may not be applied, however, unless the policy terms are indeed ambiguous." (Internal quotation marks omitted.) Id., 89; see also *Zulick* v. *Patrons Mutual Ins. Co.*, 287 Conn. 367, 373, 949 A.2d 1084 (2008).

We disagree with the defendant's assertion that the slight differences in policy language between the disputed policy here and the policy at issue in *Izzo* v. *Colonial Penn Ins. Co.*, supra, 203 Conn. 307, create

ambiguity that requires the policy to be construed against the plaintiff as the drafter under established principles of insurance contract interpretation. The policy interpreted in *Izzo* provided coverage for damages "*because of* bodily injury"; (emphasis altered) id., 309; while the policy at issue here provides coverage for damages "*arising out of* bodily injury." Principally, the defendant argues that the latter language does not require the direct causal relationship indicated by the phrase "because of" that was used in *Izzo*, and that, accordingly, it was improper for the trial court to rely on *Izzo* to determine the limits of liability in the present case. The defendant's interpretation tortures the language of the policy in order to find ambiguity where there is none. We conclude, on the facts present here, that this slight variation in policy language is a distinction without a difference.

The resolution of this appeal, therefore, turns on our Supreme Court's construction of substantively similar policy language in *Izzo* v. *Colonial Penn Ins. Co.*, supra, 203 Conn. 307. Indeed, the facts of *Izzo* are remarkably similar to those of the present appeal. In *Izzo*, a woman suffered permanent and disabling injuries, including the loss of a leg, in an automobile accident caused by another driver. Id. Although the injured woman's husband was not involved in the accident, he claimed that he suffered a loss of consortium as a result of the injuries to his wife. Id. The decision in *Izzo* arose from a declaratory judgment action regarding these claims to determine, under the terms of an insurance contract owned by the driver that caused the accident, whether separate liability limitations applied to each claim or whether the derivative loss of consortium claim was covered by the same limitation.

The driver that caused the accident in *Izzo* held an insurance policy that provided liability limitations for bodily injury of $100,000 "per person" and $300,000 "per

occurrence." Id., 308. The policy's liability limitations for bodily injury provided that, "for 'Each Person' [$100,000] is the most [w]e'll pay for damages because of bodily injury to one person caused by any one occurrence. The amount shown on your Declarations Page for 'Each Occurrence' [$300,000] is the most we'll pay for all damages as a result of any one occurrence, no matter how many people are injured." (Emphasis omitted.) Id., 309. Additionally, the policy specified that coverage for bodily injury includes "damages for the loss of an injured person's services." Id., 309 and n.4. These policy terms are substantively similar to the terms of the policy at issue in the present appeal.[3] The parties in *Izzo* did not dispute that this language expressly provided coverage for loss of consortium claims. The dispute in *Izzo*, as in the present case, was whether the husband's loss of consortium claim was entitled to a separate per person liability limitation from the wife's bodily injury claim, which would have resulted in a total maximum recovery for both claims of $200,000. Id., 308.

The court in *Izzo* identified the critical question as whether the loss of consortium claim arose "out of bodily injury sustained by 'one person' so as to make the 'per person' limit applicable, or is [a loss of consortium claim] a claim for *bodily injury* to a second person such as to invoke the 'per occurrence' limit." (Emphasis added.) Id., 309. The court concluded that the derivative nature of a loss of consortium claim caused it to be "inextricably attached" to the bodily injury claim and therefore covered by the same per person limitation under the policy language at issue, which did not expressly provide separate coverage for loss of consortium claims. Id., 312. The court explained that "[a] cause

[3] As previously noted, the policy at issue in the present action provided that the plaintiff's "maximum limit of liability for all damages including damages for . . . loss of services . . . arising out of bodily injury sustained by any one person in any one auto accident" is $100,000.

of action for loss of consortium does not arise out of a bodily injury to the spouse suffering the loss of consortium; it arises out of the bodily injury to the spouse who can no longer perform the spousal functions. . . . [A]lthough loss of consortium is a separate cause of action, it is an action [which] is derivative of the injured spouse's cause of action. . . . Loss of consortium . . . is not truly independent, but rather derivative and inextricably attached to the claim of the injured spouse. The [husband's] loss of consortium claim, therefore, clearly fits within the 'per person' limit [covering the wife's bodily injury claim] as [the husband's claim] is a loss sustained 'because of bodily injury to one person [the wife] caused by any one occurrence.' " (Citations omitted.) Id., 312.

After careful consideration of the trial court's decision in the present case, we conclude that it correctly applied *Izzo*. As noted previously, there is no meaningful difference between the language of these two policies. There is no question that both policies cover loss of consortium claims, and neither policy expressly provides separate per person coverage for loss of consortium claims. In *Izzo*, the per person limitation of liability applied to "damages *because of* bodily injury to one person caused by any one occurrence." (Emphasis altered; internal quotation marks omitted.) Id., 309. Here, the policy's per person limitation of liability applies to "damages . . . *arising out of* bodily injury sustained by any one person in any one auto accident." (Emphasis added.) It is clear that both policies refer to claims that flow from and are derivative of the bodily injury sustained by another person. In light of our Supreme Court's decision in *Izzo*, it is equally clear that the derivative nature of the loss of consortium claim requires coverage under the same per person limitation as the injury from which it flows under the policy language present here.

Our conclusion in this appeal, as in *Izzo*, is driven largely by the nature of a loss of consortium claim,

which is "not truly independent, but rather derivative and inextricably attached to the claim of the injured spouse." *Izzo* v. *Colonial Penn Ins. Co.*, supra, 203 Conn. 312. When *Izzo* was decided, loss of consortium only recently had been recognized as a cause of action in Connecticut. See *Hopson* v. *St. Mary's Hospital*, 176 Conn. 485, 496, 408 A.2d 260 (1979) (recognizing loss of consortium as independent cause of action). However, from the earliest days of its recognition in Connecticut, the derivative nature of a loss of consortium claim has been clear, and it was held that the settlement of the bodily injury claim from which the loss of consortium claim arose acted to extinguish the loss of consortium claim. See *Voris* v. *Molinaro*, 302 Conn. 791, 798–801, 31 A.3d 363 (2011) (discussing policy rationale for extinguishing loss of consortium claim upon settlement of principal injury claim regardless of status of the derivative claim). In the absence of policy language providing per person coverage for a broader category of claims[4] or expressly providing separate coverage for loss of consortium claims, we must conclude that a loss of consortium claim is encompassed in the per person liability limitation applicable to the bodily injury from which it arises.

The judgment is affirmed.

In this opinion the other judges concurred.

[4] The court in *Izzo* noted that in jurisdictions where a loss of consortium claim has been found to be subject to a separate per person limitation of liability, the policies at issue covered "personal injury" claims rather than "bodily injury" claims, which are not synonymous. "[T]he policy term 'personal injuries' is 'broader, more comprehensive and significant' than the term 'bodily injury.' . . . The term 'personal injury' is broad enough to encompass a claim for injury which is personal to the claimant, although flowing from the physical injury of another. . . . [T]he term 'bodily injury,' however, is narrower in that it connotes an element of personal contact. . . . A claim for loss of consortium, although a 'personal injury,' is not a 'bodily injury' to the claimant." (Citations omitted.) *Izzo* v. *Colonial Penn Ins. Co.*, supra, 203 Conn. 313.

ST. JOSEPH'S HIGH SCHOOL, INC., ET AL. *v.* PLANNING AND ZONING COMMISSION OF THE TOWN OF TRUMBULL (AC 38816)

Lavine, Sheldon and Pellegrino, Js.

Syllabus

The plaintiffs appealed to the trial court from the decision of the defendant planning and zoning commission denying their application for a special permit to install lighting on certain real property on which the plaintiff school was situated. The school sought a special permit, pursuant to the applicable town zoning regulation (Article II, § 1.2.4.4), to authorize the installation of four light poles, seventy feet in height, to illuminate the school's primary athletic field. After the trial court granted the motion to intervene filed by the defendant adjacent landowners, it rendered judgment sustaining the appeal in part, concluding that the plaintiffs' application met the technical requirements of § 1.2.4.4 (a) through (d) of the zoning regulations, and that it satisfied each of the known and definite standards therein. With respect to § 1.2.4.4 (e) of the regulations, which provides that "[a]ll requirements of Article XV Special Permit/Special Exception shall be satisfied," the court found that because Article XV contained no definite standards with which a prospective applicant must comply, it could not serve as the sole basis for denying a special permit application when all of the known and definite standards in the regulation in question have been satisfied. The court thus remanded the matter to the commission with direction to approve the special permit as requested, subject to such conditions that would be necessary to protect the public health, safety, convenience and property values. Subsequently, the intervening defendants, on the granting of certification, appealed to this court. *Held*:

1. The trial court applied an improper legal standard in reviewing the commission's decision on the special permit application and determining that the general standards contained in Article XV of the zoning regulations could not serve as the sole basis for denying the special permit application; a planning and zoning commission may deny a special permit application on the basis of general standards set forth in the zoning regulations, even when all technical requirements of the regulations have been met, and, contrary to the plaintiffs' claim, this court's decision in *MacKenzie* v. *Planning & Zoning Commission* (146 Conn. App. 406) did not alter the ample body of appellate precedent regarding the ability of a commission to append conditions to a special permit approval, or its ability to predicate its decision on compliance with general standards set forth in the zoning regulations.

2. The trial court improperly sustained the plaintiffs' appeal in part from the commission's denial of their special permit application, as substantial evidence existed in the record on which the commission, in its discretion, could have relied in concluding that the school did not meet its burden of demonstrating compliance with the general standards of Article XV of the zoning regulations: on the basis of the testimony and evidence in the record, the commission reasonably could have concluded, in its discretion, that the school failed to demonstrate that the proposed use would not adversely affect neighboring residential properties due to nighttime noise emissions, in contravention of the regulations, that the school's proposal lacked buffers that would adequately shield neighboring residential properties from noise and light emissions, as required by the regulations, and that the school did not establish that its proposed use adequately avoided nonresidential traffic through residential streets, that pedestrian and vehicular traffic to and from and in the vicinity of the use would not be hazardous or inconvenient to, or detrimental to the character of, the abutting residential neighborhood, that, with respect to access and parking, the design of the proposed use adequately protected the residential character of surrounding residential neighborhoods or residential zones, or that the proposed use would not exacerbate special problems of police protection inherent in the proposed use; moreover, in exercising its discretion over whether the general standards of Article XV sufficiently were met, the commission could have concluded, on the record before it, that the school did not establish that the proposed use would not adversely affect neighboring property values, the character of the adjacent neighborhood, or the quality of life of its residents.

Argued April 25—officially released September 19, 2017

Procedural History

Appeal from the decision by the defendant denying the plaintiffs' application for a special permit to install certain lighting, brought to the Superior Court in the judicial district of Fairfield, where the court, *Bellis*, *J.*, granted the motion filed by Jeffrey W. Strouse et al. to intervene as defendants; thereafter, the matter was tried to the court, *Radcliffe*, *J.*; judgment sustaining the appeal in part, from which the defendant Jeffrey W. Strouse et al., on the granting of certification, appealed to this court. *Reversed; judgment directed.*

Joel Z. Green, with whom, on the brief, was *Linda Pesce Laske*, for the appellants (defendant Jeffrey W. Strouse et al.).

Michael C. Jankovsky, for the appellees (plaintiffs).

Opinion

SHELDON, J. The intervening defendants Jeffrey W. Strouse, Barbara M. Strouse, Mukesh H. Shah, Vibhavary M. Shah, Jai R. Singh, Sonali Singh, Dennis J. McEniry, and Joanne McEniry appeal from the judgment of the Superior Court sustaining in part the appeal of the plaintiffs, St. Joseph's High School, Inc. (school), and the Bridgeport Roman Catholic Diocesan Corp. (diocese), from the decision of the Planning and Zoning Commission of the Town of Trumbull (commission) denying the school's request for a special permit pursuant to Article II, § 1.2.4.4, of the Trumbull Zoning Regulations (regulations).[1] On appeal, the defendants contend that the court improperly concluded that the commission could not deny that request on the basis of noncompliance with general standards contained in the regulations. They further submit that substantial evidence in the record supports the commission's decision. We agree and, accordingly, reverse the judgment of the Superior Court.[2]

At all relevant times, the diocese owned a parcel of land located in the AA residential zone and known as 2320 Huntington Turnpike in Trumbull (property). For more than half a century, the school has operated a private secondary school on the property. Although currently 53.95 acres in size, the property originally was significantly larger. Approximately two decades ago, the diocese sold a sizeable portion of the property to developers, on which neighboring residential homes

[1] Although the commission was named as a defendant in this action and participated in the proceeding below, it has not appealed from the judgment of the Superior Court. We therefore refer to the intervening defendants as the defendants in this opinion.

[2] "In hearing appeals from decisions of a planning and zoning commission, the Superior Court acts as an appellate body." *North Haven Holdings Ltd. Partnership* v. *Planning & Zoning Commission*, 146 Conn. App. 316, 319 n.2, 77 A.3d 866 (2013).

were constructed. The current owners of those adjacent properties are among those affected by the proposed special permit use at issue in this appeal.

Article II, § 1.2.4, of the regulations enumerates various special permit uses in the AA residential zone. Among such uses, as provided in § 1.2.4.4, are "[c]hurches and other places of worship, including parish houses and Sunday School buildings; non-profit primary and secondary schools; and buildings housing personnel affiliated with said churches and schools."

Pursuant to Article XVI, § 3, of the regulations, the commission is authorized "after public notice and a hearing, to amend, change, or repeal these Regulations . . . ." At the behest of the school, the commission, in August, 2014, exercised that authority by amending § 1.2.4.4 to permit the installation of lighting on athletic fields for nonprofit secondary schools.[3] Since it became effective on September 10, 2014, that amendment has provided, in relevant part: "Permanent and temporary light poles for lighted athletic fields on non-profit secondary school property shall be permitted for school related purposes only, provided: (a) The poles, lights and structures supporting such poles do not exceed a combined height of eighty (80) feet. (b) No such light structure shall be within two hundred (200) feet of an abutting residential property line. (c) Applicant shall submit a photometric plan at the time of application. (d) Lights must be shut off no later than 11:00 p.m. and applicant shall install an automated control system to ensure compliance. (e) All requirements of Article XV Special Permit/Special Exception shall be satisfied."[4]

[3] It is undisputed that the plaintiffs have the only "non-profit secondary school property" in Trumbull to which that amendment could apply.

[4] Article XV, § 4, sets forth various "Criteria for Decision." To grant a special permit thereunder, the commission must find that the special permit application conforms "in *all respects* with these [r]egulations . . . ." (Emphasis added.) Trumbull Zoning Regs., art. XV, § 4.2.

The commission, in enacting that amendment, formally complied with all applicable procedural requirements. See General Statutes § 8-3; Trumbull Zoning Regs., art. XVI, § 3.

In accordance with § 1.2.4.4, as amended, the school filed an application for a special permit[5] to permit the installation of four light poles, seventy feet in height, to illuminate the school's primary athletic field. In that application, the school stated, in relevant part, that "[t]he fields and lights are well-buffered with mature landscaping and there will be no negative impact on the adjoining neighborhood."

On September 17, 2014, the commission held a public hearing on the application. Attorney Raymond Rizio appeared on behalf of the school and detailed how the proposal complied with the technical requirements of § 1.2.4.4. He first noted that the light poles would be ten feet shorter than the maximum height permitted under § 1.2.4.4 (a), and would be at least 325 feet away from abutting residential property lines, in compliance with § 1.2.4.4 (b). Rizio also stated that the abutting residential properties were "very well . . . buffered with heavily wooded property."

Consistent with § 1.2.4.4 (c), the school submitted a photometric plan to the commission. It also presented expert testimony on the impact of the proposed lighting by Mark Reynolds of Techline Sports Lighting, who indicated that, although there would be "some light spillage" around the athletic field, "when you get 100 feet away from that field, it's going to be pretty much down to nothing." Rizio similarly remarked that "the

[5] "[I]n the land use context, the terms 'special exception' and 'special permit' have 'the same meaning and can be used interchangeably.' *Beckish* v. *Planning & Zoning Commission*, 162 Conn. 11, 15, 291 A.2d 208 (1971)." *MacKenzie* v. *Planning & Zoning Commission*, 146 Conn. App. 406, 410 n.4, 77 A.3d 904 (2013). For purposes of clarity, we use the term "special permit" throughout this opinion.

readings along the property lines basically measure zero, over 95 percent of the property line is zero or 0.1, which is one-tenth of a footcandle[6] at the property lines. And that's not taking into account . . . all of the . . . buffering that's up there with regard to the trees." (Footnote added.) The school's proposal also included the installation of an automated control system.

Rizio then noted certain general standards of Article XV that govern special permit applications, stating: "[W]e believe that we will have no impact on the neighborhood, we believe that we satisfy all of your special permit standards, that the use is appropriate. . . . We certainly are willing to put strong conditions on the application to ensure there is going to be minimal impact with regard to lights and activity on the property." Rizio also addressed the appropriateness of the proposed use, stating that "this is . . . a high school. [It] has athletic events. The athletic events need . . . [lighting on] the field, during minimal times . . . . We believe there is adequate buffering and controls. . . . [W]e greatly exceed the required distances from residential properties. The property is already naturally buffered . . . . [A]ll the light will be directed. The distances are more than adequate. We have given you a photometric plan that shows there will be absolutely no impact, light impact, on the neighboring properties. So, appropriateness of the use, impact on neighboring properties, we believe is absolutely minimal."

After reminding the commission that it previously had approved the use of athletic fields on the property, Rizio submitted that the proposal presently before the commission was "a completely harmonious accessory use [that] complements the current use of the athletic

[6] "A footcandle is a unit for measuring illumination and equals the amount of direct light thrown by a candle on a square foot of surface located 1 foot away." *State* v. *Hutch*, 30 Wn. App. 28, 30 n.1, 631 P.2d 1014, review denied, 96 Wn. 2d 1011 (1981).

fields." With respect to traffic considerations and the impact on residential properties, Rizio stated that "the intensity of the operations involved" with respect to "both pedestrian and vehicular traffic to and from the vicinity will not be hazardous. [There will be] no change in traffic plans."[7]

Rizio acknowledged that, in granting a special permit, the commission has the authority to place reasonable restrictions on the proposed use. See General Statutes § 8-2 (a) (special permits may be subject "to conditions necessary to protect the public health, safety, convenience and property values"); *Carpenter* v. *Planning & Zoning Commission*, 176 Conn. 581, 594, 409 A.2d 1029 (1979) (§ 8-2 "expressly" provides that "commissions [are] authorized to impose conditions as a prerequisite to certain uses of land"). He then articulated nine "voluntary conditions" that the school believed were appropriate restrictions on the special permit use in question.[8] Rizio concluded by noting that the school was proposing those conditions to "make sure we conform not

[7] Apart from Rizio's comments to the commission, the school did not furnish any documentary or testimonial evidence on the impact of the proposed use with respect to vehicular and pedestrian traffic in neighboring residential areas.

[8] Rizio stated: "[O]ne would be, lights will only be used for [school] related events. . . . Two. The athletic field may not be rented to any outside vendors. . . . Three. The light system installed must contain automatic function that shuts the lights off. We will agree to a [shutoff time of] 10 p.m. for games, 9 p.m. for practices, Monday [through] Friday, [and] we would go to 8 p.m. on Saturday. There shall be no lights on Sunday. [Four.] The lights may only be used during the following times of the year: March 15 [through] June 15 and August 15 [through] December 15. . . . [Five.] [W]e . . . agree that the lights [shall] be dimmed to 50 percent of capacity for practice. [Six.] The approval shall only be for four light poles [to be located at] four very specific locations for one athletic field. . . . [Seven.] [T]he light system . . . may not be used to light any other field on the [school] campus. [Eight.] Light shields shall be installed on all light fixtures to ensure the same. . . . [Nine.] [W]e would agree that there would be no more than three games per week in which the lights would be lit to a [full] game . . . light capacity."

only with the literal interpretation [of § 1.2.4.4], but [also] the spirit of the regulation."[9]

During the public comment portion of the hearing, the commission heard both support for and opposition to the school's proposal.[10] The commission also received written correspondence from seventeen additional members of the public, all of whom opposed the proposal. The common thread running through the comments of those who spoke in opposition was a fervent belief that permitting major sporting events on the property at nighttime would adversely affect property values, public safety, the residential character of their neighborhood, and the use and enjoyment of their properties.

When public comment concluded, the school responded to certain concerns raised therein. It volunteered two additional conditions of approval pertaining to its proposed special permit use. First, it agreed not to play any music when the proposed lights were utilized. Second, the school agreed that use of "the press box and the public announcement [system] at [night] games would only occur during boys' varsity football and boys' varsity lacrosse . . . ." As to traffic concerns, Rizio noted that "there's no more games being added to the [property]. There's no more games at all being added to [the school]. It's the exact same games. And they are both held at nonpeak hours." He thus submitted that "[w]hether you have a Saturday football game or a Friday night football game, both games" would have the

[9] The commission also heard from the town planner, Jamie Bratt. Although she remarked that "the application does meet the special permit requirements . . . as was stated by the applicant," it is unclear whether she was referring to all special permit requirements or only the technical requirements of § 1.2.4.4. Bratt elaborated no further and did not discuss the general standards of Article XV in any manner.

[10] Six individuals spoke in support of the application, including two football coaches and one longtime faculty member at the school. Twelve members of the public spoke in opposition.

same impact on the neighborhood in terms of vehicular and pedestrian traffic. Arguing that the school had "satisfied all of the items required to achieve a special permit" under § 1.2.4.4, Rizio asked the commission to grant the application, subject to the conditions that the school had proposed.

The commission then closed the public hearing and began its deliberations on the school's application. Commissioner Fred Garrity spoke first, remarking that he was "hard-pressed to find things that the applicant did not do in this process or provide this evening." He also stated that "some of the neighbors will never be happy if lights go up. It doesn't matter what we would do. The parking is going to overflow on busy days. They will park in those neighborhoods on public streets, which has occurred over time . . . whether we put the lights up or not or allow it." Garrity thus opined that the school had met its obligations under § 1.2.4.4 and encouraged his colleagues to consider conditions of approval on its special permit application.

Commissioner Anthony Silber spoke next, reminding the commission that it had "voted for this text amendment unanimously." One commissioner later asked Attorney Vincent Marino, who was in attendance in his capacity as town attorney, about the commission's ability to consider the proposal's compliance with general standards set forth in the regulations, such as the detrimental effect on the quality of life of neighboring property owners. In response, Marino reminded commission members that, while amending § 1.2.4.4 "in August, one of the concerns that [was] raised is [whether] there were adequate protections through the special permit process to vote in the negative should the commission wish to vote in the negative because they did not want to find themselves in a position where, now that the regulation change was in place it was just going to be an automatic thing. And we had [an]

extensive conversation on the special permit process and specifically Article XV and the protections that are afforded the special permit process through Article XV." To accommodate the concerns of neighboring property owners, Silber suggested adding a condition prohibiting night games on Saturdays as well as Sundays.

Commissioner David W. Preusch then opined that the central issue raised by the school's application was the impact of football games on the adjacent neighborhood, stating: "I think what this boils [down to is] how do they handle parking? And where do they park? . . . [That] is the real problem here . . . . That we need to address. And to me, it's not a couple [of] soccer games, it's not a lacrosse game. . . . [W]hat this boils down to is football games. So, [the] focus [is] on five occurrences in the fall. . . . So, we have four to five occasions a year in the fall every other week or whatever is the home [football] game. . . . I'm just wondering if there is something we can do about these games. And the problems that or issues that have been brought up, which, to me, has everything to do with the parking." In response, Silber noted that the school had proposed several voluntary conditions "to try and mitigate" the impact of the proposed use. He continued: "[M]aybe there's some more that we could do there. . . . I am not sure what the right solution is, but I think for us it is about trying to find ways to protect the people who live on these streets and at the same time give the school the lights because I think it is the right thing to do."

Commissioner Richard C. Deecken then addressed the proposal, prefacing his remarks with the observation that "[t]his is a most difficult application . . . ." Deecken noted that "what we have here is, we are transferring the [load], we are transferring the intensity from one time to another, and if we all agree that intensity is no greater during a night game than it is during

a day game, then we are in agreement. . . . But again, what I want to know and what I need to be convinced on is, is the load being transferred from day to night significant enough to warrant a negative vote?" Deecken also stated that, in his view, "the problem of light still remains" because, "as we know, you can see lights from a long distance,"[11] whether during games or nightly practices. Silber then proposed restricting lighting for practice sessions to 8 p.m. In response to concerns voiced by neighboring property owners, Silber also proposed a blanket prohibition against the use of the lights on weekends. A motion then was made to amend Garrity's original motion "to limit practices to 8 p.m. and eliminate weekend lights, flatly." That motion was unanimously approved.

Discussion then turned to the number of night football games that would be permitted each year. As Preusch noted, "the varsity football games are the issue. It's not the soccer . . . . It's not the lacrosse. It's the crowds. It's the football games." Silber responded that the school was not increasing the number of football games on the property, but simply "shifting the intensity" from day to night. Preusch then noted that "we are talking about the intensity of use here. And if we can cut the intensity of the expansion of use in half, that's what I am talking about. I am talking about a compromise." After further discussion, Deecken moved to amend the pending motion to limit the number of varsity football games to a "[m]aximum of four games. Period." That motion was approved, with all commissioners but Garrity voting in favor.

At that time, Marino raised "a point of order." Marino reminded commission members that a prerequisite to

[11] During the public hearing, the commission received photographic evidence of illuminated lights at a nearby high school football field. Those photographs depicted the visibility of that lighting from various distances.

the granting of a special permit was a specific finding by the commission pursuant to Article XV, § 4.14 (1), of the regulations,[12] as to the impact of the proposed use on surrounding residential neighborhoods. Marino further explained that "you have to incorporate that [finding] into your [primary] motion because it is required by your regulation. . . . If you vote negatively [on the primary motion] then it's a negative finding [and] if you vote affirmatively it's a positive finding" as to the impact on surrounding neighborhoods. In what the transcript suggests was a chaotic part of deliberations, commissioners expressed confusion as to the mechanics of implementing such a finding while at the same time discussing the merits thereof. At one point, Silber explained to his colleagues that Marino "is saying we have to say it explicitly. It's got to be part of the motion. . . . So, we are amending the motion to include that passage." When Anthony G. Chory, as chairman of the commission, ultimately called the question, he stated, "all in favor to amend the motion?" That motion to carried by a vote of three to two.[13]

[12] Article XV, § 4.14 (1), of the regulations provides in relevant part: "The location and size of such [special permit] use, and the nature and intensity of operations involved in or conducted in connection therewith, shall be such that both pedestrian and vehicular traffic to and from and in the vicinity of the use will not be hazardous or inconvenient to, or detrimental to the character of the said residential district or conflict with the traffic characteristics of the neighborhood. . . . Access, parking, service areas, lighting, signs and landscaping shall be designed so as to protect the residential character of surrounding residential neighborhoods or residential zones."

[13] The plaintiffs claim that the commission at that time made an independent finding, in accordance with § 4.14 (1), that the school's proposed use would "not be hazardous or inconvenient to, or detrimental to the character of the said residential district or conflict with the traffic characteristics of the neighborhood . . . ." Having allegedly made such a finding, the plaintiffs maintain that the commission "could not legally deny the application," rendering the denial thereof "clearly arbitrary and illegal . . . ."

That claim was presented to, and rejected by, the Superior Court. In its memorandum of decision, the court found that Robert's Rules of Order governed the commission's proceedings. The court further found, pursuant to those rules, that the motion in question "carried the status of a subsidiary

Chory then called the motion to approve the school's special permit application, as amended several times. Silber and Garrity voted in favor of the motion, while Chory and Preusch voted against. Deecken abstained. As a result, the motion failed by virtue of the tie vote. The commission at that time articulated no reasons for that decision. See *Hall* v. *Planning & Zoning Board*, 153 Conn. 574, 576, 219 A.2d 445 (1966) ("[i]n such a case [as a tie vote] the board, as a body, [can] give no reason for its failure to act although the result [amounts] to a rejection of the application"). Rather, it immediately adjourned the meeting following the final vote. Both the legal notice subsequently published by the commission and the written notice sent to the school confirmed that the application had been "denied" by the commission.[14]

The plaintiffs filed a timely appeal of that decision with the Superior Court, arguing that the school's application fully complied with all applicable special permit

motion, which had the effect of amending the main motion. It was not a separate main motion." Following this court's granting of the defendants' petition for certification to appeal, the plaintiffs filed a cross appeal, in which they sought to raise the present issue. In response, the defendants moved to dismiss that cross appeal in light of the undisputed fact that "the plaintiffs did not file, and the Appellate Court did not grant, any petition or cross petition for certification." By order dated March 16, 2016, this court granted that motion and dismissed the plaintiffs' cross appeal. That issue, therefore, is not properly before this court.

[14] It is well established that "the failure of an application to garner enough votes for its approval amounts to a rejection of the application." *Merlo* v. *Planning & Zoning Commission*, 196 Conn. 676, 683, 495 A.2d 268 (1985). That precept applies equally to a tie vote among members of the land use agency. As our Supreme Court has explained, "[u]nder common law or parliamentary law, an affirmative resolution or action which is the subject of a tie vote fails of adoption." (Internal quotation marks omitted.) *Huck* v. *Inland Wetlands & Watercourses Agency*, 203 Conn. 525, 533 n.8, 525 A.2d 940 (1987); see also *Lupinacci* v. *Planning & Zoning Commission*, 153 Conn. 694, 696, 220 A.2d 274 (1966) (tie vote on zoning application "amounted to a denial"); *Smith-Groh, Inc.* v. *Planning & Zoning Commission*, 78 Conn. App. 216, 222–24, 826 A.2d 249 (2003) (rejecting claim that tie vote with one abstention did not constitute denial of special permit application). Con-

requirements and that the commission's decision was not substantially supported by the record. The defendants filed a motion to intervene as statutorily aggrieved owners of abutting property, which the court granted. Although the plaintiffs and the defendants subsequently filed briefs on the substantive questions before the court, the commission did not do so. Rather, the commission filed a one sentence statement noting that it "takes no position in favor of the plaintiffs or the intervening defendants in this administrative appeal."

The court held a hearing on October 19, 2015, at which all counsel agreed that the school's special permit application satisfied the technical requirements of Article II, § 1.2.4.4 (a) through (d). Accordingly, the focus of the hearing was on compliance with § 1.2.4.4 (e), which provides that "[a]ll requirements of Article XV Special Permit/Special Exception shall be satisfied."

During the hearing, the court repeatedly asked counsel to identify the "known and fixed" and "clear and definite" standards contained in Article XV. In response, all counsel acknowledged that no such specificity was contained therein. Because Article II, § 1.2.4.4 (e), specifically provides that "[a]ll requirements of Article XV . . . shall be satisfied," the defendants' counsel nonetheless argued that the commission could predicate its decision on the general standards set forth in Article XV. The court, however, distinguished that last subsection of § 1.2.4.4 from its predecessors, stating that "[i]f there are general guidelines here [in Article XV], they can be the subject of health, safety and welfare conditions." The court later expounded on that distinction as follows: "An appeal could, I think, be sustained in part, to the extent [that the plaintiffs] comply with [the technical requirements of § 1.2.4.4 (a) through (d)] and

sistent with that precedent, we construe the commission's decision on the school's application as a denial thereof.

[with respect to § 1.2.4.4 (e)] the commission [could be] told to impose conditions related to health, safety and welfare that are site specific and protect the health, safety, welfare and property values . . . ."

In its memorandum of decision, the court did precisely that. It noted that the record of the public hearing "unambiguously reveals that the applicant's proposal meets the [technical requirements] set forth in Article II, § 1.2.4.4, subparagraphs (a) through (d)." The court then turned its attention to Article XV of the regulations, the requirements of which must be satisfied pursuant to § 1.2.4.4 (e). It stated, in relevant part: "Article XV, § 4.14, deals with uses adjacent to or impacting residential areas. Although the section does not contain any specific standards or requirements, it does provide a guidepost for the commission, as it seeks to evaluate conditions which should be adopted, before a special permit application is approved. . . . A review of § 4.14 . . . demonstrates that certain 'findings' are required of the commission, when considering a special permit application which impacts a residential area. Because every special permit application is site specific, the nature and character of abutting properties must be considered when evaluating a specific proposal. Conditions imposed on a special permit may be designed to limit the impact on surrounding properties, and may be designed to preserve the residential character of a community. However, since Article XV, § 4.14,[15] contains no definite standards with which a prospective

[15] In responding to the plaintiffs' administrative appeal before the Superior Court, the defendants alleged that the commission properly could have predicated its decision on noncompliance with several sections of Article XV. Their July 16, 2015 brief to the court discussed § 4.11 ("Public Health and Safety"), § 4.12 ("Appropriateness of Use"), § 4.13 ("Architectural Character, Historic Preservation, Site Design"), § 4.14 ("Uses In, Adjacent to, or Impacting Residential Areas"), § 5.2 ("Lighting"), and § 5.4 ("Landscaping and Screening") of Article XV. In its memorandum of decision, however, the Superior Court focused exclusively on § 4.14.

applicant must comply, it cannot serve as the sole basis for denying a special permit application, where all of the known and definite standards in the regulation in question have been satisfied. To permit the denial of an application on the basis such as a finding that it is 'detrimental to the character of a residential district' is inconsistent with the administrative nature of the special permit review. When reviewing a special permit, a commission cannot act legislatively, or quasi-judicially. . . . Because the application submitted by the [school] satisfies each of the known and definite standards in the regulation, the plaintiffs' appeal must be sustained."[16] (Citations omitted; footnote added.)

The court thus sustained the plaintiffs' appeal in part, concluding that the commission should have granted the special permit due to the school's compliance with the technical requirements of § 1.2.4.4 (a) through (d). The court remanded the matter to the commission with direction "to approve the special permit as requested, subject to such conditions as are necessary to protect the public health, safety, convenience and property values." The defendants thereafter filed a petition for certification to appeal pursuant to General Statutes § 8-8 (o), which this court granted.[17]

Preliminarily, we note that "[t]he function of a special permit is to allow a property owner to use his property in a manner expressly permitted under the zoning regulations, subject to certain conditions necessary to protect the public health, safety, convenience, and surrounding property values." *Whisper Wind Development Corp.* v. *Planning & Zoning Commission*, 32

[16] Because the court found that the general standards set forth in Article XV could not furnish a basis for denying a special permit application, it did not address the question of whether substantial evidence existed to support the denial of the school's application thereunder.

[17] As it did in the proceeding before the Superior Court, the commission has taken no position on the merits of this appeal and has not filed an appellate brief.

Conn. App. 515, 525, 630 A.2d 108 (1993) (*Dupont*, *C. J.*, dissenting), aff'd, 229 Conn. 176, 640 A.2d 100 (1994). "The basic rationale for the special permit [is] . . . that while certain [specially permitted] land uses may be generally compatible with the uses permitted as of right in particular zoning districts, their nature is such that their precise location and mode of operation must be regulated because of the topography, traffic problems, neighboring uses, etc., of the site. Common specially permitted uses, for example, are hospitals, churches and schools in residential zones. These uses are not as intrusive as commercial uses would be, yet they do generate parking and traffic problems that, if not properly planned for, might undermine the residential character of the neighborhood. If authorized only upon the granting of a special permit which may be issued after the [zoning commission] is satisfied that parking and traffic problems have been satisfactorily worked out, land usage in the community can be more flexibly arranged than if schools, churches and similar uses had to be allowed anywhere within a particular zoning district, or not at all." (Internal quotation marks omitted.) *Barberino Realty & Development Corp.* v. *Planning & Zoning Commission*, 222 Conn. 607, 612–13, 610 A.2d 1205 (1992). In reviewing a challenge to a "commission's administrative decision, we . . . must be mindful of the fact that the plaintiff, as the applicant, bore the burden of persuading the commission that it was entitled to the permits that it sought" under the zoning regulations. (Internal quotation marks omitted.) *Loring* v. *Planning & Zoning Commission*, 287 Conn. 746, 778, 950 A.2d 494 (2008) (*Norcott*, *J.*, dissenting). With that context in mind, we turn our attention to the defendants' claims.

I

We first address the defendants' contention that the court applied an improper legal standard in reviewing

the decision of the commission. That claim involves a question of law, over which our review is plenary. See *Total Recycling Services of Connecticut, Inc.* v. *Connecticut Oil Recycling Services, LLC*, 308 Conn. 312, 326, 63 A.3d 896 (2013).

There is no dispute that the school's special permit application complied with the technical requirements of Article II, § 1.2.4.4 (a) through (d). Accordingly, the only issue before the Superior Court was whether the commission properly could predicate its decision on compliance with general standards contained in Article XV of the regulations, as required by Article II, § 1.2.4.4 (e). The court answered that query in the negative, stating that those general standards "cannot serve as the sole basis for denying a special permit application . . . ." That determination, the defendants argue, constitutes a departure from established law.

Accordingly, our analysis begins with an overview of the pertinent land use jurisprudence of this state. More than one half century ago, our Supreme Court recognized that a zoning commission may deny a special permit on the basis of general standards regarding public health, safety, convenience and property values. In *Cameo Park Homes, Inc.* v. *Planning & Zoning Commission*, 150 Conn. 672, 675, 192 A.2d 886 (1963), the plaintiff filed an application to construct an apartment complex in a residential zone. Such construction was permitted under the applicable zoning regulations as a special permit use, which necessitated the approval of the defendant commission. Id., 674. Following a public hearing, the commission denied the plaintiff's application, finding, inter alia, that the proposed apartments "would affect the mode of living in the area by creating problems of safety for children"; that "the limitation of privacy due to the increase of traffic would tend to decrease the value of surrounding homes"; and "that the proposed use is not in harmony with the intent of

the commission which wrote the regulations." Id., 676. On appeal, our Supreme Court upheld the propriety of the commission's decision, stating, in relevant part, that "[t]he commission's power to stipulate such restrictions as appear to it to be reasonable and the minimum necessary to protect property values in the district as a whole and the public health, safety and welfare, necessarily implies the power to withhold its approval of the proposed use in its entirety if the commission finds that the circumstances warrant that action." (Internal quotation marks omitted.) Id., 676–77. Similarly, in *West Hartford Methodist Church* v. *Zoning Board of Appeals*, 143 Conn. 263, 269, 121 A.2d 640 (1956), the Supreme Court upheld the denial of a special permit based on a general standard requiring that the proposed activity "will not substantially or permanently injure the use of neighboring properties for residential purposes."

Despite—and arguably contrary to—that line of authority, our Supreme Court decades ago also indicated that "vague and undefined aesthetic considerations alone are insufficient to support the invocation of the police power, which is the source of all zoning authority." *DeMaria* v. *Planning & Zoning Commission*, 159 Conn. 534, 541, 271 A.2d 105 (1970); see also *Sonn* v. *Planning Commission*, 172 Conn. 156, 163, 374 A.2d 159 (1976) ("[t]he discretion of a commission must be controlled by fixed standards applied to all cases of a like nature"); *Powers* v. *Common Council*, 154 Conn. 156, 161, 222 A.2d 337 (1966) ("[a]lthough [§ 8-2] provides that the public health, safety, convenience and property values may be considered in making a determination on a special permit, this is to be done in conjunction with, and not as an alternative to, the standards which the zoning regulations themselves must provide").[18] *RK Development Corp.* v. *Norwalk*, 156 Conn.

[18] Notably, although *DeMaria* involves a special permit application; *DeMaria* v. *Planning & Zoning Commission*, supra, 159 Conn. 537; most cases in this line of authority do not. See, e.g., *Kosinski* v. *Lawlor*, 177 Conn. 420,

369, 242 A.2d 781 (1968), is illustrative. In that case, the plaintiff sought approval of certain subdivision plans by the common council. In denying that request, the council indicated that it was concerned about "[t]he safety for the sake of the children as well as the people living up there; the welfare of the community and also the health hazards." (Internal quotation marks omitted.) Id., 376. On appeal, the Supreme Court held that the council's determination was improper, stating in relevant part: "The reason given by the council for its disapproval was vague, uncertain in meaning and provided no information to the plaintiff [as to how] the plan submitted failed to satisfy the requirements of the regulations. . . . The council cannot, in utter disregard of the regulations, disapprove the plan for a reason it would not be required to apply to all applications for planned residential developments as to which the same reason obtained. It would amount to substitution of the pure discretion of the council for a discretion controlled by fixed standards applying to all cases of a like nature." Id., 377.

Nevertheless, in a decision issued only six months later, our Supreme Court again rejected a challenge to a municipal land use agency's decision on a special permit application that was predicated on compliance with general standards. *Rocchi* v. *Zoning Board of Appeals*, 157 Conn. 106, 248 A.2d 922 (1968). In so doing, it noted that "a prerequisite to granting the [special permit was the determination] that the public welfare and convenience would be substantially served and that the appropriate use of neighboring property would not be substantially or permanently injured. These criteria

423, 418 A.2d 66 (1979) (site plan approval); *Sonn* v. *Planning Commission*, supra, 172 Conn. 157 (subdivision plan approval); *RK Development Corp.* v. *Norwalk*, supra, 156 Conn. 371 (application to common council for approval of residential development plan); *Powers* v. *Common Council*, supra, 154 Conn. 158 (application to common council for designation of property as multiple housing project area).

are sufficient to pass constitutional muster." Id., 113–14; accord *Barberino Realty & Development Corp.* v. *Planning & Zoning Commission*, supra, 222 Conn. 619 (rejecting claim that regulations requiring commission to "take 'adequate safeguards' for the protection of other properties and provide for 'adequate' traffic circulation and parking" were void for vagueness).

Whatever conflict previously existed in our land use jurisprudence on this issue was definitively resolved by our appellate courts in an appeal concerning a partially completed subdivision in Middlefield. In *Whisper Wind Development Corp.* v. *Planning & Zoning Commission*, supra, 32 Conn. App. 516–17, the plaintiff developer sought a special permit to excavate and remove sand and gravel from vacant subdivision parcels. In denying that request, the defendant commission stated that "[t]he proposed use would not be harmonious with the existing development in the district and would be detrimental to the orderly development of adjacent properties and that [t]he location, size, nature and intensity of the use would create a pedestrian and traffic hazard and would conflict with the traffic characteristics of the surrounding neighborhood." (Internal quotation marks omitted.) Id., 518. On appeal to this court, the plaintiff claimed that such general standards "do not provide an independent basis for denying special permit applications." Id., 519–20. Rather, the plaintiff argued that those general standards "may be used solely to place restrictions on an approved permit and may not be used as an alternative to the standards contained in the technical considerations section of the regulations . . . . [T]he plaintiff argues that once the specific requirements [of the applicable regulations] are met, the [special] permit must be granted, subject to any limitations that may be placed on that approval . . . . Thus, according to the plaintiff, [the general standards governing special permits] cannot serve as the sole

basis for denying a special permit application, but can serve as the basis only for attaching conditions to the proposed plan." Id., 520. In short, the plaintiff's position in *Whisper Wind Development Corp.* was virtually identical to that articulated by the Superior Court in the present case.

This court disagreed with the plaintiff's contention. Noting cases such as *Cameo Park Homes, Inc.* v. *Planning & Zoning Commission*, supra, 150 Conn. 672, the court observed that "[o]n more than one occasion, our Supreme Court has held that standards set forth in the zoning regulations for the grant of a special permit may be general in nature." (Internal quotation marks omitted.) *Whisper Wind Development Corp.* v. *Planning & Zoning Commission*, supra, 32 Conn. App. 521–22. The court emphasized that "[i]t is well settled that in granting a special permit, an applicant must satisf[y] all conditions imposed by the regulations." (Emphasis omitted; internal quotation marks omitted.) Id., 521. Because the regulations at issue contained both technical requirements and general standards, the court held that the failure to comply with *either* constituted a valid basis on which the commission could deny a special permit. As it stated, "the plaintiff's claim that the general health, safety and welfare requirements contained in the regulations must be considered only for the purpose of placing conditions on a special permit and may not be considered in determining whether to deny or grant the permit must fail." Id., 522.

Significantly, *Whisper Wind Development Corp.* included a dissenting opinion. Relying principally on *DeMaria* v. *Planning & Zoning Commission*, supra, 159 Conn. 541, the dissent submitted that "[a] special permit may be denied only for failure to meet specific standards in the regulations, and not for vague or general reasons." *Whisper Wind Development Corp.* v. *Planning & Zoning Commission*, supra, 32 Conn. App.

526 (*Dupont*, *C. J.*, dissenting). Because it was undisputed that the plaintiff had complied with all technical requirements of the regulations, the dissent stated that "[t]he commission could have imposed more stringent conditions, but I do not believe, given the language of the regulation and the nature of the use, that it could deny the permit altogether." Id., 527. The dissent also expressed concern that reliance on general standards could lead to arbitrary decisionmaking, stating that "[a] zoning authority should not be able to insulate a denial of a special permit from reversal by an appellate court simply by stating a subjective conclusion such as the use is not in harmony with existing development or that the use would be detrimental because of an increase in traffic congestion." Id., 529.

Our Supreme Court subsequently granted the *Whisper Wind Development Corp.* plaintiff's petition for certification to appeal. The certified question before the court was as follows: "Was the Appellate Court correct in concluding that the trial court properly determined that the plaintiff's failure to meet the general health, safety and welfare requirements set forth in the town's zoning regulations provided an adequate basis for the defendant's denial of a special permit application, even though the plaintiff's application complied with all of the technical requirements of the regulations applicable to special permits?" *Whisper Wind Development Corp.* v. *Planning & Zoning Commission*, 227 Conn. 929, 632 A.2d 706 (1993).

In a per curiam decision, a unanimous Supreme Court first noted that the Appellate Court majority had "agreed with the defendant's contention that, in the case of a special permit, zoning regulations may authorize a planning and zoning commission to deny an application on the basis of enumerated general considerations such as public health, safety and welfare." *Whisper*

Wind Development Corp. v. *Planning & Zoning Commission*, 229 Conn. 176, 177, 640 A.2d 100 (1994). It then concluded that "the judgment of the Appellate Court must be affirmed," stating that "[t]he issue on which we granted certification was properly resolved in the thoughtful and comprehensive majority opinion of the Appellate Court." Id.

Four years later, the Supreme Court expounded on the discretion of a commission with respect to such general standards. It stated: "We previously have recognized that the special permit process is, in fact, discretionary. In *Whisper Wind Development Corp.* v. *Planning & Zoning Commission*, [supra, 229 Conn. 177], we concluded that general considerations such as public health, safety and welfare, which are enumerated in zoning regulations, may be the basis for the denial of a special permit. Also, we have stated that before the zoning commission can determine whether the specially permitted use is compatible with the uses permitted as of right in the particular zoning district, it is required to judge whether any concerns, such as parking or traffic congestion, would adversely impact the surrounding neighborhood. . . . Connecticut courts have never held that a zoning commission lacks the ability to exercise discretion to determine whether the general standards in the regulations have been met in the special permit process. . . . If the special permit process were purely ministerial there would be no need to mandate a public hearing." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *Irwin* v. *Planning & Zoning Commission*, 244 Conn. 619, 626–27, 711 A.2d 675 (1998). The court further noted that "[a]lthough it is true that the zoning commission does not have discretion to deny a special permit when the proposal meets the standards, it does have discretion to determine *whether* the proposal meets the standards set forth

in the regulations. If, during the exercise of its discretion, the zoning commission decides that all of the standards enumerated in the special permit regulations are met, then it can no longer deny the application. The converse is, however, equally true. Thus, the zoning commission can exercise its discretion during the review of the proposed special [permit], as it applies the regulations to the specific application before it." (Emphasis in original.) Id., 628.

More recently, the Supreme Court has affirmed a commission's decision to deny a special permit on the basis of the general standard that "the proposed use was not in harmony with the general character of the neighborhood . . . ." *Cambodian Buddhist Society of Connecticut, Inc.* v. *Planning & Zoning Commission*, 285 Conn. 381, 436, 941 A.2d 868 (2008); accord *Meriden* v. *Planning & Zoning Commission*, 146 Conn. App. 240, 248–49, 77 A.3d 859 (2013) (upholding denial of special permit on basis of general standard regarding intensification of use); *Children's School, Inc.* v. *Zoning Board of Appeals*, 66 Conn. App. 615, 626–31, 785 A.2d 607 (noting that board may "grant or deny applications for special [permits] based on . . . 'general' considerations" and concluding that substantial evidence supported a denial predicated thereon), cert. denied, 259 Conn. 903, 789 A.2d 990 (2001); *Connecticut Health Facilities, Inc.* v. *Zoning Board of Appeals*, 29 Conn. App. 1, 11, 613 A.2d 1358 (1992) (upholding denial of special permit on basis of general standards regarding public safety, traffic, and property values). There thus is no doubt that, under Connecticut law, a zoning commission may deny a special permit application on the basis of general standards set forth in the zoning regulations, even when all technical requirements of the regulations are met.

The plaintiffs nevertheless suggest that *MacKenzie* v. *Planning & Zoning Commission*, 146 Conn. App.

406, 77 A.3d 904 (2013), a recent decision of this court, altered the legal landscape with respect to such decisionmaking. For two distinct reasons, they are mistaken.

As a procedural matter, it is well established that this court, as an intermediate appellate tribunal, "is not at liberty to discard, modify, reconsider, reevaluate or overrule" the precedent of our Supreme Court. *Verrillo* v. *Zoning Board of Appeals*, 155 Conn. App. 657, 714, 111 A.3d 473 (2015). Furthermore, "it is axiomatic that one panel of [the Appellate Court] cannot overrule the precedent established by a previous panel's holding." (Internal quotation marks omitted.) *Samuel* v. *Hartford*, 154 Conn. App. 138, 144, 105 A.3d 333 (2014). As we often have stated, "this court's policy dictates that one panel should not, on its own, reverse the ruling of a previous panel. The reversal may be accomplished only if the appeal is heard en banc." (Internal quotation marks omitted.) *Boccanfuso* v. *Conner*, 89 Conn. App. 260, 285 n.20, 873 A.2d 208, cert. denied, 275 Conn. 905, 882 A.2d 668 (2005). The contention that *MacKenzie* overruled or otherwise modified an ample body of Supreme Court and Appellate Court precedent governing the denial of special permits on the basis of general standards necessarily assumes that the court contravened those fundamental principles of judicial restraint. We decline to make that assumption.

As a substantive matter, the plaintiffs' claim is untenable. *MacKenzie* involved a combined application that sought both a zone change and a special permit from the defendant commission. *MacKenzie* v. *Planning & Zoning Commission*, supra, 146 Conn. App. 409. The application was unique, in that with respect to the special permit request, the applicant presented the commission with two alternative proposals. The applicant's original plan would require the commission to " 'waive or vary' " certain requirements set forth in the zoning

regulations that plainly applied to the proposed use. Id., 412. The "alternate plan," by contrast, fully complied with "every standard that [was] set forth in the regulations." (Internal quotation marks omitted.) Id., 413. Following a public hearing, the commission granted the special permit in accordance with the applicant's original plan. In so doing, the commission waived certain setback and landscaping buffer requirements contained in the regulations that governed the proposal. Id., 411–19.

On appeal, the question addressed by this court was whether "the commission lacked the authority to vary those requirements." Id., 420. In answering that question, this court first reviewed relevant statutory and case law authority, concluding that "there is nothing contained within the General Statutes authorizing the commission to adopt regulations empowering itself to vary the application of the regulations when acting on a special [permit] request." Id., 428. The court further observed that "[t]he proposition that . . . the commission [properly may exercise] the power to vary the requirements of the [town's design business district] zone on a case-by-case basis reflects a fundamental misunderstanding of the role of the variance power within a municipality. The variance power exists to permit what is prohibited in a particular zone. . . . In simple terms, the zoning commission acts as a land use legislature in enacting zoning requirements. . . . By contrast, the zoning board of appeals is the court of equity of the zoning process . . . . [Z]oning commissions and zoning boards of appeal are, by design and by statute, independent branches of a municipality's land use department. Tellingly, the defendant has not presented this court with any precedent, nor have we discovered any, in which a zoning commission's decision to wield the variance power on a case-by-case basis

within a given district has been upheld . . . ." (Citations omitted; footnote omitted; internal quotation marks omitted.) Id., 428–30.

To be sure, *MacKenzie* also addressed the uniformity requirement of § 8-2.[19] Its discussion thereof must be considered in light of the bedrock precept that a zoning commission cannot grant a special permit unless the application satisfies *all* applicable requirements contained in the zoning regulations. See, e.g., *Heithaus* v. *Planning & Zoning Commission*, 258 Conn. 205, 215, 779 A.2d 750 (2001) (to obtain special permit, proposed use must satisfy standards set forth in zoning regulations); *Weigel* v. *Planning & Zoning Commission*, 160 Conn. 239, 246, 278 A.2d 766 (1971) ("[t]o justify the grant of the special permit, it must appear from the record before the commission that the manner in which the applicant proposes to use his property satisfies all conditions imposed by the regulations"); *Whisper Wind Development Corp.* v. *Planning & Zoning Commission*, supra, 32 Conn. App. 521 ("[i]t is well settled" that applicant must satisfy all conditions imposed by regulations to obtain special permit); R. Fuller, 9A Connecticut Practice Series: Land Use Law and Practice (4th Ed. 2015) § 33:4, p. 278 ("[f]or a special permit to be granted it must appear from the record before the agency that the application met all conditions imposed by the regulations"). *MacKenzie* did not alter that fundamental precept; in fact, it expressly adhered to it.

[19] General Statutes § 8-2 (a) provides, in relevant part: "The zoning commission of each city, town or borough is authorized to regulate, within the limits of such municipality, the height, number of stories and size of buildings and other structures; the percentage of the area of the lot that may be occupied; the size of yards, courts and other open spaces; the density of population and the location and use of buildings, structures and land for trade, industry, residence or other purposes. . . . All such regulations shall be uniform for each class or kind of buildings, structures or use of land throughout each district, but the regulations in one district may differ from those in another district . . . ."

See *MacKenzie* v. *Planning & Zoning Commission*, supra, 146 Conn. App. 438 (stating that "[t]o justify the grant of the special permit, it must appear from the record before the commission that the manner in which the applicant proposes to use his property satisfies all conditions imposed by the regulations" [internal quotation marks omitted]). *MacKenzie* ultimately held that when a special permit application fails to satisfy certain requirements imposed by the zoning regulations, a commission lacks authority to "vary or waive" those requirements. Id., 435.

MacKenzie further explained that the issue of a commission's ability to vary such requirements is fundamentally different from the issue of its authority to place greater restrictions on a special permit use through the imposition of conditions of approval, which originates in § 8-2.[20] Id., 434–35. The defendant in *MacKenzie* attempted to "turn this precept on its head, thereby granting a commission the power, in acting on such a special [permit] application, not only to impose greater restrictions on a parcel, but also to vary or waive existing restrictions—such as minimum setback and landscaped buffer requirements—applicable to all other properties within the district in contravention of the uniformity rule." Id., 435. This court declined to so rule. Id. Contrary to the plaintiffs' contention, *MacKenzie* did not alter the ample body of appellate authority

[20] General Statutes § 8-2 (a) provides, in relevant part, that a commission may grant a special permit "subject to standards set forth in the regulations and to conditions necessary to protect the public health, safety, convenience and property values. . . ."

In *Summ* v. *Zoning Commission*, 150 Conn. 79, 86, 186 A.2d 160 (1962), our Supreme Court discussed the 1959 revision of § 8-2, noting that "the legislature added the provision authorizing the adoption by a zoning commission of regulations which would allow a use subject to standards set forth in the regulations and under special conditions, after the obtaining of a special permit. The power of local zoning authorities was thus broadened, and they were allowed to impose certain standards and conditions on the use of property when the public interest required it."

regarding the ability of a commission to append conditions to a special permit approval, or its ability to predicate its decision on compliance with general standards set forth in the zoning regulations. Instead, it held that when a commission grants a special permit application that does not satisfy the applicable requirements of the zoning regulations, it "runs afoul of the uniformity requirement of [§] 8-2." Id., 431. For that reason, the plaintiffs' reliance on that precedent in the present case is unavailing.

Under Connecticut law, a zoning commission may deny a special permit application due to noncompliance with general standards contained in the zoning regulations. We, therefore, agree with the defendants that the court applied an improper legal standard in reviewing the commission's decision on the school's special permit application.

II

The question, then, is whether the record before us supports a finding of noncompliance with the general standards of Article XV.[21] We agree with the defendants that substantial evidence exists in the record on which the commission, in its discretion, could have relied in concluding that the school did not meet its burden of demonstrating compliance therewith.

A

Legal Standard

At the outset, we note that special permits, "although expressly permitted by local regulations, must satisfy

[21] We acknowledge that in the proceeding before it, the Superior Court did not address this question. Nevertheless, we are mindful that "[b]ecause [a zoning] appeal to the [Superior Court] is based solely on the record, the scope of the trial court's review of the [commission's] decision and the scope of our review of that decision are the same." (Internal quotation marks omitted.) *River Bend Associates, Inc.* v. *Zoning Commission*, 271 Conn. 1, 26–27 n.15, 856 A.2d 973 (2004). It would serve no useful purpose, therefore, to remand the matter to the Superior Court, particularly when the parties have briefed and argued the issue in this appeal.

. . . standards set forth in the zoning regulations . . . . [I]f not properly planned for, [special permit uses] might undermine the residential character of the neighborhood. . . . [T]he goal of an application for a special [permit] is to seek permission to vary the use of a particular piece of property from that for which it is zoned, without offending the uses permitted as of right in the particular zoning district." (Internal quotation marks omitted.) *Municipal Funding, LLC* v. *Zoning Board of Appeals*, 270 Conn. 447, 453–54, 853 A.2d 511 (2004).

As our Supreme Court has emphasized, a zoning commission's decisionmaking on a special permit application involves the exercise of discretion. "Although it is true that the zoning commission does not have discretion to deny a special permit when the proposal meets the standards, it does have discretion to determine *whether* the proposal meets the standards set forth in the regulations. If, during the exercise of its discretion, the zoning commission decides that all of the standards enumerated in the special permit regulations are met, then it can no longer deny the application. The converse is, however, equally true. Thus, the zoning commission can exercise its discretion during the review of the proposed special [permit], as it applies the regulations to the specific application before it." (Emphasis in original.) *Irwin* v. *Planning & Zoning Commission*, supra, 244 Conn. 628. The exercise of that discretion "is inherently fact-specific, requiring an examination of the particular circumstances of the precise site for which the special permit is sought and the characteristics of the specific neighborhood in which the proposed [use] would [be made]." *Municipal Funding, LLC* v. *Zoning Board of Appeals*, supra, 270 Conn. 457.

Judicial review of zoning commission determinations is governed by the substantial evidence standard, under which "[c]onclusions reached by [the] commission

must be upheld by the trial court if they are reasonably supported by the record. The credibility of the witnesses and the determination of issues of fact are matters solely within the province of the [commission]. . . . The question is not whether the trial court would have reached the same conclusion . . . but whether the record before the [commission] supports the decision reached. . . . If a trial court finds that there is substantial evidence to support a zoning board's findings, it cannot substitute its judgment for that of the board. . . . If there is conflicting evidence in support of the zoning commission's stated rationale, the reviewing court . . . cannot substitute its judgment as to the weight of the evidence for that of the commission. . . . The [commission's] decision must be sustained if an examination of the record discloses evidence that supports any one of the reasons given." (Internal quotation marks omitted.) *Cambodian Buddhist Society of Connecticut, Inc.* v. *Planning & Zoning Commission*, supra, 285 Conn. 427.

The substantial evidence standard is one that "is highly deferential and permits less judicial scrutiny than a clearly erroneous or weight of the evidence standard of review." (Internal quotation marks omitted.) *Sams* v. *Dept. of Environmental Protection*, 308 Conn. 359, 374, 63 A.3d 953 (2013); accord *Dickinson* v. *Zurko*, 527 U.S. 150, 153, 119 S. Ct. 1816, 144 L. Ed. 2d 143 (1999) (clearly erroneous standard stricter than substantial evidence standard); *Brunswick* v. *Statewide Grievance Committee*, 103 Conn. App. 601, 612, 931 A.2d 319 ("[t]he substantial evidence standard is even more deferential" than clearly erroneous standard), cert. denied, 284 Conn. 929, 934 A.2d 244 (2007). In that vein, our Supreme Court has described the substantial evidence standard as "an important limitation on the power of the courts to overturn a decision of an administrative agency . . . and to provide a more restrictive

standard of review than standards embodying review of weight of the evidence or clearly erroneous action." (Internal quotation marks omitted.) *Property Group, Inc.* v. *Planning & Zoning Commission*, 226 Conn. 684, 697–98, 628 A.2d 1277 (1993).

In an appeal from a decision of a zoning commission, the "burden of overthrowing the decision . . . rest[s] squarely upon" the appellant. *Verney* v. *Planning & Zoning Board of Appeals*, 151 Conn. 578, 580, 200 A.2d 714 (1964); see also *Blaker* v. *Planning & Zoning Commission*, 212 Conn. 471, 478, 562 A.2d 1093 (1989) (party challenging action of zoning commission bears burden of proving that commission acted improperly). To meet its burden, an appellant "must establish that substantial evidence does not exist in the record as a whole to support the agency's decision." *Samperi* v. *Inland Wetlands Agency*, 226 Conn. 579, 587, 628 A.2d 1286 (1993).

Due to its tie vote, the commission did not state any collective reasons for its decision. In such instances, "we are obligated to search the entire record to ascertain whether the evidence reveals any proper basis for the [commission's] decision . . . ." *Verrillo* v. *Zoning Board of Appeals*, supra, 155 Conn. App. 676. As the Supreme Court has explained, a "reviewing court . . . must search the record of the hearings before [the] commission to determine if there is an adequate basis for its decision. . . . [P]ublic policy reasons make it practical and fair to have a [reviewing] court on appeal search the record of a local land use body . . . composed of laymen whose procedural expertise may not always comply with the multitudinous statutory mandates under which they operate." (Citations omitted; internal quotation marks omitted.) *Samperi* v. *Inland Wetlands Agency*, supra, 226 Conn. 588–89.

The parties agree, and the record plainly indicates, that the technical requirements of Article II, § 1.2.4.4,

of the regulations do not furnish a basis for denying the school's special permit application. Our task, then, is to review the record in search of substantial evidence to support a discretionary determination that the school had failed to meet its burden of establishing compliance with any of the general standards set forth in Article XV of the regulations.

B

Evidence in Record

1

Noise

We first consider the general standards regarding noise emissions. Article XV, § 4.12, sets forth various standards regarding the appropriateness of the proposed use. Among other things, it requires the applicant to demonstrate, and the commission to find, that the proposed special permit use "will not hinder or discourage the appropriate . . . use of adjacent land and buildings" and will not produce "the emission of noise . . . without adequate buffering or controls . . . ."

During the public comment portion of the public hearing, many neighboring property owners spoke in opposition to the school's proposal. A chief complaint concerned the issue of noise, with many speakers sharing their firsthand experiences with the commission.[22] Neighboring property owners also were concerned that noise from nighttime sporting events will make it difficult for their children or grandchildren to go to sleep.

[22] As but one example, Lawrence Ganum, who also lives near the school, stated that "we are talking quality of life, we are talking about a massive expansion of use, at night, of this facility. . . . [I]f you were in my yard or you were sitting outside having a cup of coffee with me, we'd be listening to hooting and hollering and screaming and the loud music and the loudspeakers." On the basis of his experience with daytime football games, Ganum stated that allowing such games at night would have "a massive impact on a very quiet, peaceful and comfortable [neighborhood]."

Several residents indicated that they were willing to tolerate the noise generated by major sporting events on the property during daytime hours. At the same time, they strongly opposed shifting those events to nighttime hours.[23]

[23] For example, Helga Beloin, who stated that she lives across the street from the Shahs, informed the commission that the music currently played at sporting events on the property is so loud that "[i]t actually cuts down on [television] watching because [my children] can't watch [television] with the [noise] blaring at the school. . . . But we know that it comes [to] an end. Around 7-8 [p.m.] we know the activity at [the school] stops, so, you know it's okay. . . . We hear the noise. . . . But once again, 7:30 [p.m.] rolls around, it's over."

In their appellate brief, the plaintiffs describe the testimony of neighboring property owners during the public hearing as "speculative complaints . . . ." We disagree with that characterization. That testimony was predicated on firsthand experience with major sporting events held at the school, in some cases over the course of many years. As this court has observed, "the aim of the public hearing is to obtain any and all information relevant to the inquiry on hand, so as to facilitate the rendering of an informed decision by the board." *Komondy* v. *Zoning Board of Appeals*, 127 Conn. App. 669, 681, 16 A.3d 741 (2011). Testimony, such as Beloin's statement that the noise from school sporting events is so loud that her family cannot hear the television inside their home, bears directly on the question of how the school's proposed use would impact the surrounding residential neighborhood. The commission alone is empowered to accept or reject such testimony. See *Children's School, Inc.* v. *Zoning Board of Appeals*, supra, 66 Conn. App. 630 (zoning board entitled to credit testimony offered at public hearing); *Pelliccione* v. *Planning & Zoning Commission*, 64 Conn. App. 320, 331, 780 A.2d 185 ("the commission, as the judge of credibility, is not required to believe any witness" [internal quotation marks omitted]), cert. denied, 258 Conn. 915, 782 A.2d 1245 (2001).

Furthermore, the commission, as the trier of fact in this municipal land use proceeding, was free to draw reasonable inferences from the testimonial and documentary evidence submitted during the public hearing. See, e.g., *Cockerham* v. *Zoning Board of Appeals*, 146 Conn. App. 355, 368, 77 A.3d 204 (2013) (municipal land use agency entitled to credit testimony at public hearing and draw reasonable inferences therefrom), cert. denied, 311 Conn. 919, 85 A.3d 653, 654 (2014); *Hayes Family Ltd. Partnership* v. *Town Plan & Zoning Commission*, 115 Conn. App. 655, 661, 974 A.2d 61 (evidence sufficient to sustain commission's finding "if it affords a substantial basis of fact from which the fact in issue can be reasonably inferred" [internal quotation marks omitted]), cert. denied, 293 Conn. 919, 979 A.2d 489 (2009); *Raczkowski* v. *Zoning Commission*, 53 Conn. App. 636, 645, 733 A.2d 862 (upholding determination of zoning commission based on inference reasonably drawn

With respect to the school's proposal to shift many of its major sporting events from daytime to nighttime, another abutting property owner, Jeffrey W. Strouse, submitted that the noise described previously by many of his neighbors "will unequivocally erase the peaceful environment and the natural surroundings that we invested in when we made the decision to live here. . . . It doesn't matter how tall these lights are . . . with the lights and the night games comes the noise . . . ." Jeffrey W. Strouse implored the commission to remember that the matter before it pertained to the backyards of residential neighbors, stating: "[W]ho here among us would want that in her backyard? And when I say backyard, again, just to emphasize this. This is not over the hill, across the pond and past grandma's house. This is in my backyard."

In addition to that testimony during the public comment portion of the hearing, the commission received written letters from seventeen other neighboring residential property owners, all of whom expressed the concern that "nightly practices and football games at [the school] will lead to sound . . . pollution . . . and an overall deterioration of our quality of life . . . ."

During the rebuttal portion of the public hearing, Rizio proposed two additional conditions regarding "the

from evidence in record), cert. denied, 250 Conn. 921, 738 A.2d 658 (1999). It often is said that jurors, in weighing the evidence, are not expected to leave their common sense at the courtroom door. *State* v. *Martinez*, 319 Conn. 712, 735, 127 A.3d 164 (2015). That precept applies equally to members of municipal land use agencies. See *Huck* v. *Inland Wetlands & Watercourses Agency*, supra, 203 Conn. 537 n.9 ("common sense maintains a proper place in a judicial or administrative proceeding").

On the ample testimony adduced at the public hearing on the noise issues experienced by neighboring property owners on a regular basis, the commission, as a matter of both reasonable inference and common sense, could in its discretion conclude that moving those sporting events from daytime to nighttime hours would have an adverse impact on the adjacent neighborhood and its residents.

noise issue." First, the school agreed to a condition prohibiting any music to be played "while the lights [are] on . . . ." Second, the school agreed to a restriction that "the press box and the public announcement [system] at [night] games would only occur during boys' varsity football and boys' varsity lacrosse . . . ." The question, then, becomes whether those additional conditions or others adequately addressed the noise problems detailed at length by neighboring property owners, sufficient to warrant a finding of compliance with § 4.12. Under Connecticut law, that determination is a matter left to the discretion of the commission. *Irwin* v. *Planning & Zoning Commission*, supra, 244 Conn. 628 (commission has discretion to determine whether proposal satisfies standards set forth in regulations). The task of balancing significant interests of purely local concern is one best decided by the local land use authority. As noted decades ago, "[t]he history of zoning legislation indicates a clear intent on the part of the General Assembly that, subject to certain underlying principles, the solution of zoning questions is for the local agencies." *Couch* v. *Zoning Commission*, 141 Conn. 349, 359, 106 A.2d 173 (1954); see also *Kutcher* v. *Town Planning Commission*, 138 Conn. 705, 709, 88 A.2d 538 (1952) (reviewing court "is powerless to replace the discretion of the commission with its own"). For that reason, "[i]t is well settled that a court, in reviewing the actions of [a zoning commission], is not permitted to substitute its judgment for that of the [commission] or to make factual determinations on its own." (Internal quotation marks omitted.) *R & R Pool & Patio, Inc.* v. *Zoning Board of Appeals*, 257 Conn. 456, 470, 778 A.2d 61 (2001).

On appeal, judicial review is confined to the question of whether the commission abused its discretion in finding that an applicant failed to demonstrate compliance with the requirements of applicable zoning regulations. When there is evidence in the record to

substantiate the commission's determination, the determination must stand. See *Rural Water Co.* v. *Zoning Board of Appeals*, 287 Conn. 282, 294, 947 A.2d 944 (2008) (agency's decision must be sustained if examination of record discloses evidence that supports any reason given).

The record in the present case contains substantial evidence on which the commission could have relied in finding that the school failed to demonstrate that the proposed use would not adversely affect neighboring residential properties due to nighttime noise emissions, in contravention of § 4.12 of the regulations. We cannot say that the commission abused its discretion in denying the application on that basis.

2

Adequate Buffers

We next address the mandate of Article XV, § 5.4, of the regulations that applicants provide all-season visual buffers between the proposed use and adjacent residential properties. Section 4.12 similarly requires a showing that the proposed use will not produce "the emission of noise, light . . . or other offensive emissions without adequate buffering or controls . . . ."

At the September 17, 2014 public hearing, Rizio told the commission that the abutting residential properties were "very well . . . buffered with heavily wooded property." As multiple neighboring property owners noted during the public comment portion of that hearing, however, that wooded buffer is temporary in nature.[24] Jai R. Singh, another abutting property owner,

[24] Jeffrey W. Strouse, whose property abuts the school's property, remarked, "[a]s autumn comes, the trees lose their leaves . . . . A buffer can only be as good as the leaves buffering the property. No leaves, no buffer. Guess what? The leaves [on these trees] are gone in the fall. . . . [T]here is no buffer there when the leaves fall . . . ." Joanne McEniry provided the commission with a photograph of her backyard, which borders the property. She explained that she did so to show the commission "[w]hat

also noted that "lights can be seen from a far distance. . . . [E]ven if your house is not bordering [the school], even if you live quite far away, you will see these lights every night."[25] Moreover, we already have recounted the testimony regarding the impact of noise emissions on neighboring property owners.[26]

On the basis of that testimonial and photographic evidence, the commission in its discretion reasonably could have concluded that the school's proposal lacked "all-season" buffers that would adequately contain noise and light emissions from neighboring residential properties, as required by §§ 4.12 and 5.4 of the regulations.

3

Special Problems Inherent in Proposed Use

Article XV contains a general standard regarding "special problems of . . . police protection inherent in

the buffer actually looks like for [six] months of the year. Which is pretty sparse. . . . Leaves actually do come off the trees in the fall."

[25] Jai R. Singh provided the commission with handouts that included photographs of a nearby high school football field illuminated at night. They included a photograph taken from a distance of approximately 700 feet, and another "about 1200 feet from the lights, which is basically [one quarter] of a mile." In those photographs, the lights are plainly visible. Lars Jorgenson, who also lives near the school, similarly remarked that "talking in these minute technicalities over [a footcandle] . . . really masks what [the proposed use] does to the neighbors of this property. And that is, if you look out the window, you are going to see those lights."

[26] In addition, multiple residents reminded the commission that, although the plaintiffs originally had a much larger parcel of land, they had made the tactical decision to sell a sizeable portion of it to developers, on which many homes are now located. As Joanne McEniry noted, the "school property is surrounded by our homes. Unfortunately, when the [diocese] decided to sell off a good chunk of their property to people who developed our homes, they did not have the foresight to envision these [proposed uses], their athletic program." Jeffrey W. Strouse, an abutting property owner whose family members had graduated from the school, stated: "I wish, I really wish, for [the school's] sake, that it would have been a different story for them. I wish that before the [diocese] had decided to sell off its land . . . [that] they would have first considered, how much space are we going to need one day? But for whatever reason, they sold more than they should.

the proposed use . . . ." Trumbull Zoning Regs., art. XV, § 4.12. "[T]he avoidance of non-residential traffic through residential streets" is another general standard set forth in § 4.12. Also relevant to this issue are the standards set forth in § 4.14 (1), which require the commission to find that the proposed use "shall be such that both pedestrian and vehicular traffic to and from and in the vicinity of the use will not be hazardous or inconvenient to, or detrimental to the character of the said residential district or conflict with the traffic characteristics of the neighborhood. . . . Access, parking . . . shall be designed so as to protect the residential character of surrounding residential neighborhoods or residential zones."

At the public hearing, multiple residential property owners raised concerns about the detrimental impact that moving the school's major sporting events from daytime to nighttime would have on their neighborhood. The commission heard testimony from many members of the public detailing the parking and traffic issues that frequently arise when major sporting events such as football games are held on the property.[27]

And what they are left with is a very limited space and a field that sits right on top of people's properties, with a buffer that's only good in the summer when these lights won't even be on anyway."

[27] As Michael Love, who also lives near the school, told the commission, "I can tell you right now, when there's a big [school] event, parking overflows into our neighborhood. People park there intentionally because there is only one exit to get out of [the school], so they can walk over to their car, they can go away much faster than people exiting the parking lots, which probably aren't big enough in the first place. Parking is really the result also of all of the traffic that is going to be there. More people are going to come to these games. It's going to increase traffic in our neighborhood. I can tell you right now, people zipping through our winding roads don't obey the speed limits and they don't obey the stop signs. It's terrible what they do to our neighborhoods."

In his initial presentation, Rizio acknowledged that one impetus for the school's proposal was to enable more people to attend sporting events on the property. Joe Dzurenda, a school employee, also confirmed that "a football game where we have an abundance [of attendees] . . . does create excessive traffic . . . ."

Related to those traffic and parking concerns is the problem of loitering and disruptive behavior within the residential neighborhood, which transpires on a regular basis when major sporting events are held on the property. Multiple neighbors shared their personal experience with youths loitering in the neighborhood following such events at the school.[28] Another neighboring property owner told the commission that those parking, traffic, and loitering problems all present safety issues.[29] During his rebuttal on behalf of the school, Rizio acknowledged that "loitering is a police issue . . . ."

[28] Helga Beloin, who stated that she lives across the street from the Shahs, shared with the commission her firsthand knowledge of "the activity that goes on at the end of the cul-de-sac" on her street, which abuts the school's property. She explained that "kids are kids, they get together at the end of the cul-de-sac, make a party. . . . [W]ith more nighttime games, it will promote more of this partying atmosphere. And you will have more kids hanging out at the corner or on the cul-de-sac. We've woken up to garbage, broken glass, empty beer cans, garbage in the cul-de-sac that, on occasion we have had to pick up; at various times, we have taken turns, the neighbors who have had to pick up. And we do it. I haven't called the police like other people have because it didn't happen so often that I felt like I needed to. But I'm afraid with the lights on a Friday night or Saturday night, [I] will. There's also a lot of traffic with the kids, you know, hanging out longer on the corner, with their blaring music. They will park there and will talk and they laugh and so forth and so on."

Vibhavary M. Shah told the commission that "so many kids [already] hang out on the cul-de-sac" during major sporting events that, on multiple occasions, she has been forced to call "the cops to get rid of those kids . . . ."

In his remarks, Jeffrey W. Strouse noted that he "met recently one of my neighbors who . . . is an older woman, and her house sits just near the field. She echoed a lot of the same things you heard tonight about the noise and the woods and the loitering. She finds herself . . . actually going out to clean up their cans the morning after. I can only imagine how much more time she will be spending cleaning out her beautiful woods after these nighttime games."

[29] As Karen Draper, a neighbor of the Shahs, stated, "I'm concerned about the proposal . . . . I'm concerned for the safety of my children. I have [three] children, [ages nine, seven, and three]. This will affect the enjoyment of my property, it will increase the amount of loitering at the end of [the street] . . . and will add a considerable amount of traffic. The traffic does

As our Supreme Court has explained, "before the zoning commission can determine whether the specially permitted use is compatible with the uses permitted as of right in the particular zoning district, it is required to judge whether any concerns, such as parking or traffic congestion, would adversely impact the surrounding neighborhood." *Barberino Realty & Development Corp.* v. *Planning & Zoning Commission*, supra, 222 Conn. 613. In light of the testimony elicited at the public hearing, the commission, in its discretion, reasonably could have concluded that the school had not established (1) that its proposed use adequately avoided nonresidential traffic through residential streets, as required by Article XV, § 4.12; (2) that nighttime pedestrian and vehicular traffic to and from and in the vicinity of the use "will not be hazardous or inconvenient to, or detrimental to the character" of the abutting residential neighborhood, as required by § 4.14; (3) that, with respect to access and parking, the design of the proposed use adequately protected the residential character of surrounding residential neighborhoods or residential zones, as required by § 4.14; and/or (4) that the proposed use would not exacerbate "special problems of . . . police protection inherent in the proposed use," as required by § 4.12.

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Quality of Life, Character of Neighborhood And Property Values

Article XV also contains several provisions related generally to the character of nearby residential neighborhoods and the quality of life therein. In setting forth standards as to the appropriateness of a proposed use on a given property, § 4.12 requires the commission to find, inter alia, that the proposed use "will not be detrimental to the orderly development of adjacent

not stop, nor do the students abide by the . . . stop signs and speed limits. This [proposal] places an unnecessary burden on my neighborhood . . . ."

properties" and will preserve "the character of the neighborhood . . . ." Section 4.13 similarly requires the commission, in acting on a special permit application, to consider whether the design of the proposed use will adversely "impact the character or quality of life on adjoining properties, in the neighborhood . . . ." Section 4.14 (1), in turn, requires a finding by the commission as to whether "[a]ccess, parking . . . lighting . . . and landscaping [are] designed so as to protect the residential character of surrounding residential neighborhoods . . . ."

Article XV also requires the commission to make findings with respect to the impact of the proposed use on neighboring property values. Pursuant to § 4.12, the commission must find that the proposed use "will not hinder or discourage the appropriate development and use of adjacent land and buildings or impair the value thereof . . . ." Section 4.12 further requires the commission to evaluate "the overall impact on neighborhood property values . . . ." Section 4.13 likewise provides that the design of the proposed use "shall not be detrimental to property values in the neighborhood . . . ." Last, § 4.14 (3) requires the commission to find that the proposed use "will not hinder or discourage the appropriate . . . use of adjacent land . . . or impair the value thereof."

We have already detailed numerous issues raised by neighboring property owners at the public hearing regarding the impact of noise and light emissions, inadequate buffering, traffic, parking, and special problems inherent in the school's proposed use stemming from the influx of pedestrian and vehicular traffic in their neighborhood during major sporting events at the school. That evidence all bears directly on the quality of life, character of neighborhood, and property value standards contained in Article XV.

In addition, the commission heard testimony specifically addressing the character of the abutting residential neighborhood and the quality of life of its residents.[30] Helga Beloin, who stated that she lives across the street from the Shahs, explained to commission members how the proposed use would adversely affect the quality of life for nearby residents. She recounted her firsthand experience with noise emissions, parking problems, loitering, and disruptive behavior in the neighborhood on days when major sporting events are held at the school. Although she tolerated such activity during the daytime, she explained why allowing that activity at night would harm her and other neighbors, stating that when the evening "rolls around, it's over. . . . [W]e're all getting ready for bed . . . it's quiet [and] we can do it . . . . We retired for the night, went to bed, started our new day, you know, refreshed from a good night's sleep. And now that's going to be impossible."

Adverse impact on property values was also a significant concern of abutting property owners.[31] During his

[30] As Lawrence Ganum, who also lives near the school, told commission members, his family "moved here for a reason, for a certain quality of life," and, after noting the problems of noise emissions and loitering in his neighborhood, stated that the proposed use would have "a massive impact on a very quiet, peaceful and comfortable neighborhood."

Karen Draper, a neighbor of the Shahs, testified that the proposed use "will affect the enjoyment of my property, it will increase the amount of loitering at the end of [her street], and will add a considerable amount of traffic." Jeffrey W. Strouse stated that he and his neighbors were "just trying to protect the value of our land and the quality of our lives." Alluding to the various conditions of approval proposed by the school, Robert Haymond, another resident, stated: "I'd just like to ask, why limit the days of the week? Why turn down the lights? Why agree to turn them off early?" Haymond then answered his own question: "[T]he reason is, because they affect the community."

[31] In his remarks, another resident who lives near the school, whom the record identifies only as S. Edelman, opined that the proposed use would cause "major housing depreciation . . . . [There are] about [six to seven] houses; they are exposed to [the school]. Those [six to seven] houses, they also have neighbors, they have houses across the street. You bring the price of one house down, exponentially, the whole neighborhood will go down. People, when they [consider purchasing a home] nowadays, they look at

rebuttal, Rizio stated that "there was no evidence at all put forth with regard to housing, depreciation of housing values." It nonetheless remained the burden of his client, as the applicant requesting a special permit, to demonstrate to the satisfaction of the commission that its application fully complied with the general standards contained in Article XV, including those concerning the impact on property values. *Loring* v. *Planning & Zoning Commission*, supra, 287 Conn. 778 (*Norcott*, *J.*, dissenting). During the public hearing, the school provided no evidence whatsoever on that issue, only Rizio's bald assertion that the proposed use "will have no impact on the neighborhood . . . ." Moreover, the commission heard ample testimony about the adverse impact that moving major sporting events at the school from daytime to nighttime would have on the adjacent residential area. In addition, several neighbors opined that the proposed use would detrimentally affect their property values, the character of their neighborhood, and their quality of life. The commission, as arbiter of credibility, was "entitled to credit the testimony and evidence adduced during the [public hearing] in arriving at its ultimate conclusion" as to compliance with the requirements of the regulations. *Children's School, Inc.* v. *Zoning Board of Appeals*, supra, 66 Conn. App. 630; see also *Hayes Family Ltd. Partnership* v. *Town Plan & Zoning Commission*, 115 Conn. App. 655, 662, 974 A.2d 61 (denial of special permit upheld when "evidence was presented that the plaintiffs' proposal would directly impact neighboring residential properties not only by

what's the house [values] on each of the lanes. They don't pay attention that this house has a flaw in terms of being exposed, they look at that one price and the whole neighborhood will come down." On a similar note, Jeffrey W. Strouse reminded the commission that a principal purpose of the regulations, memorialized in the preamble thereto, was "to preserve and protect" property values. Trumbull Zoning Regs., art. I, § 1. In his view, the school's application was likely to damage the value of neighboring residential properties.

way of increased noise and traffic, but also in that it would adversely affect their property values"), cert. denied, 293 Conn. 919, 979 A.2d 489 (2009). In exercising its discretion over whether the general standards of Article XV sufficiently were met, the commission could have concluded, on the record before it, that the school had not established that the proposed use would not adversely affect neighboring property values, the character of the adjacent neighborhood, or the quality of life of its residents.

C

Conclusion

Under the substantial evidence standard that governs challenges to commission determinations, the commission's decision "must be sustained if an examination of the record discloses evidence that supports any one of the reasons given." (Internal quotation marks omitted.) *Rural Water Co.* v. *Zoning Board of Appeals*, supra, 287 Conn. 294. "The question is not whether [a reviewing court] would have reached the same conclusion but whether the record before the [commission] supports the decision reached." *Burnham* v. *Planning & Zoning Commission*, 189 Conn. 261, 265, 455 A.2d 339 (1983). A zoning commission has discretion to determine whether a proposal satisfies the requirements for a special permit; *Irwin* v. *Planning & Zoning Commission*, supra, 244 Conn. 628; and judicial review is confined to the question of whether the commission abused its discretion in finding that an applicant failed to demonstrate compliance therewith. In the present case, testimonial and documentary evidence exists in the record on which the commission could have found that the school did not demonstrate compliance with the general standards of Article XV in multiple respects.

The Superior Court, therefore, improperly sustained the plaintiffs' appeal in part.

The judgment is reversed and the case is remanded with direction to dismiss the plaintiffs' appeal.

In this opinion the other judges concurred.