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CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

SUN VAL, LLC *v.* COMMISSIONER OF TRANSPORTATION (SC 20045)

Palmer, McDonald, Robinson, Mullins and Kahn, Js.*

Syllabus

The plaintiff landowner, S Co., sought to recover damages from the defendant, the Commissioner of Transportation, alleging that he had negligently authorized a subcontractor on a highway reconstruction project, H Co., to deposit certain materials on S Co.'s property without its consent. Specifically, S Co. sought to recover for remediation costs and for lost profits in connection with the termination of a contract for the sale of the property that allegedly resulted from certain unfavorable environmental assessments. In response, the commissioner claimed that S Co. had failed to mitigate its damages by declining an offer from H Co. to remove thirty truckloads of material that it had deposited on S Co.'s property in exchange for a release from liability. At trial, S Co.'s real estate agent, K, testified about the impact of environmental conditions on real estate contracts generally but stated on cross-examination that he could not say the environmental condition of the property was the only reason for the termination of the contract. In addition, a representative of S Co., J, testified that there was no guarantee that the proposed sale would be completed even if the property was cleaned. Each party also introduced expert testimony regarding the appropriate manner in which to remove the material deposited by H Co. S Co.'s expert witness, C, produced a report in support of his testimony, in which he opined that the material on the property was lightly polluted and could not qualify as clean fill under applicable solid waste regulations (§ 22a-209-

* This case originally was scheduled to be argued before a panel of this court consisting of Justices Palmer, McDonald, Robinson, Mullins and Kahn. Although Justice Robinson was not present when the case was argued before the court, he has read the briefs and appendices, and listened to a recording of the oral argument prior to participating in this decision. The listing of justices reflects their seniority status on this court as of the date of oral argument.

1 et seq.). The commissioner's expert witness, M, produced a report in support of his testimony, in which he opined that much of the material appeared consistent with the definition of clean fill under solid waste regulations. The trial court determined that S Co. had proven negligence and was entitled to damages for removal of the material. The trial court specifically concluded that thirty-two truckloads of material must be removed but declined to adopt either C's or M's proposed plan for removal in full. Instead, the trial court concluded that 70 percent of the material could be disposed of at a low level facility, 20 percent must be disposed of at a high level facility, and the remaining 10 percent could be recycled. The court then reconciled certain disparities between the costs associated with these facilities and settled on an amount for remediation costs. The court rejected S Co.'s claim for lost profits and reduced the amount attributed to remediation costs on the basis of S Co.'s failure to mitigate damages and its comparative negligence. The trial court rendered judgment for S Co., and S Co. appealed. *Held*:

1. S Co. could not prevail on its claim that the trial court improperly applied regulations (§ 22a-133k-1 et seq.) governing remediation instead of the solid waste regulations and, as a result, awarded insufficient damages: this court, upon reviewing the record, concluded that there was no indication that the trial court relied on the remediation regulations rather than regulations governing the disposal of solid waste, and the trial court's factual findings regarding the percentages of waste that could be allotted to the different disposal facilities and the costs associated with removal were not clearly erroneous, as those findings were supported by, inter alia, photographs of the property, testimony regarding the amount and nature of the material deposited by H Co., and testimony from the parties' expert witnesses; moreover, in light of this court's conclusion that the trial court's factual findings were supported by sufficient evidence, S Co.'s related claim that the trial court improperly failed to adopt C's proposed plan for the removal of the material also failed.
2. The trial court's finding that S Co. failed to mitigate its damages by declining to accept H Co.'s offer to remove thirty truckloads of the material it had deposited on the property was not clearly erroneous; the trial court's finding that S Co. had failed to take reasonable action to lessen its damages when it declined to accept H Co.'s offer was supported by sufficient evidence, including C's testimony and evidence presented by the parties regarding the cost of removal, and the damages that could have been avoided could be measured with reasonable certainty.
3. There was sufficient evidence in the record to support the trial court's finding that S Co. had failed to meet its burden of establishing that the commissioner's negligence was the proximate cause of lost profits allegedly resulting from the termination of the contract to sell the property, and, accordingly, the trial court correctly concluded that S Co.

was not entitled to damages for lost profits; in light of the testimony of K and J, the existence of other unfulfilled contingencies in the proposal to purchase the property that were unrelated to the material deposited by H Co., the existence of S Co.'s prior failed attempts to sell the property, and photographs showing the property in a poor cosmetic condition, this court could not conclude that the evidence established that the material deposited by H Co. was the proximate cause of the termination of the contract.

Argued May 3—officially released October 9, 2018

Procedural History

Action to recover damages sustained as a result of, inter alia, the defendant's alleged negligence, brought to the Superior Court in the judicial district of Litchfield and tried to the court, *J. Moore*, *J.*, judgment for the plaintiff, from which the plaintiff appealed. *Affirmed.*

Neal L. Moskow, with whom were *Stephanie Dellolio* and, on the brief, *Deborah M. Garskof*, for the appellant (plaintiff).

Christine Jean-Louis, assistant attorney general, with whom were *Charles Walsh*, assistant attorney general, and, on the brief, *Eileen Meskill*, assistant attorney general, and *George Jepsen*, attorney general, for the appellee (defendant).

Opinion

MULLINS, J. The plaintiff, Sun Val, LLC, appeals[1] from the judgment of the trial court rendered in its favor against the defendant, the Commissioner of Transportation. On appeal, the plaintiff contends that the trial court improperly (1) applied the wrong environmental regulations to determine whether materials left on the plaintiff's property were contaminated and, as a result, failed to award appropriate damages for removal of those contaminated materials, (2) determined that the

[1] The plaintiff appealed from the judgment of the trial court to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

plaintiff failed to mitigate its damages, and (3) rejected the plaintiff's claim for lost profits. We disagree and, accordingly, affirm the judgment of the trial court.

The record reveals the following facts, as found by the trial court, and procedural history relevant to our resolution of this appeal. The plaintiff was formed in August, 2002, for the limited purpose of purchasing and managing a parcel of real property (property) located in the town of New Milford. The property, consisting of slightly less than eleven and one-half acres, had been used for a variety of purposes over the years, including as a farm, a gravel quarry, and an all-terrain vehicle course. In September, 2002, the plaintiff purchased the property with the intent to regrade it and resell it for possible development.

In the summer of 2006, Hallberg Contracting Corporation (Hallberg) was hired as a subcontractor for a highway reconstruction project undertaken by the defendant. Shortly thereafter, and with the defendant's consent, Hallberg entered into an oral contract with Dominick Peburn, an individual that Hallberg believed had authority to act on behalf of the plaintiff, to use the property for "crushing and stockpiling" construction materials related to the project. Without verifying Peburn's authority, Hallberg proceeded to haul approximately thirty-two truckloads of "mostly soil and clay-like material, including only a minimal amount of milled asphalt and concrete," and deposited it in an area occupying one-quarter acre in the northwest corner of the property.[2] In September, 2006, the plaintiff's real estate agent visited the property and informed the plaintiff's members that material was being deposited on the prop-

[2] At trial, the plaintiff claimed that Hallberg dumped approximately 225 truckloads of material over the entire property; on the basis of the evidence presented, however, the trial court found that Hallberg deposited thirty-two truckloads and that it was deposited in a "small [one-quarter] acre" portion of the property. The plaintiff does not challenge this finding on appeal.

erty. Thereafter, Peter Joseph and Jeffrey Serkes visited the property on behalf of the plaintiff to examine the materials deposited by Hallberg.

While pursuing its legal remedies for the unauthorized dumping on its property, in December, 2006, the plaintiff entered into a contract to sell the property to BTP New Milford, LLC (Bow Tie) for $2,025,000. The contract of sale included contingency provisions relating to, inter alia, clear title, compliance with applicable laws, regulations, and ordinances, and the payment of taxes. Under the contract, Bow Tie was obligated to perform standard due diligence on the property, including engineering studies, a market analysis, a Phase I environmental assessment, and to investigate the applicable zoning regulations. Phase I environmental assessments are limited, and include the following three components: (1) identify areas of concern or previously recognized environmental conditions; (2) review historical record research back to 1940 or the earliest known development; and (3) conduct visual site visits and interviews. A Phase I environmental assessment does not involve sampling or testing of soil or material on the property.

The contract also contained additional contingencies as a result of the recent dumping on the property. Specifically, the plaintiff agreed to hire an environmental consultant to perform both a Phase I and Phase II environmental assessment of the property. A Phase II environmental assessment is field oriented and involves taking test samples from areas of concern previously identified in the Phase I environmental assessment. Samples may be taken by digging, drilling, or boring.

The contract provided that, in the event that the test results revealed evidence of contamination on the property, Bow Tie would have the option of terminating the contract if the cost to remediate the soil was greater

than $150,000. The contract, however, did not specify whether the assessments would be limited to only areas of new dumping. The plaintiff hired an engineering and environmental consulting firm to perform the Phase I and Phase II environmental assessments. Prior to this time, the plaintiff had not requested or seen the results of any Phase II environmental assessment on the property and, therefore, had not reviewed results of soil sampling on the property. The results of the Phase I environmental assessment were issued on January 31, 2007, and the results of the Phase II environmental assessment were issued on February 20, 2007. After receipt of these assessments, the contract for the sale of the property to Bow Tie terminated.

As early as November, 2006, Hallberg offered to remove thirty truckloads of material from the plaintiff's property. Then, in January, 2007, Hallberg again presented the plaintiff with a written offer to restore the property to its original condition.[3] Hallberg offered, inter alia, to remove approximately thirty truckloads of material, the amount that Hallberg admitted to depositing on the property. In return, Hallberg demanded a release from all liability of itself, its agents, and its employees associated with dumping the materials on the plaintiff's property. The plaintiff rejected Hallberg's offer.

Subsequently, the plaintiff commenced the present action,[4] alleging, inter alia, that the defendant negli-

[3] Hallberg's written offer to settle the plaintiff's claims relating to the unauthorized dumping on the property contained three options: (1) setting up a processing operation on site to prepare the material for resale; (2) a monetary offer to settle for $2500; and (3) allowing Hallberg to remove approximately thirty truckloads of dumped material from the plaintiff's property. In its special defense alleging failure to mitigate damages, the defendant raised a claim related only to the plaintiff's failure to allow Hallberg to remove the material. Accordingly, that option alone is relevant in the present case.

[4] The plaintiff commenced the present action after obtaining the requisite authorization from the Office of the Claims Commissioner pursuant to General Statutes § 4-160.

gently authorized Hallberg to deposit construction materials on the property. The plaintiff sought damages in the amount of $483,864 for remediation of the property and $1,146,500 for lost profits. In response, the defendant pleaded, inter alia, failure to mitigate damages as a special defense. The case was tried before the court.

At trial, both parties presented numerous exhibits, and the court heard testimony from multiple witnesses pertaining to the amount, quality, and location of material deposited by Hallberg. Indeed, each party introduced testimony from environmental professionals[5] who testified about the appropriate manner in which to remove the dumped material from the plaintiff's property.

The plaintiff introduced testimony from Brian Conte, a licensed environmental consultant who primarily performs field work as part of environmental due diligence for real estate transactions. Conte submitted a plan for removing the Hallberg material from the property, which suggested that 60 percent of the material be sent to a high level, more expensive, facility; 30 percent of the material be sent to a low level, less expensive, facility; and 10 percent of the material be sent to a recycling facility. Under this plan, the cost of removing thirty-two truckloads would be $105,122.[6] Conte also produced a report in which he opined that the material on the property was "lightly polluted" and that it "would

[5] Brian Conte, the plaintiff's witness, testified as an expert in the fields of hydrogeology and environmental consulting. Douglas Martin, the defendant's witness, testified as an expert in the field of environmental site assessment remediation.

[6] Conte also produced a second scenario, which involved the removal of 225 truckloads of material spread over the entire property, at a cost of $483,864. Because the trial court ultimately found that Hallberg was responsible for depositing only thirty-two truckloads, this scenario was rejected by the trial court. See footnote 2 of this opinion.

not qualify as clean fill under [applicable] solid waste regulations."

The defendant introduced testimony from Douglas Martin, a licensed environmental professional with more than thirty years of professional environmental experience and expertise in the area of environmental site assessments. Martin testified and submitted a plan for removing the Hallberg material from the property. In his plan, he opined that 90 percent of the material should be sent to a low level, less expensive, facility, and that 10 percent of the material should be sent to a recycling facility at a cost of $60,492. In support of this plan, Martin produced a report stating that "much of the subject material appears to be consistent with the definition of [clean fill] under the [solid waste] regulations . . . ."

In addition to testimony from these experts regarding the quality of the material deposited by Hallberg, photographs of the property were presented, which also provided insight into the quality of material attributable to Hallberg. These photographs, which were taken by Hallberg's risk manager, Brian Festa, revealed that the northwest corner of the property contained regularly sized piles of earth and clay, which were not present throughout the rest of the property. Alan Antonelli, a Hallberg employee, provided testimony that Hallberg only deposited soil and clay-like material on the property.

After considering all of the testimonial and documentary evidence presented at trial, the trial court found that the Hallberg material must be removed, but did not adopt either Conte's or Martin's proposed plan in full. Instead, the court explained that Conte's plan was partly based on flawed assumptions and extrapolations and that Martin's plan was "too conservative." The court also credited the photographs showing the material

dumped on the northwest corner of the property to largely consist of soil or clay and Antonelli's corroborating testimony, thus suggesting that a larger portion of the material could be sent to the low level facility.

The trial court agreed with both experts that thirty-two truckloads would comprise 640 tons. The trial court then compared the costs for disposal in each of the expert's reports. The trial court found that Conte's costs for disposal were lower because the report was five years older than the report from Martin. Therefore, the trial court used the higher figures from Martin's report. Because Martin did not opine that any materials should go to the high level facility, he did not include a cost for removal to that facility. To arrive at a disposal cost for the high level facility, the trial court added 10 percent to the cost used by Conte for the high level facility. Accordingly, the court calculated the disposal costs using a cost of $29 per ton for the recycling facility, $65 per ton for the low level facility, and $144.65 per ton for the high level facility. Using these rates, the court further found that "70 percent of the material, 448 tons, could legally be disposed of at a low level [facility] for a cost of $29,120 . . . 20 percent of the material, 128 tons, needs to be legally . . . disposed of at a higher level [facility] at a cost of $18,515.20 . . . and 10 percent, 64 tons, could be recycled for a cost of $1856 . . . . The court also agrees with [Martin] as to ancillary costs, such as survey at $1625, clearing and grubbing at $2715, erosion control measures at $801.80, excavation and direct load out at $3949.24, and engineering and consulting fees at $11,140. Therefore, the court concludes that the plaintiff has proven that the defendant caused the plaintiff to sustain $69,722.24 in remediation costs."

At the conclusion of trial, the court made the following factual findings: (1) "the plaintiff has proven the defendant negligent in its authorization of Hallberg to

use the property for the disposal of materials from the project"; (2) "the amount of damages proven by the plaintiff is $69,722.24"; and (3) "the defendant has proven that the plaintiff failed to mitigate its damages in the amount of $34,598.41 and that, as a result, the $69,722.24 should be reduced by $34,598.41." The trial court then reduced the amount remaining by an additional 15 percent on the basis of the plaintiff's comparative negligence and, accordingly, awarded $29,855.26 in damages. This appeal followed. Additional relevant facts will be set forth as necessary.

I

A

The plaintiff first claims that the trial court improperly applied regulatory provisions governing remediation; see Regs., Conn. State Agencies § 22a-133k-1 et seq. (remediation regulations); instead of regulatory provisions governing the disposal of solid waste; see Regs., Conn. State Agencies § 22a-209-1 et seq. (solid waste regulations); in determining the plaintiff's damages. The plaintiff further claims that the trial court failed to award sufficient damages as a result of the failure to apply the solid waste regulations. The defendant responds by asserting that the trial court applied the proper regulations. Specifically, the defendant claims that the trial court relied on the report and opinion of Conte, who utilized the solid waste regulations. We agree with the defendant.

"The scope of our appellate review depends upon the proper characterization of the rulings made by the trial court. To the extent that the trial court has made findings of fact, our review is limited to deciding whether such findings were clearly erroneous. When, however, the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find sup-

port in the facts that appear in the record." (Internal quotation marks omitted.) *Stratford* v. *Jacobelli*, 317 Conn. 863, 869, 120 A.3d 500 (2015).

On appeal, the plaintiff claims that the trial court applied the wrong regulations and then posits that this claim presents an issue of law over which we exercise plenary review. For the reasons which follow, we disagree that the plaintiff's claim regarding the trial court's award of damages presents a question of law.

A review of the trial court's memorandum of decision reveals no indication that the court relied on the remediation regulations as opposed to the solid waste regulations. Instead, the record reveals that *both* parties' experts indicated at some point during their testimonies that the remediation regulations did not apply to removal of the Hallberg material from the property. Specifically, Conte, the plaintiff's expert, testified that the remediation regulations are "a good reference, but [they have] no bearing" if there is no remediation taking place on the soil. He further testified that the remediation regulations "were actually set up as a means to determine when you're essentially done with your remediation. . . . [T]here's not remediation here, but it's the only standards we have in the state to compare to." Likewise, the defendant's expert, Martin, when asked on direct examination if the remediation regulations applied to the property, responded "[n]ot as far as I'm aware." He further opined that "[r]emediation, typically, you need [a] better definition of what it is you're removing and . . . the basis for the limits of what you're removing. And, typically, you know, in Connecticut, if you're performing a remediation, then you would . . . perform sampling and postremediation sampling, postexcavation sampling in this case, with the idea that you're trying to meet some regulatory end point."

Consistent with the testimony of the experts, the trial court's ninety page memorandum of decision is devoid

of any findings regarding specific contamination levels or application of the remediation regulations. Rather, the memorandum of decision reveals that the trial court made a factual determination as to the percentages of the waste that could be allotted to the different disposal facilities on the basis of qualitative information provided by the parties' experts. This analysis by the trial court is consistent with the definitions supplied in the solid waste regulations. Furthermore, during closing arguments, the trial court pointed out that removal is not the only option for polluted soil "under [the] definition of 'clean fill' [in the solid waste regulations]." The court made no reference to the remediation regulations. We conclude that the trial court, after weighing the credibility of each expert and on the basis of the information they provided, made a factual determination regarding the appropriate plan for removal. Accordingly, we reject the plaintiff's claim that the issue before us is one of law. Instead, we understand the plaintiff's claim to be that the findings of the trial court regarding the percentages of the waste that could be allotted to the different disposal facilities and the costs associated with these removal methods were clearly erroneous.

We now turn to that question. In doing so, we apply the clearly erroneous standard of review. "Although we give great deference to the findings of the trial court because of its function to weigh and interpret the evidence before it and to pass upon the credibility of witnesses . . . we will not uphold a factual determination if we are left with the definite and firm conviction that a mistake has been made." (Internal quotation marks omitted.) *Wyszomierski* v. *Siracusa*, 290 Conn. 225, 237–38, 963 A.2d 943 (2009).

Throughout the course of the trial, the court heard significant testimony regarding the amount and nature of the material dumped on the plaintiff's property by Hallberg and the appropriate manner in which to remove that

material. To begin with, the trial court heard testimony from a Hallberg employee, Antonelli, who described the material brought to the property by Hallberg as "fill material," essentially "a fill of dirt material" with "maybe a little clay in it." This description of the Hallberg material was consistent with photographs that were presented to the court, which ultimately described the deposits on the northwest corner of the property as "regularly-sized piles containing earth and clay-like material . . . ." Antonelli also testified that discarded material, such as asphalt, bricks, catch basins, and drainage pipes, depicted in additional photographs of the remainder of the property, were not brought there by Hallberg. Antonelli explained that, at the time of the dumping on the property, the highway reconstruction project was not in a phase where materials such as bricks, catch basins, and drainage pipes would have been removed from the project site.

Next, Conte testified over the course of three days regarding his suggested plan for removal of the Hallberg material. Specifically, he described how he relied on data contained in the two environmental assessments that he had performed for the plaintiff in 2006 in connection with the pending sale of the property to Bow Tie. Conte explained that the assessments, which involved taking samples from various soil piles, "indicated [that] petroleum and semi volatile organics were present in [the] soil piles throughout the site," the source of which was "likely coal ash or bituminous asphalt," and that it was his professional opinion that it was from site wide fill material. He further testified that his proposed removal plan was "based on whether or not the soil [was] polluted . . . and whether or not the soil piles were present there . . . [b]etween 2005 and 2006" using comparisons of aerial photographs of the property. Notably, however, Conte also testified that he determined the amount of material that he allotted for

removal to each facility based on "[v]isual observations and estimation[s]."

Martin opined on the soundness of the removal plan proposed by Conte, stating that he didn't believe there was "a direct correlation between the [plaintiff's proposed removal] and the [environmental] conditions on the property." In support of this statement, he pointed to a lack of "quality data relating to either [removal] scenario" presented by Conte. Martin further testified that "there [were] assumptions made by [Conte] as to the quality [of the material], but there was no basis for [those assumptions]." Specifically, Martin identified the quantity of debris in the material and the level of contamination as assumptions Conte made without a basis of support. Martin asserted that, as a result, the material "was not characterized" for removal on the basis of any "real data . . . ." He further testified that the failure to properly characterize the material impacted the assumptions made that ultimately drove disposal costs. Martin's written report also concluded that "much of the subject material . . . if disposed, could conceivably be shipped to any number of closer, less-expensive facilities [than those Conte had proposed in his plan].

Martin then testified about how he relied on the information gathered by Conte, as well as his own visual inspection of the perimeter of the property, to create his removal plan. He stated that it was a "fairly conservative" estimate on the basis that he did not have access to site specific information. During cross-examination, however, Martin conceded that, because he had never been on the property or performed any independent testing of his own, he could not contradict Conte's findings regarding the contamination of the material.

The trial court's memorandum of decision reveals that the credibility of the witnesses, in particular the experts, was a significant consideration in its determi-

nation. "[I]n a case tried before a court, the trial judge is the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony. . . . On appeal, we do not retry the facts or pass on the credibility of witnesses." (Internal quotation marks omitted.) *Bristol* v. *Tilcon Minerals, Inc.*, 284 Conn. 55, 65, 931 A.2d 237 (2007).

Furthermore, "[i]t is the quintessential function of the fact finder to reject or accept certain evidence, and to believe or disbelieve any expert testimony. . . . The trier may accept or reject, in whole or in part, the testimony of an expert offered by one party or the other. . . . The trier [of fact] may not, however, arbitrarily disregard, disbelieve or reject an expert's testimony in the first instance. . . . There are times . . . that the [fact finder], despite his superior vantage point, has erred in his assessment of the testimony. . . . Where the trial court rejects the testimony of a plaintiff's expert, there must be some basis in the record to support the conclusion that the evidence of the [expert witness] is unworthy of belief. . . . [W]here the factual basis of an opinion is challenged the question before the court is whether the uncertainties in the essential facts on which the opinion is predicated are such as to make an opinion based on them without substantial value." (Citations omitted; internal quotation marks omitted.) *Wyszomierski* v. *Siracusa*, supra, 290 Conn. 243–44.

The trial court noted that Conte's opinions "were only as good as the facts on which they were based, and many of these facts do not square with the facts found by the court." The trial court found fault with many of the assumptions made by Conte that were used as a basis for the plaintiff's removal plan and cost estimates, including the following: the samples analyzed for the Phase II environmental assessment were taken from the entire property, not just from the small corner

where the trial court found that Hallberg had limited its deposits; the samples came from areas that had recently been levelled by a tractor, making it impossible to know what soil was attributable to Hallberg; Conte assumed that any contaminants in his samples came from the Hallberg material despite the mixing of the Hallberg material with native soil and despite knowing that likely there were contaminants on the property attributable to sources other than Hallberg, given the history and lack of soil testing. Furthermore, the trial court heard evidence that Conte's findings were qualified in the report as "preliminary in nature, and [that they] should not be considered a full delineation of the nature, [or] extent of contamination at the [property]." Ultimately, the trial court considered "the [plaintiff's] evidence in regard to the quality and volume of material brought by Hallberg . . . circumstantial or speculative" because "there were no eyewitnesses to Hallberg's dumping."

As it noted in its memorandum of decision, however, the trial court "found Hallberg's employees to be credible in regard to the amounts of material brought to the property, where that material was placed on the property, and the dates on which material was brought there." In particular, Antonelli's description of the Hallberg material as "a fill of dirt" with "maybe a little clay" was consistent with the photographs of the northwest corner of the property. Furthermore, material of this nature would be largely disposable at a low level facility.[7]

[7] The plaintiff's expert, Conte, testified as follows on cross-examination by the defendant's counsel:

"Q. What type of material would [the high level facility] accept?

"A. . . . [S]oil with bulky waste that's less than two inches.

"Q. And . . . what does [the low level facility] take?

"A. [The low level facility] would take lightly polluted soil that doesn't have . . . bulky materials in it—anything but soil—and actually use it for covering of a landfill . . . ."

Significantly, the trial court concluded in its memorandum of decision "that the plaintiff has seriously damaged its own credibility on the issue of damages by means of inconsistent allegations and claims that the plaintiff has made against other entities . . . ." Indeed, the court noted that the plaintiff "has attempted, unfairly, to shape the presentation of the facts, and the facts themselves to fit the targets in each individual case.[8] . . . These strategies by [the plaintiff], in the court's eyes, create a huge credibility gap, especially in regard to the proof of damages in this case." (Footnote added.) After a careful review of the record, we conclude that the trial court's factual findings regarding the percentages of the waste that could be allotted to the different disposal facilities, and the costs associated with these removal methods, are supported by evidence in the record and are, therefore, not clearly erroneous.

B

The plaintiff also appears to make a related claim that the trial court improperly failed to adopt Conte's proposed removal plan and, as a result, awarded insufficient damages. The defendant responds by repeating its claim that the award was sufficient because the trial court's measure of damages for removal and disposal of the material was consistent with the solid waste regulations.

We set forth the appropriate standard of review. We recognize that "[t]he trial court has broad discretion in determining damages. . . . The determination of damages involves a question of fact that will not be overturned unless it is clearly erroneous." (Internal quotation marks omitted.) *Gianetti* v. *Norwalk Hospital*, 304 Conn. 754, 780, 43 A.3d 567 (2012).

[8] The trial court was referring to separate civil actions related to this matter that were brought by the plaintiff against various other defendants.

The plaintiff asserts that the trial court's award of damages is insufficient as a result of its determination that a higher percentage of the Hallberg material could go to a lower level, less expensive facility than what was proposed in Conte's removal plan. Notably, the plaintiff is not claiming on appeal any error with the actual costs associated with each facility that were used to calculate the award of damages. Rather, the plaintiff's claim rests on the assertion that a higher percentage of the material should go to a high level, more expensive facility, thus entitling the plaintiff to a larger award for damages. Because we already have concluded that the trial court's finding regarding the percentage of material that could go to each facility was supported by the evidence contained within the record, we also conclude that the trial court was not obligated to accept Conte's proposed removal plan, and its award of damages is, therefore, not clearly erroneous.

II

The plaintiff next claims that the trial court improperly concluded that the plaintiff failed to mitigate its damages by refusing to accept Hallberg's offer to remove material from the property. Specifically, the plaintiff asserts that the trial court improperly determined that the plaintiff had failed to mitigate its damages because (1) it was unreasonable for the trial court to expect it to allow Hallberg back onto the property that it had damaged, (2) the plaintiff had a good faith belief that Hallberg was responsible for depositing all of the discarded material that existed on the property, and (3) accepting Hallberg's offer would have precluded the plaintiff from exercising its substantive right to bring an action against those responsible for additional damages.

The defendant responds by asserting that acceptance of Hallberg's offer, along with the drafting of a narrow

release, would not infringe upon the plaintiff's right to bring an action against either Hallberg or the defendant for additional damages. The defendant further contends that the plaintiff could not have refused the offer on the basis of its belief that Hallberg was responsible for all of the material discarded on the property because the evidence at trial revealed that the plaintiff was aware of other dumping by third parties, both before and after Hallberg brought its materials to the property. We agree with the defendant.

We begin by setting forth the standard of review and the principles of law governing the plaintiff's claim. "We have often said in the contracts and torts contexts that the party receiving a damage award has a duty to make reasonable efforts to mitigate damages. . . . What constitutes a reasonable effort under the circumstances of a particular case is a question of fact for the trier." (Internal quotation marks omitted.) *Murtha* v. *Hartford*, 303 Conn. 1, 17 n.5, 35 A.3d 177 (2011). "Questions of fact are subject to the clearly erroneous standard of review." (Internal quotation marks omitted.) Id., 12.

"[T]he burden of proving that the injured party could have avoided some or all of his or her damages universally rests on the party accused of the tortious act." (Internal quotation marks omitted.) *Preston* v. *Keith*, 217 Conn. 12, 21, 584 A.2d 439 (1991). "To claim successfully that the plaintiff failed to mitigate damages, the defendant must show that the injured party failed to take reasonable action to lessen the damages; that the damages were in fact enhanced by such failure; and that the damages which could have been avoided can be measured with reasonable certainty." (Internal quotation marks omitted.) Id., 22. Furthermore, "[t]he duty to mitigate damages does not require a party to sacrifice a substantial right of his own in order to minimize a loss." *Camp* v. *Cohn*, 151 Conn. 623, 627, 201 A.2d 187 (1964).

The following additional facts are relevant to this claim. At trial, the defendant introduced evidence that, in January, 2007, Hallberg made a written offer to remove approximately thirty truckloads of material from the property in exchange for a written release from liability of Hallberg, its agents, and its employees. In its memorandum of decision, the trial court found that "the plaintiff could have eliminated virtually all of the damages arising from Hallberg's dumping from the property if it had accepted this offer." The trial court further concluded that "Hallberg would have borne the expense and exposure of disposing properly of this material, whatever it was made of, and the plaintiff still could have reserved the right, by drafting the Hallberg release narrowly, to [bring an action against the defendant] for whatever consequential damages may have ensued by the later release or escape of contaminants." We agree with the trial court.

In fact, the trial court heard testimony from Conte supporting the position that the plaintiff could have mitigated its damages with regards to the thirty-two truckloads of material deposited by Hallberg.[9] Conte testified that some of the samples collected from the property showed "no clear change between what was native and what was fill," indicating that the Hallberg material continued to mix with soil "native" to the property. Thus, the court found that accepting the Hallberg

[9] The plaintiff's expert, Conte, testified as follows on cross-examination by the defendant's counsel:

"Q. If Hallberg had removed the [thirty-two] truckloads of material that [it] deposited on the property back in 2006 or 2007, would there be a need for any of these costs . . . ?

"A. That removal would address [the removal of the thirty-two truckloads] but would not address the other soil piles well above what the [thirty-two] truckloads were.

"Q. So is your answer that, no, it wouldn't be necessary?

"A. So [the thirty-two truckloads] would be taken care of. In other words the [thirty-two] truckloads would be removed . . . ."

offer at the time it was presented would have "either completely prevented or at least substantially diminished" any potential for concomitant contamination.

The trial court also relied on evidence introduced by the parties regarding costs for removal. At trial, Conte supplied the court with cost estimates to transport and dispose of the material at each of the three disposal facilities. Martin provided cost estimates for disposal at the low level and recycling facilities only. As noted previously in this opinion, the trial court used the plaintiff's cost estimate when calculating the cost to dispose of the material at the high level facility, but added 10 percent to account for an increase in cost over time because the plaintiff's figures were from 2010, whereas the defendant's figures were from 2015. The trial court used the defendant's cost estimates, which were higher than the plaintiff's estimates, when calculating the disposal cost at the low level and recycling facilities because it recognized that those figures were more recent and, therefore, more accurately represented the costs at the time of trial. Using these figures, the court calculated the total expense to dispose of thirty-two truckloads of material under its plan allotting 70 percent to a low level facility, 20 percent to a high level facility, and 10 percent to recycling. In order to arrive at the amount of damages due to the plaintiff's failure to mitigate, the court divided thirty (truckloads) by thirty-two (truckloads), then multiplied that quotient with the total damages it had awarded to the plaintiff for removal, excavation, and load out. Under this approach, the trial court found "that the plaintiff failed to mitigate its damages in the amount of $50,100.41." This was then offset by $15,502, the amount the plaintiff received from settling a separate action against Hallberg, so that the total amount attributable to the failure to mitigate was $34,598.41.[10]

[10] At oral argument before this court, the plaintiff claimed that, rather than accept Hallberg's offer, it chose to mitigate its damages by marketing

After a careful review of the record, we conclude that there was evidence to support the trial court's finding that the plaintiff failed to take reasonable action to lessen its damages, and that those damages were, in fact, enhanced by that failure; we further conclude that the damages that could have been avoided can be measured with reasonable certainty. Thus, we conclude that the trial court's finding that the plaintiff failed to mitigate its damages by refusing Hallberg's offer is supported by sufficient evidence in the record and is, therefore, not clearly erroneous.

III

The plaintiff finally claims that the trial court improperly rejected its claim for lost profits. Specifically, the plaintiff contends that the defendant's negligence was a proximate cause of the termination of the sale to Bow Tie, resulting in a loss of profits in the amount of $1,146,500. The defendant responds by arguing that it cannot be held responsible for profits lost as a result of the cancelation of the sale to Bow Tie because its negligence can be attributed only to a small portion of the material discarded on the property. We agree with the defendant.

We begin by setting forth the appropriate standard of review. "[T]he trial court has broad discretion in determining damages. . . . The determination of damages involves a question of fact that will not be overturned unless it is clearly erroneous." (Citations omitted; internal quotation marks omitted.) *Beverly*

the property for sale "as is," thereby transferring the cost of cleaning up the property to a subsequent owner. A review of the record indicates that the plaintiff did not make this argument in its brief. Because this argument was presented for the first time at oral argument, we decline to consider it. See, e.g., *Grimm* v. *Grimm*, 276 Conn. 377, 393, 886 A.2d 391 (2005) ("[i]t is well settled that claims on appeal must be adequately briefed, and cannot be raised for the first time at oral argument before the reviewing court"), cert. denied, 547 U.S. 1148, 126 S. Ct. 2296, 164 L. Ed. 2d 815 (2006).

Hills Concepts, Inc. v. *Schatz & Schatz, Ribicoff & Kotkin*, 247 Conn. 48, 68, 717 A.2d 724 (1998). "In deciding whether damages properly have been awarded, however, we are guided by the well established principle that such damages must be proved with reasonable certainty. . . . Although we recognize that damages for lost profits may be difficult to prove with exactitude . . . such damages are recoverable only to the extent that the evidence affords a sufficient basis for estimating their amount with reasonable certainty. . . . [T]he plaintiff cannot recover for the mere possibility of making a profit." (Citations omitted; emphasis omitted; internal quotation marks omitted.) Id., 69–70. "In order to recover lost profits, therefore, the plaintiff must present sufficiently accurate and complete evidence for the trier of fact to be able to estimate those profits with reasonable certainty." Id., 70.

Further, "[t]he test of proximate cause is whether the defendant's conduct is a substantial factor in bringing about the plaintiff's injuries. . . . The existence of the proximate cause of an injury is determined by looking from the injury to the negligent act complained of for the necessary causal connection. . . . This causal connection must be based upon more than conjecture and surmise." (Internal quotation marks omitted.) *Ugrin* v. *Cheshire*, 307 Conn. 364, 374–75, 54 A.3d 532 (2012).

In support of its claim on appeal, the plaintiff relies on testimony from the plaintiff's real estate broker, Harold Kurfehs. Specifically, the plaintiff asserts that Kurfehs' testimony established that the Hallberg material was a proximate cause of the cancelation of the sale to Bow Tie. We disagree.

At trial, Kurfehs offered the following testimony on direct examination by the defendant's counsel:

"Q. But you mentioned there's a slew of things that people would consider so—

"A. There's no question of that.

"Q.—environmental is one of them but . . . there's other—

"A. The problem though is that there are many, many different things a person has to consider when they're buying a piece of land to build their building. You cannot tell sometimes which are the most important things in their mind, and they're not going to verbalize that sort of thing. But I know from experience that environmental is way up there.

"Q. But, as I was saying, it could be one of some significant factors—

"A. Oh, yeah.

"Q.—but it's not the only—

"A. No question.

"Q.—factor.

"A. Not the only factor but a very significant one."

The defendant responds to this argument by highlighting the following testimony from Kurfehs on direct examination:

"Q. Have you ever encountered properties where you thought [you] would sell but didn't sell?

"A. Oh, many times, many times.

"Q. Can you provide an example for the court?

"A. Being in the business for [twenty-nine] years, it's hard to even think. . . . [Y]ou probably have more deals that don't close than do. It's the nature of the business."

The record indicates that the trial court also heard the following testimony from Kurfehs on direct examination:

"Q. Returning to the . . . Bow Tie deal, do you know exactly why the deal fell through?

"A. As I said before, in a lot of cases, a buyer will just say I'm not going to go through with the deal, and they won't really tell you why they won't go through with the deal. Sometimes they give you an answer to satisfy you and say one thing and then really mean another thing. And I'm sure that environmental issue did loom a little high, but I couldn't say it was the only issue."

Despite the plaintiff's claim to the contrary, we cannot conclude that the foregoing testimony established that the Hallberg material was a proximate cause of the cancelation of the sale to Bow Tie. Specifically, a review of the record reveals that the plaintiff failed to meet its burden of demonstrating that the presence of the Hallberg material was the proximate cause of the plaintiff's lost profits and did not present sufficiently accurate and complete evidence for the trier of fact to be able to estimate those profits with reasonable certainty. Instead, although the trial court heard extensive testimony about the effects of the environmental condition of the property on the sale of the property to Bow Tie, that testimony was wholly speculative. For instance, Kurfehs spoke about the effect that environmental conditions *may* have on purchasers in real estate transactions *in general*. He was not directing his testimony to the Bow Tie contract in particular. In addition, Kurfehs conceded that, with regard to the Bow Tie contract specifically, he could not say that the environmental issue was the only reason why the sale was not completed. Rather, he speculated as to Bow Tie's reasons for cancelling the contract on the basis of his experience with real estate transactions in general.[11]

[11] In its memorandum of decision, the trial court explained: "*For all of these reasons*, the plaintiff did not prove that the [defendant's] authorization permitting Hallberg to dump caused the plaintiff to lose the benefit of its bargain when the Bow Tie sale did not go through." (Emphasis added.)

In its memorandum of decision, the trial court found that the plaintiff had failed to prove that the defendant's actions caused the cancelation of the sale to Bow Tie. In support of its finding, the trial court explained that "Bow Tie had many contingencies in its proposal to purchase the property," some of which were unrelated to the Hallberg material. For example, Bow Tie was concerned about a pipe on the property, an easement possibly affecting clear title, and the environmental condition of the property as a whole. Further, testimony from Serkes, who represented a member of the plaintiff organization, indicated that there was no guarantee that the sale would close even if the plaintiff were to clean up the property.[12]

The trial court also recognized that "several deals to purchase all or part of the property at a profit to the plaintiff had been proposed before and after the Hallberg dumping, and none [has] ever come to fruition." Relying on photographs admitted at trial demonstrating that "the property had become an eyesore," the trial court reasoned that "the cosmetic appearance, or perhaps the difficulty in securing the property, may well have turned off a potential commercial purchaser . . . ." The trial court further emphasized that, because it found that Hallberg was responsible for depositing only thirty-two truckloads of material on a small corner of the property, "such minor dumping, especially in light of [the other dumping by third parties], which would have included all unwanted material on the property, was not an actual or a proximate cause of the Bow Tie deal going sour."

[12] Specifically, the following colloquy occurred between Serkes and the defendant's counsel:

"Q. So [the plaintiff] chose not to spend the money [to clean up the property as required in the contract]?

"A. No. It was several hundred thousand dollars, and we were not prepared to do that because there was no guarantee that it would close, you know, if we were to do that."

We conclude that there was sufficient evidence in the record to support the trial court's finding that the plaintiff did not meet its burden of establishing that the defendant was the proximate cause of its lost profits.[13] Accordingly, we conclude that the trial court properly did not award the plaintiff damages for lost profits.

The judgment is affirmed.

In this opinion the other justices concurred.

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[13] In its brief, the plaintiff argues that, because the trial court found that the defendant breached its duty to the plaintiff by negligently authorizing Hallberg to deposit materials on the property, and because the breach was a proximate cause of the damages proven by the plaintiff during trial, the trial court improperly rejected its claim for lost profits. This argument, however, misconstrues the trial court's findings. As revealed in its memorandum of decision, the trial court found that the defendant's "breach of . . . duty was a proximate cause of the damages proven by [the plaintiff]" and that "[the defendant's] negligence proximately damaged the property." The trial court determined, and indeed we affirm, that the defendant's breach was a proximate cause of the damage to the property. The trial court, however, did not find that the breach was a proximate cause of the plaintiff's lost profits. Therefore, lost profits are not damages that were proven by the plaintiff.

ORDERS

CONNECTICUT REPORTS

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BARBARA B. HAMBURG *v.* JEFFREY R. HAMBURG

The substitute and intervening plaintiffs' petition for certification to appeal from the Appellate Court, 182 Conn. App. 332 (AC 38225), is denied.

Richard W. Callahan, in support of the petition.

Chris R. Nelson, in opposition.

Decided September 26, 2018

STATE OF CONNECTICUT *v.* MICHAEL PAPINEAU

The defendant's petition for certification to appeal from the Appellate Court, 182 Conn. App. 756 (AC 39474), is denied.

James B. Streeto, senior assistant public defender, in support of the petition.

Laurie N. Feldman, special deputy assistant state's attorney, in opposition.

Decided September 26, 2018

STATE OF CONNECTICUT *v.* JOHN CORVER

The defendant's petition for certification to appeal from the Appellate Court, 182 Conn. App. 622 (AC 40239), is denied.

Joseph G. Bruckmann, public defender, in support of the petition.

Denise B. Smoker, senior assistant state's attorney, in opposition.

Decided September 26, 2018

STATE OF CONNECTICUT *v.* ABIMAEL RAMOS

The defendant's petition for certification to appeal from the Appellate Court, 182 Conn. App. 604 (AC 40606), is denied.

ROBINSON, C. J., and KAHN, J., did not participate in the consideration of or decision on this petition.

Sean P. Barrett, assigned counsel, in support of the petition.

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

Decided September 26, 2018

JEAN ST. JUSTE *v.* COMMISSIONER OF CORRECTION

The petitioner Jean St. Juste's petition for certification to appeal from the Appellate Court, 183 Conn. App. 471 (AC 33424), is denied.

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

Justine F. Miller, assigned counsel, in support of the petition.

Michele C. Lukban, senior assistant state's attorney, in opposition.

Decided September 26, 2018

STATE OF CONNECTICUT *v.* DARRYL FLETCHER

The defendant's petition for certification to appeal from the Appellate Court, 183 Conn. App. 1 (AC 39358), is denied.

Laila M. G. Haswell, senior assistant public defender, in support of the petition.

Jennifer W. Cooper, special deputy assistant state's attorney, in opposition.

Decided September 26, 2018

STATE OF CONNECTICUT *v.* JERMAINE HARRIS

The defendant's petition for certification to appeal from the Appellate Court, 183 Conn. App. 865 (AC 39432), is denied.

Naomi T. Fetterman, assigned counsel, in support of the petition.

Timothy F. Costello, assistant state's attorney, in opposition.

Decided September 26, 2018

MARCOS MERCADO *v.* COMMISSIONER OF CORRECTION

The petitioner Marcos Mercado's petition for certification to appeal from the Appellate Court, 183 Conn. App. 556 (AC 39802), is denied.

Peter Tsimbidaros, in support of the petition.

Lisa A. Riggione, senior assistant state's attorney, in opposition.

Decided September 26, 2018

CHI HUM ET AL. *v.* MARK S. SILVESTER ET AL.

The plaintiffs' petition for certification to appeal from the Appellate Court, 183 Conn. App. 489 (AC 39977), is denied.

Lloyd L. Langhammer, in support of the petition.

F. Jerome O'Malley, in opposition.

Decided September 26, 2018

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CONNECTICUT APPELLATE REPORTS

Vol. 185

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

ANTHONY V. GUDDO *v.* KIMBERLI M. GUDDO
(AC 40004)

Keller, Bright and Pellegrino, Js.

Syllabus

The plaintiff, whose marriage to the defendant previously had been dissolved, appealed to this court from the judgment of the trial court denying his postdissolution motion for contempt, in which he claimed that the defendant had violated certain prior court orders by failing to make certain payments to the plaintiff and to return personal property belonging to the plaintiff. At the time of filing the plaintiff's motion, during its pendency, and in the present appeal, the plaintiff was self-represented and incarcerated. The defendant was represented by counsel in connection with the plaintiff's motion for contempt. On appeal, the plaintiff claimed that the hearing on the motion for contempt was unfair in that at the time of the hearing, both parties were represented

by the same law firm, which created a conflict of interest, and that the law firm violated numerous professional rules of conduct. *Held* that the plaintiff having failed to distinctly raise his claim before the trial court, the unpreserved claim was not reviewable; the record provided to this court did not reflect that the plaintiff raised the present claim, or any objection related to the defendant's counsel, before the trial court, the plaintiff acknowleged that his claim was unpreserved in his reply brief, the record was devoid of evidence to support the factual representations underlying the plaintiff's conflict of interest claim, which were made for the first time on appeal, and it did not appear in the record that the court considered the claim, resolved any of the distinct factual issues that arose from the claim, or ruled on the merits of the claim, nor would it have been appropriate to afford an extraordinary level of review to the claim.

Argued September 6—officially released October 9, 2018

Procedural History

Action for the dissolution of marriage, and for other relief, brought to the Superior Court in the judicial district of New Haven, and tried to the court, *Goodrow*, *J.*; judgment dissolving the marriage and granting certain other relief; thereafter, the court denied the plaintiff's motion for contempt, and the plaintiff appealed to this court. *Affirmed.*

Anthony V. Guddo, self-represented, the appellant (plaintiff).

Keith Anthony, for the appellee (defendant).

Opinion

PER CURIAM. The self-represented plaintiff, Anthony V. Guddo, appeals from the judgment of the trial court denying the postdissolution motion for contempt that he brought against the defendant, Kimberli M. Guddo. The plaintiff claims that because of a conflict of interest related to the defendant's counsel, the hearing on the motion for contempt was unfair. We affirm the judgment of the trial court.

The record reflects that, in August, 2015, the court, *Goodrow*, *J.*, dissolved the parties' marriage and entered

financial orders. Thereafter, the plaintiff brought several contempt motions against the defendant in which he alleged that she wilfully failed to comply with the court's orders. On May 23, 2016, the plaintiff filed the contempt motion underlying the present appeal. Therein, he alleged, among other things, that, in violation of prior orders, the defendant failed to make money payments to him and failed to return personal property belonging to him. The plaintiff filed the motion for contempt as a self-represented litigant, appeared as a self-represented litigant during the relevant proceedings before the trial court, and appears as a self-represented litigant in the present appeal. In June, 2016, the court granted the defendant's motion for the appointment of counsel to represent her in connection with the plaintiff's motion. Thereafter, the defendant was represented at trial by Bansley, Anthony, Burdo, LLC, and is so represented in the present appeal.

The court held a hearing on the plaintiff's motion for contempt on November 16, 2016.[1] On December 7, 2016, the court rendered judgment denying the contempt motion, finding that the defendant did not wilfully fail to comply with its orders. This appeal followed.

The plaintiff, who was incarcerated during the underlying proceedings, states in his appellate brief that when the court held a hearing on his motion for contempt, both he and the defendant were "represented" by the same law firm, namely, Bansley, Anthony, Burdo, LLC.[2]

[1] On November 7, 2016, the plaintiff filed a motion to amend his motion for contempt. By agreement of the parties, the court considered the plaintiff's motion to amend on the papers. At the time that it rendered its judgment on the motion for contempt, the court noted that it had granted the motion to amend, but had denied the plaintiff any relief with respect to the amended claims.

[2] In her appellate brief, the defendant states that Bansley, Anthony, Burdo, LLC, never represented the plaintiff in any matter and that the firm has not received any confidential information concerning the plaintiff. Thus, the defendant disputes that any conflict of interest existed or that the firm violated any rules of professional conduct.

He states that one or more persons associated with the firm not only provided legal assistance to him with respect to "incarceration issues" in connection with "the Inmate Legal Aid Program," but also that the firm provided assistance to him related to the present "case" involving the defendant. The plaintiff baldly asserts that the firm violated numerous rules of professional conduct and that a conflict of interest existed. As a result of this impropriety on the part of the defendant's counsel, the plaintiff argues, the hearing on the motion for contempt was "unfair." These arguments make up the only claim advanced by the plaintiff in the present appeal.

The record provided to this court does not reflect that the plaintiff raised the present claim, or *any* objection related to the defendant's counsel, before the trial court. The defendant argues that the plaintiff did not raise this claim during the hearing or at any time prior to the present appeal and, responding to this critique, the plaintiff acknowledges that the present claim is unpreserved.[3] Moreover, the record is devoid of evidence to support the factual representations underlying the plaintiff's conflict of interest claim, which are made for the first time on appeal. Not surprisingly, it does not appear in the record that the court considered the claim, resolved any of the distinct factual issues that arise from the claim, or ruled on the merits of the claim.

"Our appellate courts, as a general practice, will not review claims made for the first time on appeal. . . . [A]n appellate court is under no obligation to consider

[3] Furthermore, we observe that although it is the plaintiff's burden to furnish this court with a record adequate to review the claim that the November 16, 2016 hearing was unfair; see Practice Book § 61-10; he has not provided this court with a copy of the transcript of the hearing. Instead, the plaintiff filed a certificate with the appellate clerk stating that no transcript was necessary in connection with this appeal. See Practice Book § 63-4 (a) (2).

a claim that is not distinctly raised at the trial level. . . . [B]ecause our review is limited to matters in the record, we [also] will not address issues not decided by the trial court. . . . The purpose of our preservation requirements is to ensure fair notice of a party's claims to both the trial court and opposing parties. . . . These requirements are not simply formalities. They serve to alert the trial court to potential error while there is still time for the court to act. . . . The reason for the rule is obvious: to permit a party to raise a claim on appeal that has not been raised at trial—after it is too late for the trial court or the opposing party to address the claim—would encourage trial by ambuscade, which is unfair to both the trial court and the opposing party." (Citations omitted; internal quotation marks omitted.) *Gartrell* v. *Hartford*, 182 Conn. App. 526, 537, A.3d (2018); see also Practice Book § 60-5 (generally appellate court is not bound to consider claim not distinctly raised at trial or arising subsequent to trial).

There is no indication in the record before us that the plaintiff distinctly raised the present claim before the trial court and he does not argue, nor do we believe, that it would be appropriate to afford any extraordinary level of review to the claim. Accordingly, we decline to review the plaintiff's unpreserved claim.

The judgment is affirmed.

STATE OF CONNECTICUT *v.* CODY MEADOWS
(AC 40472)

Sheldon, Elgo and Flynn, Js.

Syllabus

Convicted of two counts each of the crimes of criminal violation of a standing criminal protective order in violation of statute (§ 53a-223a) and threatening in the second degree, the defendant appealed to this court. The defendant's conviction stemmed from his actions toward the victim

while they appeared before the juvenile court in New Haven for a hearing relating to their children. At the time, the defendant, pursuant to the terms of a standing criminal protective order, was to have no contact with the victim in any manner and was not to, inter alia, threaten or harass her. In addition, the order included a limited exception that contact with the victim was allowed only for purposes of visitation with the children as directed by the family court. At the beginning of the hearing, the defendant tried to make small talk with the victim, who ignored him. He then told her that he loved her and asked her why she had blocked her telephone, but she continued to ignore him and to look toward the judge. At that point, the defendant threatened to harm the victim and to kill her. The victim considered the defendant's statements to be real threats, and she was fearful after she heard them. At the conclusion of the hearing, the defendant met with a social worker. During the meeting, the defendant appeared upset and made comments to the social worker that he was going to hurt the victim. In the first count of the substitute information, the state alleged that the defendant had violated the standing criminal protective order by having contact with the victim, and, in the second count, the state alleged that the defendant had violated the protective order by threatening and harassing the victim. After a jury trial, the defendant was convicted on all counts against him. *Held*:

1. The defendant could not prevail on his unpreserved claim that his conviction of two counts of criminal violation of a standing criminal protective order violated his right to be free from double jeopardy because the offenses charged in the counts arose out of the same act: the defendant's conversation with the victim was separable into distinct acts, each punishable as a separate offense but one of which involved a more culpable conduct than the other, the defendant having first engaged in conversation with the victim, unrelated to visitation with their children, which amounted to contact with a person protected under the standing criminal protective order, and then he proceeded to harass the victim and to threaten her with death, which amounted to threatening and harassing and violated additional terms of the standing criminal protective order, and, therefore, those two distinct acts, both undertaken by the defendant, were separately punishable under § 53a-223a, and by convicting and sentencing the defendant on two separate counts, one for each distinct violation of the protective order, the court did not punish the defendant twice for a single offense but, rather, convicted him of two completed and distinct violations of the same statute; moreover, the defendant's reliance on certain case law in support of his claim that his conduct was one continuous criminal offense was misplaced, as those cases were distinguishable from the present case in that the defendant's conduct could be dissected into separate and distinct acts prohibited by the same statute and was not a single, continuous criminal

offense, and the state charged him with two different acts that violated two separate provisions of the protective order.

2. The defendant could not prevail on his claim that the trial court erroneously instructed the jury as to the second count of criminal violation of a standing criminal protective order by providing the jury with an incorrect definition of "harassing conduct," instead of using the higher standard set forth in *State* v. *Larsen* (117 Conn. App. 202): although the trial court defined the term "harassing" as "trouble, worry, or torment," which was different from the definition used in *Larsen*, the distinction was not so great as to implicate the fairness of the defendant's trial, as this court was satisfied that the trial court's definition conveyed equally and sufficiently the definition this court employed in *Larsen*, and, in instructing the jury as it did, the trial court employed the definition of harass that more commonly is applied to describe that element of § 53a-223a.

3. The defendant could not prevail on his claim that his conviction of threatening in the second degree pursuant to statute ([Rev. to 2015] § 53a-62 [a] [3]) should be reversed because it constituted a violation of the first amendment to the United States constitution, which was based on his claims that because, pursuant to *Virginia* v. *Black* (538 U.S. 343), the true threats doctrine now requires that he possessed a subjective intent to threaten the victim and the intent element of § 53a-62 (a) (3) may be satisfied with recklessness, that statute is unconstitutional, and that, by reading a subjective intent element into a federal criminal statute that penalized threats made in interstate commerce, the United States Supreme Court in *Elonis* v. *United States* (135 S. Ct. 2001) signaled approval of that element as essential to establish liability under the true threats doctrine of the first amendment: in *Elonis*, the court expressly declined to address any first amendment issues and left the elements of the true threats doctrine undisturbed, and, therefore, *Elonis* did not abandon the existing standard for the true threats doctrine sub silentio and had no bearing on whether the defendant must possess subjective intent for purposes of the true threats doctrine; moreover, the constitutional necessity of a subjective intent element was never at issue in *Black*, and, therefore, this court declined to read *Black* as making the change to the true threats doctrine as proposed by the defendant, and concluded that the objective standard, which has been the traditional standard in this state for the true threats doctrine, remained valid.

Argued May 22—officially released October 9, 2018

Procedural History

Substitute information charging the defendant with two counts each of the crimes of criminal violation of a standing criminal protective order and threatening in the second degree, brought to the Superior Court in

the judicial district of New Haven and tried to the jury before *O'Keefe*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

John L. Cordani, *Jr.*, assigned counsel, for the appellant (defendant).

Bruce R. Lockwood, senior assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, and *Laura Deleo*, senior assistant state's attorney, for the appellee (state).

Opinion

FLYNN, J. The defendant, Cody Meadows, was convicted after a jury trial of two counts of criminal violation of a standing criminal protective order in violation of General Statutes § 53a-223a, one count of threatening in the second degree in violation of General Statutes (Rev. to 2015) § 53a-62 (a) (2)[1] and one count of threatening in the second degree in violation of § 53a-62 (a) (3). On appeal, the defendant claims that (1) the two convictions for violation of the standing criminal protective order violated his protection against double jeopardy, (2) the trial court erroneously instructed the jury as to the second count of violation of a standing criminal protective order, and (3) his conviction under § 53a-62 (a) (3) violated his right to freedom of speech under the first amendment to the United States constitution. We disagree and affirm the judgment of the trial court.

The jury reasonably could have found the following facts. On September 1, 2015, the defendant, along with

[1] Number 16-67 of the 2016 Public Acts (P.A. 16-67) amended subsection (a) of § 53a-62 by redesignating the existing subdivisions (2) and (3) as subdivision (2) (A) and (B) without modifying the language of that provision. We refer to the 2015 revision of § 53a-62 (a) (3) because that is the statute under which the defendant was charged and convicted.

the victim,[2] the mother of his children, appeared before the juvenile court in New Haven for a hearing relating to their children. At the time, the defendant, pursuant to the terms of a standing criminal protective order, was to have no "contact [with the victim] in any manner, including by written, electronic or telephone [communication]" and was not to "assault, threaten, abuse, harass, follow, interfere with, or stalk the [victim]." As an exception, the order provided that "contact with [the victim was] only allowed for purposes of visitation as directed by [the] family court." As the hearing began, the defendant tried to "make small talk" with the victim, who ignored him. According to the victim, the defendant tried to tell her that he loved her and asked her why she had blocked her telephone, but she continued to ignore him and to look toward the judge. At this point, the defendant told the victim, "you're going to have problems when I get home, bitch." The victim then looked at the defendant who mouthed that he was going to "f---ing kill [her]." The victim told the defendant that she could hear him and that he should stop threatening her. The defendant remarked that he was not threatening; thereafter, he stopped trying to converse with the victim. The victim considered the defendant's statements to be real threats, and she was fearful after she heard them.

At the conclusion of the hearing, the defendant met, at the courthouse, with a social worker, Shannon McGinnis. During the meeting, the defendant appeared upset and told McGinnis that "if he's not with [the victim], he's going to make sure nobody else is with her." The defendant then said that, "if [the victim] chooses not to be with him, he will beat the f---ing shit out of her" and would "make her another Tracey

[2] In accordance with our policy of protecting the privacy interest of the victim of a criminal violation of a protective order, we decline to identify the victim or others through whom the victim's identity may be ascertained.

Morton."[3] The defendant also said that "[h]e would kill himself or die suicide by cops . . . ." At this point, McGinnis informed the defendant that his statements were concerning and that she would have to tell others about them; the defendant then stopped making such statements. Afterward, McGinnis met with the victim and informed her that during their meeting the defendant had threatened to hurt the victim. The victim thereafter contacted the state police and, after meeting with a state police officer, signed a statement that had been prepared by the officer. At trial, the victim testified that she believed the threats against her were real and that she had feared the defendant even though he was in prison, where he would remain for seven more months.

The state subsequently charged the defendant in a four count information with two counts of violation of a standing criminal protective order and two counts of threatening in the second degree. After a jury trial, the defendant was convicted on all four counts. This appeal followed.

I

The defendant first claims that his conviction for two counts of violation of a standing criminal protective order violated his right to be free from double jeopardy. He argues that count one of the information, which alleged a violation of the protective order by having contact with the victim, and count two of the information, which alleged a violation of the protective order by threatening and harassing the victim, arose out of the same act. Specifically, the defendant argues that his conversation with the victim inside the courtroom was a "single, continuous, [and] uninterrupted" act, and that it, therefore, cannot be dissected and penalized

[3] During deliberations, the jury submitted a note to the trial court asking who Tracey Morton was, whereupon the court responded that there was no evidence in the record from which that question could be answered.

as two separate acts. Because the court rendered a judgment of conviction on two counts of violation of a standing criminal protective order resulting from that single conversation, the defendant claims his right against double jeopardy was violated.[4] In support of this argument, the defendant relies on *Rowe* v. *Superior Court*, 289 Conn. 649, 667–68, 960 A.2d 256 (2008), and *State* v. *Nixon*, 92 Conn. App. 586, 590–91, 886 A.2d 475 (2005). Additionally, the defendant argues that the language of § 53a-223a (c) exemplifies the legislature's intent to make a violation of a standing criminal protective order punishable only once. We disagree.

The defendant did not preserve this claim at trial, nor has he asked, on appeal, for review under *State* v. *Golding*, 213 Conn. 233, 567 A.2d 823 (1989).[5] Nevertheless, "[a] defendant may obtain review of a double jeopardy claim, even if it is unpreserved, if he has received

[4] In his appellate brief, the defendant cites to article first, § 9, of the Connecticut constitution, but makes no claim that the double jeopardy protection under our constitution exceeds that provided by the federal constitution. As our appellate courts repeatedly have observed, "the absence of an explicit constitutional double jeopardy provision [in our state constitution] strongly suggests that the incorporated common-law double jeopardy protection mirrors, rather than exceeds, the federal constitutional protection." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Burnell*, 290 Conn. 634, 652–53, 966 A.2d 168 (2009). Because the defendant does not claim otherwise, and has not briefed such a claim, we review his double jeopardy claim only under the federal constitution. See *State* v. *Baker*, 168 Conn. App. 19, 21 n.5, 145 A.3d 955, cert. denied, 323 Conn. 932, 150 A.3d 232 (2016).

[5] Under the well established principles of *Golding*, as revised in *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015), a defendant can prevail on a claim of constitutional error not preserved at trial only if all of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation exists and deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. In the absence of any one of these conditions, the defendant's claim will fail. *State* v. *Golding*, supra, 213 Conn. 239–40. "The first two [prongs of *Golding*] involve a determination of whether the claim is reviewable; the second two . . . involve a

two punishments for two crimes, which he claims were one crime, arising from the same transaction and prosecuted at one trial . . . . Because the claim presents an issue of law, our review is plenary. . . . Double jeopardy analysis in the context of a single trial is a two-step process. First, the charges must arise out of the same act or transaction. . . . Second, it must be determined whether the charged crimes are the same offense. Multiple punishments are forbidden only if both conditions are met." (Citations omitted; internal quotation marks omitted.) *State* v. *Nixon*, supra, 92 Conn. App. 590–91.

Counts one and two of the state's long form information respectively charged that the defendant (1) "violate[d] the . . . protective order . . . by having contact with the protected person, in violation of . . . [§] 53a-223a" and (2) that the defendant "violate[d] the . . . protective order . . . by threatening and harassing the protected person, in violation of . . . [§] 53a-223a." Although these counts charge the defendant under the same statute, we conclude that the offenses charged did not arise out of the same act. Our courts have long held that "distinct repetitions of a prohibited act, however closely they may follow each other . . . may be punished as separate crimes without offending the double jeopardy clause. . . . The same transaction, in other words, may constitute separate and distinct crimes where it is susceptible of separation into parts, each of which in itself constitutes a completed offense. . . . [T]he test is not whether the criminal intent is one and the same and inspiring the whole transaction, but whether separate acts have been committed with the requisite criminal intent and are such as are made punishable by the [statute]." (Internal quotation marks omitted.) *State* v. *Miranda*, 260 Conn. 93, 120, 794 A.2d

determination of whether the defendant may prevail." (Internal quotation marks omitted.) *In re Yasiel R.*, supra, 779 n.6.

506, cert. denied, 537 U.S. 902, 123 S. Ct. 224, 154 L. Ed. 2d 175 (2002); see also *State* v. *Morales*, 164 Conn. App. 143, 157, 136 A.3d 278 (same), cert. denied, 321 Conn. 916, 136 A.3d 1275 (2016); *State* v. *James E.*, 154 Conn. App. 795, 833, 112 A.3d 791 (2015) (same), cert. denied, 321 Conn. 911, 136 A.3d 1273 (2016).

In other words, the fact that a defendant's two separate charges of violation of a standing criminal protective order arise from acts that closely follow one another is not determinative, by itself, of whether they constitute a single criminal offense. Rather, the question is whether each act charged by the state is susceptible of separation into parts which are separate, complete offenses and are thus punishable under the controlling statute. The contact described in the first count is less culpable than the conduct charged in the second. In the first count, the defendant is merely charged with prohibited contact with the victim. In the second, he is charged with threatening and harassing the victim. Each of these charges, based upon a separate act, was a separate offense that led to a separate conviction.

In *State* v. *Miranda*, supra, 260 Conn. 120, our Supreme Court considered whether the defendant, who had been convicted of two counts of assault in the first degree for injuries resulting to a minor child in his care, was being punished twice for the same offense. In answering that question in the negative, our Supreme Court concluded that the defendant's failure to act, which had resulted in two separate injuries to the victim, constituted two separate acts of omission rather than one continuous failure to act. Id., 124. Similarly, in *State* v. *James E.*, supra, 154 Conn. App. 831, the defendant shot the victim twice and was convicted of two counts of assault of an elderly person in the first degree, which he claimed violated his right against double jeopardy. This court held that each shooting was a separate and distinct act because the defendant first

removed the gun from his cabinet, turned toward the victim and shot him; the defendant then, approached the victim, grabbed his shirt and shot him again. Id., 834.

In the present case, the defendant's conversation with the victim likewise is separable into distinct acts, each punishable as a separate offense but one of which involves a more culpable conduct than the other.[6] It was one thing for the defendant to tell the victim he loved her; it was another to tell her, a few breaths later, that she was a bitch, whom he would kill when he got home. The defendant first engaged in conversation with the victim, unrelated to visitation with their children, which amounted to contact with a person protected under the standing criminal protective order. The defendant then proceeded to harass the victim and to threaten the victim with death, which amounted to threatening and harassing and violated additional terms of the standing criminal protective order. These two distinct acts, both undertaken by the defendant, were *separately* punishable under § 53a-223a. By convicting and sentencing the defendant on two separate counts, one for each distinct violation of the protective order, the court did not punish the defendant twice for a single offense. Rather, the court convicted the defendant of two completed and distinct violations of the same statute.

We also consider the defendant's reliance on *Rowe* and *Nixon* and conclude that this reliance is misplaced.

[6] At oral argument before this court, the defendant's counsel cited to our Supreme Court's decision in *State* v. *Bernacki*, 307 Conn. 1, 52 A.3d 605 (2012), cert. denied, 569 U.S. 918, 133 S. Ct. 1804, 185 L. Ed. 2d 811 (2013), for the proposition that it prohibits an inspection of how a protective order was violated for purposes of double jeopardy. To the extent the court's decision in *Bernacki* can be read that way, it pertains to the application of the same elements analysis from the United States Supreme Court case of *Blockburger* v. *United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932). Because the same elements analysis is not at issue in this case, and neither the defendant nor the state claims that it is, *Bernacki* does not preclude us from examining the terms of the standing criminal protective order.

In *Rowe* v. *Superior Court*, supra, 289 Conn. 675–76, our Supreme Court concluded that the plaintiff's refusal to answer two questions, constituted one, continuous act of contempt. In reaching that conclusion, however, the court specifically noted that the United States Supreme Court, in *Yates* v. *United States*, 355 U.S. 66, 78 S. Ct. 128, 2 L. Ed. 2d 95 (1957), had "recognized three circumstances in which multiple refusals to testify may be punished only as a single act of contempt: when the witness refuses to give any testimony at the outset and adheres to that refusal (blanket refusal); when the witness refuses to give testimony 'within a generally defined area of interrogation' (area of refusal) . . . and when the witness refuses to answer questions relating to the same fact or subject of inquiry (subject of inquiry)." (Citation omitted.) *Rowe* v. *Superior Court*, supra, 667. The court in *Rowe* then concluded that the plaintiff's refusal to answer questions could be viewed either as a blanket refusal or refusal to answer questions on a particular subject area, because the subject on which the plaintiff had refused to provide testimony was the only subject matter on which the state had sought to question him. Id., 675. For that reason, the plaintiff's refusal to answer any questions was one continuous act of contempt. Id.

In the present case, there is no mandate similar to *Yates* by our Supreme Court that defines conduct protected under the double jeopardy clause in the context of violating a protective order. Moreover, unlike *Rowe*, the defendant's conduct in the present case can be dissected into separate and distinct acts prohibited by the same statute, albeit occurring within the same conversation. It is not, therefore, a single continuous criminal offense.

Similarly, we conclude that *Nixon* is inapposite. In *Nixon*, this court concluded that the defendant's rights under the double jeopardy clause were violated by his

conviction of two counts of assault in the second degree, resulting from his stabbing the victim twice. *State* v. *Nixon*, supra, 92 Conn. App. 597. The stabbing was against one victim and was continuous, uninterrupted and close in time. Consequently, we rejected the state's claim in *Nixon* that each knife stab constituted a separate assault. In reaching that conclusion, we noted specifically that the state, in both counts of assault, had charged the defendant in the exact same manner. Id., 590. We noted, additionally, that the "defendant twice stabbed the same victim, at the same place and during the same time period, with the same instrument, with the same common intent to inflict physical injury during one continuous, uninterrupted assault." Id., 591. We, therefore, held that the conviction of two separate counts of assault, based on one continuous assault, violated double jeopardy. Id., 597.

In the present case, however, the state charged the defendant with two different acts that violated two separate provisions of the standing criminal protective order. Particularly, the defendant's initial words, his attempt to engage in "small talk," and his telling the victim that "he loved her," by themselves, likely would not support a conviction on the state's second count, which alleged a violation of the standing criminal protective order by threatening and harassing the victim. After engaging in this conversation, however, the defendant then went on to threaten to kill the victim, which constituted a separate act in violation of the protective order. For these reasons, the convictions did not violate the defendant's right to be free from double jeopardy. The acts charged were separate and distinct, and it matters not that they arose from the same conversation.[7] See *State* v. *Miranda*, supra, 260 Conn. 119.

[7] We are also unpersuaded by the defendant's argument that the use of the word "involves" in § 53a-223a (c) signifies the legislature's intent to make the offense punishable only once. A plain reading of the statute reveals no such intent and, given the unambiguous language of the statute, we will not look for further intent of the legislature not expressed within the statute

II

The defendant next claims that the trial court erroneously instructed the jury as to the second count of violation of a standing criminal protective order. Specifically, the defendant claims that the trial court provided the jury with the incorrect definition of "harassing conduct," for the second count of violation of a standing criminal protective order. The defendant contends that the court instead should have used the definition set forth in this court's opinion in *State* v. *Larsen*, 117 Conn. App. 202, 209 n.5, 978 A.2d 544, cert. denied, 294 Conn. 919, 984 A.2d 68 (2009), which, according to the defendant, set a higher threshold for "harassing" conduct. We disagree.

The defendant did not object to the court's charge at trial and submitted no request to charge suggesting the language he now argues on appeal was mandated, nor does he now seek review pursuant to *State* v. *Golding*, supra, 213 Conn. 233. We extend review, however, pursuant to *State* v. *Elson*, 311 Conn. 726, 754–55, 91 A.3d 862 (2014), because the claim that the jury was not instructed properly as to an essential element of a crime is a claim of constitutional magnitude. "It is . . . constitutionally axiomatic that the jury be instructed on the essential elements of a crime charged. . . . A claim that the trial court failed to instruct the jury adequately on an essential element of the crime charged necessarily involves the defendant's due process rights and implicates the fairness of his trial." (Internal quotation marks omitted.) *State* v. *Felder*, 95 Conn. App. 248, 258, 897 A.2d 614, cert. denied, 279 Conn. 905, 901 A.2d 1226 (2006).

In the second count of its information, the state charged the defendant with violation of a standing criminal protective order by "threatening and harassing the

itself. See *Cornelius* v. *Arnold*, 168 Conn. App. 703, 717, 147 A.3d 729 (2016), cert. denied, 324 Conn. 908, 152 A.3d 1245 (2017).

protected person . . . .'' At trial, the court instructed the jury as to this count as follows: ''In this case, the state alleges that threatening or harassing the complainant was forbidden by the order, and you have the order. As far as what's the definition of a threat, use the same definition that I'm going to give you on threatening. As far as what's harassing, harassing *is to trouble*, *worry*, *or torment*; that's the legal definition. *Trouble*, *worry*, *or torment.* A person acts intentionally with respect to conduct when his conscious objective is to engage in such conduct. That's general intent. In summary, the state must prove beyond a reasonable doubt (1) that a court issued a standing criminal protective order against the defendant; and (2) the defendant violated a condition of that order; and in count two, we're talking about an allegation that he violated a prohibition in an order that required him not to threaten or harass the complainant.'' (Emphasis added.)

The plaintiff contends that in using the words ''trouble, worry, or torment,'' the trial court improperly defined the term ''harassing'' to the jury, which, instead, is defined by the higher standard set forth in *Larsen*. In that case, after a trial to the court, the defendant was convicted of two counts of criminal violation of a protective order, and one count of criminal violation of a restraining order. *State* v. *Larsen*, supra, 117 Conn. App. 203. On appeal, the defendant claimed that the state failed to prove that she had the requisite intent to violate the orders. Id., 204. In rejecting the defendant's claim, we noted that the dictionary definition of ''harass'' was ''to annoy persistently . . . to create an unpleasant or hostile situation . . . by uninvited and unwelcome verbal or physical conduct.'' (Internal quotation marks omitted.) Id., 209 n.5. In light of this dictionary definition, we concluded that the court reasonably could have found that the defendant harassed the victim. Id., 210.

In the present case, although the definition employed by the trial judge is different from the one this court used in *Larsen*, the distinction is not so great as to implicate the fairness of the defendant's trial. Specifically, the defendant's contention that "troubled" is a much lower standard than to "annoy persistently" is unavailing. The word "annoy" means to "disturb or irritate especially by repeated acts." Merriam-Webster's Collegiate Dictionary (11th Ed. 2003) p. 50. "Trouble" means to "agitate mentally or spiritually" and is synonymous with "worry," which means "to assail with rough or aggressive attack or treatment" or to "subject to *persistent or nagging* attention or effort" and is synonymous with "torment." (Emphasis added.) Id., 1342, 1444. "Torment," in turn, means "to cause severe, usually, *persistent* or *recurrent* distress." (Emphasis added.) Id., 1319. When compared fully, we are satisfied that the definition, "trouble, worry, or torment," conveys equally and sufficiently the definition this court employed in *Larsen*. Accordingly, we reject the defendant's argument that the use of this definition resulted in constitutional error.

Moreover, in using this instruction, the trial court employed the definition of "harass" that more commonly is applied to describe that element of § 53a-223a (c). See, e.g., *State* v. *Hersey*, 78 Conn. App. 141, 161, 826 A.2d 1183 (considering different instructional challenge to charge that defined "harass" as "to trouble, worry or torment" [internal quotation marks omitted]), cert. denied, 266 Conn. 903, 832 A.2d 65 (2003); *State* v. *Charles*, 78 Conn. App. 125, 130, 826 A.2d 1172 (same), cert. denied, 266 Conn. 908, 832 A.2d 73 (2003).[8] Consequently, we are not persuaded that the court erroneously instructed the jury on this element.

[8] By contrast, *Larsen* appears to be the only published Connecticut case to cite to the dictionary definition that the defendant in this case invokes as a constitutional requirement.

III

The defendant finally claims that his conviction for threatening in the second degree in violation of § 53a-62 (a) (3), should be reversed because it constitutes a violation of the first amendment to the United States constitution. That section provides in pertinent part that "[a] person is guilty of threatening in the second degree when . . . such person threatens to commit any crime of violence with . . . reckless disregard of the risk of causing such terror . . . ." General Statutes (Rev. to 2015) § 53a-62 (a) (3). The defendant argues that pursuant to *Virginia* v. *Black*, 538 U.S. 343, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003), the true threats doctrine now requires that he possess a subjective intent to threaten the victim. Because the intent element of § 53a-62 (a) (3) may be satisfied with recklessness, the defendant claims that the statute is unconstitutional. Additionally, the defendant argues that the decision of our Supreme Court in *State* v. *Krijger*, 313 Conn. 434, 97 A.3d 946 (2014), rendered after *Black*, left open the constitutional question he now poses. Moreover, the defendant asserts that *Elonis* v. *United States*, U.S. , 135 S. Ct. 2001, 192 L. Ed. 2d 1 (2015), a more recent decision of the United States Supreme Court, signals the court's approval of a subjective intent requirement to make speech punishable under the true threats doctrine. Because *Elonis* was decided after our Supreme Court's decision in *Krijger*, the defendant urges us to abandon the objective standard applied by our Supreme Court in that case and to adopt the subjective intent standard in *Elonis*. We are not persuaded by the defendant's arguments.

Although the defendant makes this claim for the first time on appeal and does not seek review under *Golding*, we review his claim pursuant to *State* v. *Elson*, supra, 311 Conn. 754–55. "The constitutionality of a statute presents a question of law over which our review is

plenary." (Internal quotation marks omitted.) *State* v. *Book*, 155 Conn. App. 560, 564, 109 A.3d 1027, cert. denied, 318 Conn. 901, 122 A.3d 632 (2015), cert. denied, U.S. , 136 S. Ct. 2029, 195 L. Ed. 2d 219 (2016). "True threats encompass those statements [through which] the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. . . . The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats protect[s] individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur. . . . In the context of a threat of physical violence, [w]hether a particular statement may properly be considered to be a [true] threat is governed by an objective standard—whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault. . . . [A]lleged threats should be considered in light of their entire factual context, including the surrounding events and reaction of the listeners. . . . Prosecution under a statute prohibiting threatening statements is constitutionally permissible [as] long as the threat on its face and in the circumstances in which it is made is so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution." (Citations omitted; internal quotation marks omitted.) *State* v. *Krijger*, supra, 313 Conn. 449–50.

The defendant's claim turns on two cases of the United States Supreme Court, *Virginia* v. *Black*, supra, 538 U.S. 343, and *Elonis* v. *United States*, supra, 135 S. Ct. 2001. Because the defendant argues that our Supreme Court has not had the opportunity to reconsider our jurisprudence in light of the United States

Supreme Court's decision in *Elonis*, we first address his claim based on that case.[9] The defendant asks us to read *Elonis* as establishing a subjective intent element for true threats under the first amendment to the United States constitution. He acknowledges, however, that in *Elonis*, the United States Supreme Court construed 18 U.S.C. § 875 (c) (2012), a federal criminal statute that penalized threats made in interstate commerce. The defendant argues, nevertheless, that the United States Supreme Court, by reading a subjective intent element into that statute, signaled an approval of that element as essential to establish liability under the true threats doctrine of the first amendment.

As a conceptual matter, we cannot agree with this argument. To be constitutionally valid, a statute must provide at least as much protection as the federal constitution. It follows, therefore, that a statute can provide greater, but not less, protection than the constitution. Concluding that 18 U.S.C. § 875 (c) requires subjective intent, the United States Supreme Court held that the *statute* required a higher mens rea. *Elonis* v. *United States*, supra, 135 S. Ct. 2010 ("[w]hen interpreting federal criminal statutes that are silent on the required

[9] Contrary to the defendant's assertions, our Supreme Court had the opportunity to examine these issues post-*Elonis* in *State* v. *Pelella*, 327 Conn. 1, 170 A.3d 647 (2017). After the current case was argued before this court, our Supreme Court decided *State* v. *Taupier*, 330 Conn. 149, A.3d (2018), which held that General Statutes § 53a-61aa (a) (3) is not unconstitutional under the free speech provisions of the federal and state constitutions because the specific intent to terrorize the victim was not an element of the crime.

Taupier was a case in which all threats directed against the victim were not directly addressed to the victim, but instead, were made to third parties. However, in the case before us, there was direct evidence before the jury from the victim's testimony that the defendant told her that he would kill her. The defendant's conviction was therefore not dependent on other evidence of the defendant's threats against the victim that were voiced to a third-party social worker. We therefore decline the defendant's appellate counsel's postargument suggestion made under Practice Book § 67-10 to review the court's jury charge for plain error, in light of *Taupier*. Plain error review is a rule of reversibility, which we conclude is inappropriate.

mental state, we read into the statute only that mens rea which is necessary to separate wrongful conduct from otherwise innocent conduct" [internal quotation marks omitted]); see also *United States* v. *White*, 810 F.3d 212, 220 (4th Cir. 2016) ("*Elonis* abrogates our prior holding that liability under [18 U.S.C.] § 875 (c) can turn solely on how a recipient would interpret a statement, without regard to whether the speaker intended it as a threat. . . . . But *Elonis* does not affect our constitutional rule that a 'true threat' is one that a reasonable recipient familiar with the context would interpret as a serious expression of an intent to do harm." [citation omitted]), cert. denied, U.S. , 136 S. Ct. 1833, 194 L. Ed. 2d 837 (2016). By contrast, the court expressly declined to address any first amendment issues; see *Elonis* v. *United States*, supra, 135 S. Ct. 2013; thereby leaving the elements of the true threats doctrine undisturbed. We, therefore, cannot join the defendant's assumption that the United States Supreme Court abandoned the existing standard for the true threats doctrine sub silentio. See *Shalala* v. *Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 18, 120 S. Ct. 1084, 146 L. Ed. 2d 1 (2000) (United States Supreme Court "does not normally overturn, or so dramatically limit, earlier authority sub silentio"). Accordingly, we conclude that *Elonis* has no bearing on whether the defendant must possess a subjective intent for purposes of the true threats doctrine. Whether *Black* affected the true threats doctrine, however, is a different question and one which was not addressed by our Supreme Court in *Krijger*, but which the defendant now invites us to consider.

In *Virginia* v. *Black*, supra, 538 U.S. 343, the United States Supreme Court considered whether a Virginia statute that criminalized cross burning violated the first amendment. The statute made it unlawful for "any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned,

a cross on the property of another, a highway or other public place." (Internal quotation marks omitted.) Id., 348. It provided further that "[a]ny such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons." (Internal quotation marks omitted.) Id. It was this latter part of the statute that a plurality of the court struck down as unconstitutional. Id., 367. In reaching this conclusion, the court first recited the principle, now well established in this state, that " '[t]rue threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." Id., 359. The court went on to add, however, that "[i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death." Id., 360. It is this language that the defendant regards as marking a shift from the usual objective standard to a subjective intent requirement for true threats. We are not persuaded.

The language on which the defendant relies is found in part III of *Black*, which upheld the constitutionality of the intent requirement in the Virginia statute. See id., 363 ("[a] ban on cross burning carried out with the intent to intimidate is fully consistent with our holding in *R.A.V.* [v. *St. Paul*, 505 U.S. 377, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992)] and is proscribable under the First Amendment"). Although this holding declares the constitutionality of the intent requirement for the Virginia statute, it says nothing about the traditional objective standard for true threats. See, e.g., *Elonis* v. *U.S.*, supra, 135 S. Ct. 2016 (Alito, J., concurring) (arguing that objective standard should be applied post-*Black*). In other words, the constitutional necessity of a subjective intent was never at issue in part III of *Black*. Consequently, we decline to read it that way.

In part IV of *Black*, a plurality of four justices went further and found the prima facie provision of the Virginia statute to be unconstitutional on its face. In reaching that conclusion, the plurality noted that "[t]he act of burning a cross may mean that a person is engaging in constitutionally proscribable intimidation. But that same act may mean only that the person is engaged in core political speech. The prima facie evidence provision in this statute blurs the line between these two meanings of a burning cross . . . [and] makes no effort to distinguish among these different types of cross burnings." *Virginia* v. *Black*, supra, 538 U.S. 365–66. Whatever reservations we might have about the court's reasoning, the court's ratiocination falls far short of bringing the traditional objective standard into question. In fact, it may even be read as suggesting that the prima facie provision *lacked* objectivity because it lacked any standard at all. See *United States* v. *Jeffries*, 692 F.3d 473, 480 (6th Cir. 2012), overruled on other grounds by *Elonis* v. *United States*, supra, 135 S. Ct. 2001. Consequently, we decline to read *Black* as marking the sea change to the true threats doctrine that the defendant proposes.[10] Thus the objective standard, which has been the traditional standard in this state for the true threats doctrine, remains valid. Accordingly, § 53a-62 (a) (3) is constitutionally sound.[11] Because the

[10] In reaching this conclusion we align with a majority of federal appellate courts that has declined to read *Black* as altering the traditional objective standard. See *United States* v. *Castillo*, 564 Fed. Appx. 500, 504 (11th Cir.), cert. denied, U.S. , 135 S. Ct. 438, 190 L. Ed. 2d 333 (2014); *United States* v. *Clemens*, 738 F.3d 1, 12 (1st Cir. 2013); *United States* v. *Elonis*, 730 F.3d 321, 332 (3d Cir. 2013), rev'd on other grounds, U.S. , 135 S. Ct. 2001 (2015); *United States* v. *Nicklas*, 713 F.3d 435, 440 (8th Cir. 2013); *United States* v. *Jeffries*, supra, 692 F.3d 479–81; *United States* v. *White*, 670 F.3d 498, 508 (4th Cir. 2012).

[11] We note additionally that the appellate courts in this state have had the opportunity to consider these questions and to revise our jurisprudence in light of *Black*. See, e.g., *State* v. *Pelella*, supra, 327 Conn. 1; *State* v. *Krijger*, supra, 313 Conn. 434; *State* v. *Tarasiuk*, 125 Conn. App. 544, 8 A.3d 550 (2010). Specifically, in *Krijger*, although our Supreme Court declined to address the question the defendant raises in this claim, it went on to apply

defendant's sole challenge to his conviction under § 53a-62 (a) (3) was constitutional, our treatment of his claim ends here.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* RICARDO CORREA (AC 39899)

Alvord, Prescott and Beach, Js.

Syllabus

Convicted, following a conditional plea of nolo contendere, of the crimes of conspiracy to possess a controlled substance with intent to sell, conspiracy to possess a controlled substance with intent to sell by a person who is not drug-dependent, and conspiracy to operate a drug factory, the defendant appealed to this court, claiming that the trial court improperly denied his motion to suppress certain evidence that was seized from his motel room after the police conducted a warrantless canine sniff of the front door of the motel room, which was open to the public and located in an open, shared walkway. The police were surveilling the building for illegal activity and observed what appeared to be a drug transaction out of the defendant's motel room. Thereafter, the police conducted a canine examination of the walkway of the motel. After the canine alerted the handler that it had detected contraband at the bottom of the door to the defendant's motel room, the police applied for a warrant to search the motel room. Prior to obtaining the warrant, the police detained the defendant and used his room key to open the door to look inside his room for occupants who might destroy evidence. A police officer, in conducting the visual sweep of the room without entering it, observed evidence of drug activity. In his motion to suppress, the defendant argued that the police officer's visual sweep of the room was per se unreasonable as it was performed without a valid search warrant and that the search did not fall within any recognized exceptions to the warrant requirement. On appeal, the defendant claimed, for the first time, that the warrantless dog sniff outside the door to his motel

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the traditional objective standard. See *State* v. *Krijger*, supra, 460. Given the recent and frequent application of the objective standard for true threats by our Supreme Court, this court is not free to depart from it. *State* v. *Inglis*, 151 Conn. App. 283, 293 n.13, 94 A.3d 1204, cert. denied, 314 Conn. 920, 100 A.3d 851 (2014), cert. denied, U.S. , 135 S. Ct. 1559, 191 L. Ed. 2d 647 (2015).

room violated his rights under article first, § 7, of the state constitution. *Held*:

1. The defendant could not prevail on his unpreserved claim that the dog sniff constituted a violation of his state constitutional rights: the defendant's claim that the police were required to obtain a warrant before conducting a dog sniff search of the pathway outside of his motel room was unavailing, as the defendant, under the facts of this case, did not show a reasonable expectation of privacy on the outside of the door to his motel room and cited no authority to support his assertion that a canine sniff outside the door of a motel room, conducted from an open, shared walkway, which was located outside of the structure and visible to and accessible by any member of the public, constituted a search within the meaning of article first, § 7, of the state constitution; moreover, the defendant also was unable to prevail under the plain error doctrine, as he could not demonstrate that an obvious error existed that affected the fairness and integrity of and public confidence in the judicial proceedings.

2. The defendant's claim that the conduct of the police in opening the door to his motel room and conducting a visual sweep of the room without a warrant was unlawful under the federal and state constitutions was unavailing, trial court having properly concluded that the search was lawful under the exigent circumstances exception to the warrant requirement: although the defendant claimed that the testifying officers could not identify any definite and specific reason for believing that someone was in the room who might destroy evidence and, thus, that the officers did not hold a reasonable belief that immediate action was necessary, probable cause existed to search the motel room, as there was ample evidence that would persuade a reasonable person to believe that criminal activity had occurred and to conclude that there was a fair probability that contraband or evidence of a crime would be found in the motel room; moreover, under the totality of the circumstances, a reasonable, well trained police officer reasonably would have believed that immediate entry into the motel room was necessary to prevent the destruction of evidence, as the police had reason to suspect, on the basis of firsthand observations, that criminal activity was occurring in the motel room, those suspicions were confirmed over a series of events that unfolded over the course of two hours, which demonstrated that there was a distinct possibility that someone who might have observed those events, or the police and canine presence at the motel, might have informed someone involved with the criminal activity, and, thus, the police had ample reason, under the facts of this case, to believe that, in the absence of swift action in opening the door to the room and performing a visual sweep, there was a significant risk of the destruction of evidence.

Argued April 24—officially released October 9, 2018

Procedural History

Information charging the defendant with the crimes of possession of more than four ounces of marijuana, conspiracy to possess more than four ounces of marijuana, possession of a controlled substance with intent to sell, conspiracy to possess a controlled substance with intent to sell, possession of narcotics, conspiracy to possess narcotics, possession of narcotics with intent to sell by a person who is not drug-dependent, conspiracy to possess narcotics with intent to sell by a person who is not drug-dependent, operation of a drug factory, and conspiracy to operate a drug factory, brought to the Superior Court in the judicial district of Stamford, geographical area number one, where the court, *Blawie*, *J.*, denied the defendant's motion to suppress certain evidence; thereafter, the defendant was presented to the court on a conditional plea of nolo contendere to conspiracy to possess a controlled substance with intent to sell, conspiracy to possess a controlled substance with intent to sell by a person who is not drug-dependent, and conspiracy to operate a drug factory; judgment of guilty in accordance with the plea; thereafter, the state entered a nolle prosequi as to the remaining charges, and the defendant appealed to this court. *Affirmed.*

Laila M.G. Haswell, senior assistant public defender, with whom, on the brief, was *Lauren Weisfeld*, chief of legal services, for the appellant (defendant).

Michele C. Lukban, senior assistant state's attorney, with whom, on the brief, were *Richard J. Colangelo, Jr.*, state's attorney, and *Susan M. Campbell*, deputy assistant state's attorney, for the appellee (state).

Opinion

ALVORD, J. Following a conditional plea of nolo contendere, entered pursuant to General Statutes § 54-94a,[1]

[1] General Statutes § 54-94a provides: "When a defendant, prior to the commencement of trial, enters a plea of nolo contendere conditional on the

the defendant, Ricardo Correa, appeals from the judgment of conviction of conspiracy to possess a controlled substance with intent to sell in violation of General Statutes §§ 53a-48 and 21a-277 (b), conspiracy to possess a controlled substance with intent to sell by a person who is not drug-dependent in violation of General Statutes §§ 53a-48 and 21a-278 (a), and conspiracy to operate a drug factory in violation of General Statutes §§ 53a-48 and 21a-277 (c). The defendant entered his conditional plea following the court's denial of his motion to suppress evidence seized from a motel room he was renting. On appeal, the defendant claims that the trial court erred in denying his motion to suppress because: (1) a warrantless dog sniff outside the door of his motel room violated his state constitutional rights, and (2) a warrantless visual search of his motel room violated his state and federal constitutional rights. We affirm the judgment of the trial court.

The trial court set forth the following findings of fact in its memorandum of decision on the defendant's motion to suppress. During the early morning hours of February 5, 2013, Sergeant Christopher Broems of the Stamford Police Department was parked on Home Court, a street immediately behind the America's Best Value Inn motel (motel) on East Main Street in Stamford. Sergeant Broems, a nineteen year veteran of the Stamford Police Department who also spent three years in the New York City Police Department, had made

right to take an appeal from the court's denial of the defendant's motion to suppress or motion to dismiss, the defendant after the imposition of sentence may file an appeal within the time prescribed by law provided a trial court has determined that a ruling on such motion to suppress or motion to dismiss would be dispositive of the case. The issue to be considered in such an appeal shall be limited to whether it was proper for the court to have denied the motion to suppress or the motion to dismiss. A plea of nolo contendere by a defendant under this section shall not constitute a waiver by the defendant of nonjurisdictional defects in the criminal prosecution."

many prior arrests at the motel for narcotics, prostitution, and other criminal activity. From the street, Sergeant Broems was surveilling the motel for evidence of possible illegal activity. He was parked approximately fifty yards away from the motel and had a clear, well illuminated view of the motel, which included two floors of numbered motel room doors that opened onto the back parking lot.

At approximately 1:20 a.m., Sergeant Broems observed a silver colored 2004 GMC Yukon pull into the motel parking lot. Only the passenger in the Yukon, who was later determined to be Eudy Taveras, exited the Yukon, while the operator remained in the vehicle with the headlights on. Taveras approached and entered room 118 of the motel, which was on the first floor, where he remained for less than one minute. Taveras returned to the vehicle, which then left the motel. Given the location, time of night, and duration of the visit, Sergeant Broems believed that he may have witnessed a narcotics transaction out of room 118. Sergeant Broems radioed to a nearby colleague, Officer Vincent Sheperis, that he intended to stop the Yukon, and then drove in the direction of the Yukon.

When the operator of the Yukon, who was later determined to be Charles Brickman, observed Sergeant Broems approaching the Yukon in his marked Stamford Police SUV, he turned off the Yukon's headlights. A short distance from the motel, Sergeant Broems stopped the vehicle. Officer Sheperis joined Sergeant Broems, acting as backup. When Sergeant Broems and Officer Sheperis approached the vehicle, they both smelled a strong odor of marijuana emanating from inside the Yukon. Sergeant Broems and Officer Sheperis removed Taveras from the vehicle, and Taveras admitted to possessing "weed." A search of Taveras revealed two glass jars with yellow tops containing marijuana, along with three other similar, but empty, yellow topped

glass jars, as well as a knotted corner of a plastic sandwich bag containing heroin. On the basis of this evidence, Sergeant Broems requested a sweep of the Yukon by a canine officer trained in the detection of narcotics.

A canine officer, Cooper, and his Stamford Police Department handler, Sergeant Seth O'Brien, arrived on the scene shortly after Sergeant Broems' request. Cooper alerted to the center console of the vehicle, but the officers found no additional drugs. Brickman was found to have no drugs on his person. Brickman was issued an infraction ticket for operating a motor vehicle without headlights, and allowed to drive off in the Yukon. The officers detained Taveras.

Taveras informed Sergeant O'Brien that he lived with his grandmother nearby on Charles Street in Stamford. At that point, Sergeant Broems, Officer Sheperis, and Sergeant O'Brien went to the grandmother's home on Charles Street, where they spoke with Taveras' brother. Taveras' grandmother signed a consent form allowing the officers to search Taveras' bedroom. In Taveras' bedroom, the officers found numerous plastic bags with the corners cut off, consistent with narcotics packaging, along with other bags containing an off white powder residue.

The officers then returned to the motel. They spoke with the manager of the motel, who advised them that several days earlier, the defendant had rented room 118 for the week, until February 8, 2013, paying $430 in cash.[2] The manager provided the officers with documentation concerning room 118, including a photocopy of the defendant's driver's license. The guest registration card for room 118 also included the name of a second individual, Victor Taveras. Although the officers

[2] As the result of a prior case, the Stamford police already knew the defendant by name.

were not certain who Victor Taveras was, Sergeant O'Brien testified that they believed that he most likely was Eudy Taveras.

After speaking with the manager, the officers went together to knock on the door of room 118. The officers observed a light on in the room, but no one answered the door. Sergeant O'Brien then retrieved Cooper and conducted a narcotics sweep, which included several passes along the first floor walkway where room 118 is located. On each pass, Cooper consistently alerted to the presence of narcotics at the door to room 118.

It was then approximately 3 a.m. on February 5, 2013, a little over ninety minutes since Sergeant Broems first observed Taveras enter and exit room 118. At this point, on the basis of all that had transpired since observing Taveras enter and exit room 118, Sergeant Broems decided to apply for a warrant to search room 118. The officers decided that Sergeant Broems and Officer Sheperis would return to Stamford Police headquarters to prepare the search warrant and to process Taveras for his drug charges, and Sergeant O'Brien would remain behind on Home Court, in the same area where Sergeant Broems was parked earlier, to surveil room 118 for any possible activity. Very shortly after the officers split up, however, just as Sergeant O'Brien was getting into position to surveil room 118, he observed the defendant on foot near the motel at the corner of Home Court and East Main Street, walking away from the motel. Sergeant O'Brien, who recognized the defendant, immediately radioed for Sergeant Broems and Officer Sheperis to return to the motel to stop the defendant.

While walking on Home Court, the defendant made eye contact with Sergeant O'Brien, who was in a marked police SUV. After the defendant made eye contact with Sergeant O'Brien, the defendant changed his direction

and began walking east on East Main Street. About 100 yards from the motel, Sergeant O'Brien approached the defendant, stepped out of his police vehicle, and, addressing the defendant as "Ricky," told the defendant that he needed to speak with him. Initially, the defendant was cooperative. Sergeant Broems arrived on the scene, and the defendant was searched. The officers found that the defendant was carrying a large wad of cash, amounting to over $3600, in his pocket, along with a key to a room at the motel. Sergeant O'Brien informed the defendant that Taveras was taken into custody, and that "the jig is up." The defendant responded, "nothing in the room is mine." The defendant agreed to open the door to room 118 for the officers. When the officers and the defendant reached the threshold of room 118, however, the defendant changed his mind and refused to grant them entry. The officers informed the defendant that if he did not consent to a search of the room, they were going to obtain a search warrant.

The defendant informed Sergeant Broems that there was no one in the room. To ensure that there was no one else inside the room that might destroy evidence before the officers could obtain a search warrant, however, Sergeant Broems used the defendant's room key to open the door. After opening the door, Sergeant Broems announced "Police!" and looked inside the room for approximately fifteen to thirty seconds.[3] Once he was satisfied that the room contained no occupants, Sergeant Broems closed the door. While the door was open, neither Sergeant Broems, nor any other officer or Cooper, set foot in or otherwise physically entered room 118. When he did not observe anyone in the room, Sergeant Broems "cleared" room 118. Although he did

[3] Sergeant O'Brien characterized the sequence of events as follows: "[Broems] cracked the door, stuck his head in, cleared it, you know, visually and then he relayed that nobody else was in there, he closed the door."

not enter the room, or take any steps to seize any evidence located inside the room, Sergeant Broems did observe a large black digital scale on a table, as well as a plastic sandwich bag lying on the floor nearby. The officers advised the defendant that he was free to leave the motel, and the defendant left.

Following the defendant's departure, other officers of the Stamford Police Department arrived at the motel. Those officers were assigned to watch room 118 while the investigating officers prepared an application for a search warrant, with Sergeant O'Brien and Officer Sheperis acting as affiants. Several hours later, at 9:20 a.m., the court, *Hon. Richard F. Comerford, Jr.*, judge trial referee, signed the search warrant for room 118.

When the police executed the search warrant, they discovered a total of approximately 200 grams of heroin, with a street value of approximately $85,000. The heroin was broken down into dozens of smaller baggies or glassine folds for individual sale. The officers also discovered a large quantity of U.S. currency, a laptop computer, and paper documents pertaining to a street gang, the Latin Kings. The police also discovered over four ounces of marijuana and a quantity of packaging materials, along with a vacuum sealing machine, two sifters, and two digital scales. These items were consistent with the operation of a drug factory by the defendant in the motel room. After the search warrant was executed, the police arrested the defendant at Taveras' grandmother's house on Charles Street. The defendant was charged with a variety of felony drug offenses.[4] On October 28,

[4] The defendant was charged with the crimes of possession of more than four ounces of marijuana in violation of General Statutes (Rev. to 2013) § 21a-279 (b); conspiracy to possess more than four ounces of marijuana in violation of General Statutes § 53a-48 and General Statutes (Rev. to 2013) § 21a-279 (b); possession of a controlled substance with intent to sell in violation of General Statutes § 21a-277 (b); conspiracy to possess a controlled substance with intent to sell in violation of General Statutes §§ 53a-48 and 21a-277 (b); possession of narcotics in violation of General Statutes § 21a-279 (a); conspiracy to possess narcotics in violation of General Statutes

2015, the defendant filed a motion to suppress "all items seized by police on February 5, 2013 from America's Best Value Inn Room #118." In his memorandum of law in support of the motion to suppress, the defendant argued that because Sergeant Broems' visual sweep of the room was performed without obtaining a valid search warrant, it was "per se unreasonable." The defendant further argued that, because the search did not fall within any recognized exceptions to the warrant requirement, as no exigent circumstances existed at the time and the conduct fell short of a protective sweep, "any evidence found as a result of the prior police illegality must be suppressed."

The court held a hearing on the motion to suppress on February 29, 2016. The state presented the testimony of Sergeant Broems, Officer Sheperis, and Sergeant O'Brien. At the conclusion of the suppression hearing, the state did not contest that Sergeant Broems' visual sweep of the room constituted a warrantless search within the meaning of the fourth amendment to the United States constitution and article first, § 7, of the Connecticut constitution. Rather, the state argued that because Officer Broems' visual sweep of room 118 was undertaken "solely for the purpose of insuring the lack of—insuring that no evidence was being destroyed," it was lawful pursuant to the exigent circumstances exception to the warrant requirement. The state specifically noted that the visual sweep did not constitute a "protective sweep."[5] The state alternatively argued that,

§§ 53a-48 and 21a-279 (a); possession of narcotics with intent to sell by a person who is not drug-dependent in violation of General Statutes § 21a-278 (a); conspiracy to possess narcotics with intent to sell by a person who is not drug-dependent in violation of General Statutes §§ 53a-48 and 21a-278 (a); operation of a drug factory in violation of 21a-277 (c); and conspiracy to operate a drug factory in violation of General Statutes §§ 53a-48 and 21a-277 (c).

[5] "The protective sweep doctrine . . . is rooted in the investigative and crime control function of the police. . . . As its name suggests, the purpose of the doctrine is to allow police officers to take steps to assure themselves that the house in which a suspect is being, or has just been, arrested is not

even if the visual sweep was unlawful, the evidence seized from the room was still admissible pursuant to the independent source doctrine.

On June 22, 2016, the court denied the defendant's motion to suppress in a written memorandum of decision. The court concluded that Sergeant Broems' warrantless visual sweep was proper, under the exigent circumstances doctrine, to prevent the destruction of evidence. The court reasoned that, "when all the facts of this case as known by police at the time of the warrantless entry by Broems are viewed objectively, the case meets the criteria for a finding of exigent circumstances." In reaching its decision, the court noted that other courts have found that evidence destruction is frequent in drug cases, and it relied on the testimony of the police officers, including: Sergeant Broems' testimony that his only motivation to open the door to room 118 was to avoid the destruction of possible evidence; Sergeant O'Brien's testimony that, based on his training and experience, it is common for additional people to be present in a motel room, especially in the context of narcotics or prostitution, regardless of the actual number of registered parties; Sergeant O'Brien's testimony that he was concerned that, on the basis of his prior experience as a trained officer with respect to the destruction or contraband or evidence, a number of people already knew of the Stamford police's investigation into the activity in room 118, and that phone calls

harboring other persons who are dangerous and who could not unexpectedly launch an attack. . . . Although originally a protective sweep was defined as one made incident to a lawful arrest . . . the scope has since been broadened so that the current rule is that a law enforcement officer present in a home *under lawful process* . . . may conduct a protective sweep when the officer possesses articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the . . . scene." (Citations omitted; emphasis in original; footnote omitted; internal quotation marks omitted.) *State* v. *Kendrick*, 314 Conn. 212, 229–30, 100 A.3d 821 (2014).

informing potential confederates of that investigation may have already been made, prompting the destruction of evidence; and Sergeant Broems' testimony that he believed that there was a real possibility for the loss of potential evidence of illegal activity in room 118 because the police did not continue to surveil room 118 after initially departing the motel to stop the Yukon. The court further noted that the officers were not aware of the true extent of Taveras' involvement with the room, or the possibility of the presence of other persons inside the room. The court also concluded that "even assuming, arguendo, that the act of Broems in opening the door without a warrant in order to check the room for other occupants violated the defendant's fourth amendment rights, the court finds that the evidence later seized pursuant to a search warrant is admissible under the independent source doctrine."

On October 19, 2016, the defendant entered a conditional plea of nolo contendere to conspiracy to possess a controlled substance with intent to sell in violation of General Statutes §§ 53a-48 and 21a-277 (b), conspiracy to possess a controlled substance with intent to sell by a person who is not drug-dependent in violation of General Statutes §§ 53a-48 and 21a-278 (a), and conspiracy to operate a drug factory in violation of General Statutes §§ 53a-48 and 21a-277 (c). The plea was entered conditionally on his right to take an appeal from the court's ruling on the motion to suppress. The court, *Blawie*, *J.*, rendered a judgment of conviction. The court sentenced the defendant to a term of incarceration of nine years on each of the charges, followed by six years of special parole, to run concurrently with one another, for a total effective sentence of nine years to serve followed by six years of special parole. On March 31, 2017, the court made a finding that the motion

to suppress was dispositive of the case.[6] This appeal followed.

We begin by noting that "[a]s a general matter, the standard of review for a motion to suppress is well-settled. A finding of fact will not be disturbed unless it is clearly erroneous in view of the evidence and pleadings in the whole record. . . . [W]hen a question of fact is essential to the outcome of a particular legal determination that implicates a defendant's constitutional rights, [however] and the credibility of witnesses is not the primary issue, our customary deference to the trial court's factual findings is tempered by a scrupulous examination of the record to ascertain that the trial court's factual findings are supported by substantial evidence. . . . [W]here the legal conclusions of the court are challenged, [our review is plenary, and] 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 . . . .

"Notwithstanding the responsibility to examine the record scrupulously, it is well established that we may not substitute our judgment for that of the trial court when it comes to evaluating the credibility of a witness. . . . It is the exclusive province of the trier of fact to weigh conflicting testimony and make determinations of credibility, crediting some, all or none of any given

[6] The defendant filed his appeal on December 13, 2016. On his appeal form, he listed "denial of the defendant's motion to suppress evidence" as the appealable judgment or decision. On December 29, 2016, the defendant filed a motion, without objection from the state, requesting permission to correct his appeal form to state that he was appealing "from judgment and sentencing following a nolo contendere plea following denial of a motion to suppress." On February 17, 2017, this court granted that motion, and also sua sponte ordered that "the matter is remanded to the trial court, *Blawie*, *J.*, for a determination regarding whether the ruling on the motion to suppress would be dispositive of the case as required by General Statutes § 54-94a. See *State* v. *McGinnis*, 83 Conn. App. 700 [851 A.2d 349] (2004); *State* v. *Douros*, 87 Conn. App. 122 [864 A.2d 57] (2005)."

witness' testimony. . . . Questions of whether to believe or disbelieve a competent witness are beyond our review. As a reviewing court, we may not retry the case or pass on the credibility of witnesses. . . . We must defer to the trier of fact's assessment of the credibility of the witnesses that is made on the basis of its firsthand observation of their conduct, demeanor and attitude." (Citations omitted; footnote omitted; internal quotation marks omitted.) *State* v. *Kendrick*, 314 Conn. 212, 222–24, 100 A.3d 821 (2014).

I

For the first time on appeal, the defendant claims that the dog sniff constituted a violation of his rights under article first, § 7, of the state constitution. Specifically, he argues that "the police conducted an illegal, warrantless dog sniff search of the outside door of the defendant's hotel room during which the canine signaled that he detected drugs in the room," and as a result of that illegal search, obtained a search warrant for his motel room. The defendant concedes that this issue is unpreserved, but nevertheless seeks review pursuant to the bypass doctrine set forth by our Supreme Court in *State* v. *Golding*, 213 Conn. 233, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 120 A.3d 1188 (2015),[7] or reversal pursuant to the plain

[7] Pursuant to *Golding*, a defendant may prevail on a claim of constitutional error not preserved at trial only if all four of the following conditions are satisfied: "(1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Footnote omitted.) *State* v. *Golding*, supra, 213 Conn. 239–40; see also *In re Yasiel R.*, supra, 317 Conn. 781 (modifying third prong of *Golding* by eliminating word "clearly" before words "exists" and "deprived").

error doctrine. See Practice Book § 60-5 ("[t]he court may in the interests of justice notice plain error not brought to the attention of the trial court").[8] The record is adequate to review the defendant's claim,[9] and the issue of a warrantless search is an issue of constitutional magnitude. See *State* v. *Buie*, 129 Conn. App. 777, 787, 21 A.3d 550, aff'd, 312 Conn. 574, 94 A.3d 608 (2014) (concluding that defendant's claim satisfied *Golding*'s second prong where he was alleging violation of his right to be free from unreasonable searches under article first, § 7, of the Connecticut constitution). The defendant cannot, however, establish a constitutional violation. We therefore conclude that the defendant's state constitutional claim is reviewable, but fails under *Golding*'s third prong.[10]

[8] "[T]he plain error doctrine is not . . . a rule of reviewability. It is a rule of reversibility. That is, it is a doctrine that this court invokes in order to rectify a trial court ruling that, although either not properly preserved or never raised at all in the trial court, nonetheless requires reversal of the trial court's judgment, for reasons of policy. . . . In addition, the plain error doctrine is reserved for truly extraordinary situations where the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings. . . . Plain error is a doctrine that should be invoked sparingly. . . . A party cannot prevail under plain error unless it has demonstrated that the failure to grant relief will result in manifest injustice. . . . Implicit in this very demanding standard is the notion . . . that invocation of the plain error doctrine is reserved for occasions requiring the reversal of the judgment under review. . . . [Thus, a] defendant cannot prevail under [the plain error doctrine] . . . unless he demonstrates that the claimed error is both so clear and so harmful that a failure to reverse the judgment would result in manifest injustice." (Internal quotation marks omitted.) *State* v. *Terry*, 161 Conn. App. 797, 820, 128 A.3d 958 (2015), cert. denied, 320 Conn. 916, 131 A.3d 751 (2016).

[9] The state argues that the record is inadequate for review. Specifically, the state argues that "[b]ecause the defendant did not challenge the dog sniff below, both the state and the trial court were temporally focused on Broems' opening of the door," and, therefore, "the state will be unable to show that despite the alleged illegality of the canine sniff, the evidence was nevertheless admissible under the independent source doctrine." Because we do not reach the issue of whether the independent source doctrine applies in this case; see footnote 20 of this opinion; we need not decide the adequacy of the record with respect to that issue.

[10] The defendant also argues that, because our Supreme Court decided *State* v. *Kono*, 324 Conn. 80, 152 A.3d 1 (2016), in which it held that a dog

Article first, § 7, of the Connecticut constitution provides: "The people shall be secure in their persons, houses, papers and possessions from unreasonable searches or seizures; and no warrant to search any place, or to seize any persons or things, shall issue without describing them as nearly as may be, nor without probable cause supported by oath or affirmation."[11] "A search for purposes of the [f]ourth [a]mendment occurs when a reasonable expectation of privacy is infringed." *State* v. *Saturno*, 322 Conn. 80, 88, 139 A.3d 629 (2016). "It is well established that, in determining whether the police conducted a search within the meaning of article first, § 7, a court employ[s] the same analytical framework that would be used under the federal constitution. . . . Specifically, we ask whether the defendant has established that he had a reasonable expectation of privacy in the area or thing searched. . . . In the absence of such an expectation, the subsequent police action has no constitutional ramifications . . . . The determination of whether such an expectation exists is to be made on a [case-by-case] basis . . . and requires a [two part] inquiry: first, whether the individual has exhibited an actual subjective expectation of privacy, and, second, whether that expectation is one society recognizes as reasonable. . . . Whether

sniff of the outside door of a condominium, conducted from a common hallway in the condominium building, constitutes a search within the meaning of article first, § 7, of the Connecticut constitution, after the trial court decided the motion to suppress, "this case falls squarely under the rule permitting review when 'a new constitutional right not readily foreseeable has arisen between the time of trial and appeal.' [*State* v. *Evans*, 165 Conn. 61, 70, 327 A.2d 576 (1973)]." This argument necessarily fails on the basis of our conclusion that *Kono* does not apply to the facts of this case.

[11] The language of the fourth amendment to the federal constitution similarly states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const., amend. IV.

a defendant's actual expectation of privacy in a particular place is one that society is prepared to recognize as reasonable involves a fact-specific inquiry into all the relevant circumstances. . . .

"The determination that a particular place is protected under [article first, § 7] requires that it be one in which society is prepared, because of its code of values and its notions of custom and civility, to give deference to a manifested expectation of privacy. . . . It must be one that society is prepared to recognize as reasonable. . . . Legitimate expectations of privacy derive from concepts of real or personal property law or [from] understandings that are recognized and permitted by society. One of the main rights attaching to property is the right to exclude others . . . and one who owns or lawfully possesses or controls properly will in all likelihood have a legitimate expectation of privacy by virtue of his right to exclude. . . . Of course, one need not have an untrammeled power to admit and exclude in order to claim the protection of [article first, § 7, as] long as the place involved is one affording an expectation of privacy that society regards as reasonable." (Citations omitted; footnotes omitted; internal quotation marks omitted.) *State* v. *Kono*, 324 Conn. 80, 89–91, 152 A.3d 1 (2017).

The defendant's state constitutional claim rests on his interpretation of a recent decision by our Supreme Court, *State* v. *Kono*, supra, 324 Conn. 80, in which that court decided the issue of "whether article first, § 7, of the Connecticut constitution prohibits police from conducting a warrantless canine sniff of the front door of a condominium in a multiunit condominium complex, and the common hallway adjacent thereto, for the purpose of detecting marijuana inside the condominium." (Footnote omitted.) Id., 82. On the basis of the

court's ruling that the dog sniff did constitute a search within the meaning of article first, § 7, the defendant argues: "The police did not obtain a warrant before they decided to conduct a dog sniff search of the pathway right outside of the defendant's hotel room. . . . Thus, under the recent case of *State* v. *Kono*, [supra, 80], the dog sniff of the hotel room violated the defendant's right under the state constitution to be free of illegal search and seizure."

In *Kono*, the police, after receiving an anonymous tip that the defendant was boasting about growing marijuana in his condominium, which was located in a condominium complex in Berlin, obtained consent from the property manager to enter the building. Id., 83. Specifically, the property manager signed a consent form allowing the police officers and a canine officer, Zeusz, to conduct a sweep of the common areas of the building. Id. Because the outside doors to the multiunit condominium buildings were normally locked, allowing access only through a keypad, a property manager admitted the police and Zeusz into the building. Zeusz, who was trained to detect various controlled substances, including marijuana, was accompanied by his handler, an officer of the Berlin Police Department. Id., 83–84.

The officer first had Zeusz conduct a "presearch," of the first floor common hallway, during which he was allowed to walk throughout the condominium building hallway without direction. Id., 84. After the presearch, the officer conducted a directed search in which Zeusz was commanded to sniff at the bottom of the front door of each condominium unit on the first floor. Id. The same presearch and directed search procedures also were conducted on the second floor, where the defen-

dant's condominium unit was located.[12] When Zeusz performed his sniff at the bottom of condominium unit 204, the defendant's unit, he sat down in front of the door, which constituted a passive alert for drugs in the unit. Id.

The police knocked on the door to unit 204, but received no response. Id. An officer remained at the door to ensure that no one entered the premises, and another officer left to prepare a search warrant application. Id. Approximately four hours later, the officer returned with a signed search warrant. Id. Upon executing the warrant, the police discovered an indoor greenhouse containing marijuana plants, as well as seeds, lighting equipment, and various firearms. Id. The defendant was arrested and charged with several drug and weapon related offenses. Id.

The defendant moved to suppress the evidence seized from his condominium on the ground that a canine sniff of the threshold of his home, conducted for the purpose of investigating the home's contents, constituted a search under both the fourth amendment to the United States constitution and article first, § 7, of the Connecticut constitution, and therefore, required a warrant based on probable cause. Id., 84–85. Specifically, the defendant argued that the front door to his condominium unit, as well as the hallway adjacent to his front door, were "within the constitutionally protected curtilage of his condominium unit such that the entry of a dog into that area for the purpose of conducting a drug sniff constituted a trespass." Id., 85. The defendant further argued that the canine sniff violated his reasonable expectation of privacy. Id. The trial court agreed with the defendant that the canine sniff violated his reasonable expectation of privacy under the fourth amend-

[12] The other officers, who were aware of which condominium unit belonged to the defendant, did not inform Zeusz' handler which condominium unit was under investigation. *State* v. *Kono*, supra, 324 Conn. 84.

ment,[13] and granted the defendant's motion to suppress.[14] Id., 82. The state appealed. Id.

On appeal to our Supreme Court, the state reasserted its trial court argument that the canine sniff of the defendant's front door and the hallway adjacent thereto did not constitute a search under article first, § 7, because the defendant had no reasonable expectation of privacy in the common hallway or the contraband inside his home. Id., 89. The court, employing the multifactor approach set forth in *State* v. *Geisler*, 222 Conn. 672, 685, 610 A.2d 1225 (1992),[15] looked first to

[13] The trial court in *Kono* primarily relied on Second Circuit precedent which held that "a canine sniff of a person's front door in a multiunit apartment building, for the purpose of detecting drugs inside the apartment, constituted a search within the meaning of the fourth amendment," and two United States Supreme Court decisions, which held that "a canine sniff conducted within the curtilage of a single-family residence ([*Florida* v. *Jardines*, 569 U.S. 1, 133 S. Ct. 1409, 185 L. Ed. 2d 495 (2013)]) and the thermal imaging of a single-family residence ([*Kyllo* v. *United States*, 533 U.S. 27, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001)]), for purposes of detecting marijuana therein, violated the fourth amendment to the United States constitution." *State* v. *Kono*, supra, 324 Conn. 86.

[14] On appeal, the defendant also argued, consistent with the trial court's conclusion, that the canine sniff violated the fourth amendment's prohibition against unreasonable searches and seizures. Our Supreme Court, however, decided only the state constitutional issue, explaining: "We recently have explained that when the issue presented is one of first impression under both the state and federal constitutions, it is appropriate to consider the state constitutional claim first, turning to the federal claim only after determining that the appellant's state constitutional [challenge] will not succeed. . . . As we discuss more fully in part IV of this opinion, we see no reason to deviate from this approach when, as in the present case, the issue is not truly settled under the federal constitution, such that we cannot predict to a reasonable degree of certainty how the United States Supreme court would resolve the issue." (Citations omitted; internal quotation marks omitted.) *State* v. *Kono*, supra, 324 Conn. 82 n.3.

[15] "In order to construe the contours of our state constitution and reach reasoned and principled results, the following tools of analysis should be considered to the extent applicable: (1) the *textual approach* . . . (2) *holdings and dicta of this court, and the Appellate Court* . . . (3) *federal precedent* . . . (4) *sister state decisions* or sibling approach . . . (5) the *historical approach*, including the historical constitutional setting and the debates of the framers . . . and (6) *economic/sociological considerations*." (Citations omitted; emphases in original; internal quotation marks omitted.) *State* v. *Geisler*, 222 Conn. 672, 684–86, 610 A.2d 1225 (1992). Our Supreme

federal precedent involving the use of a trained narcotics detection dog. *State* v. *Kono*, supra, 324 Conn. 92. The court concluded that "federal precedent provides support for the defendant's claim of a state constitutional violation."[16] Id., 93. The court next examined precedent from other state courts, and concluded that "it appears that the weight of sister state precedent supports the view that the canine sniff of the defendant's door in the present case was a search under our constitution."[17] Id., 121. Finally, the court concluded that there

Court has noted, however, "that these factors may be inextricably interwoven, and not every [such] factor is relevant in all cases." *State* v. *Kono*, supra, 324 Conn. 92.

[16] Specifically, the court cited the Second Circuit's decision in *United States* v. *Thomas*, 757 F.2d 1359, 1367 (2d Cir. 1985), cert. denied, 474 U.S. 819, 106 S. Ct. 67, 88 L. Ed. 2d 54 (1985), in which the court held that a canine sniff of the common hallway of a multiunit apartment building, for the purpose of detecting drugs inside one of the apartments, constitutes a search within the meaning of the fourth amendment, and *United States* v. *Whitaker*, 820 F.3d 849 (7th Cir. 2016), in which the United States Court of Appeals for the Seventh Circuit reaffirmed that principle. *State* v. *Kono*, supra, 324 Conn. 93. Although it noted that the United States Supreme Court had not yet decided the issue decided by *Thomas*, the court noted two cases which "tend to favor the defendant's position": the United States Supreme Court's decisions in *Kyllo* and *Jardines*. See id.; see also footnote 15 of this opinion. The court finally cited *United States* v. *Hopkins*, 824 F.3d 726, 729, 731–33 (8th Cir. 2016), cert. denied, U.S. , 137 S. Ct. 522, 196 L. Ed. 2d 425 (2016), in which the United States Court of Appeals for the Eighth Circuit held that a canine sniff of the front door of a two-story townhouse, which shared a common walkway and front stoop with the unit next door, violated the fourth amendment.

[17] The court noted that only seven states appear to have addressed the issue of whether a canine sniff of an apartment door in a multiunit building is a search within the meaning of the federal, or their respective state, constitutions. *State* v. *Kono*, supra, 324 Conn. 116. The court further noted that five states, Illinois, Minnesota, Nebraska, New York, and Texas, had concluded that it is a search that requires either a reasonable and articulable suspicion or a warrant supported by probable cause, and two, Florida and Washington, had concluded that a canine sniff of the front door of a single family house violates the resident's reasonable expectation of privacy in the home and requires a warrant supported by probable cause. Id., 117. Additionally, the court observed that "several state appellate courts have determined that even a canine sniff of a nonresidential property may be a search under their respective state constitutions and may require a reason-

is "no principled reason of public policy . . . why, in the context of canine sniffs, the firm and bright line that we draw at the entrance of the house should apply to single-family dwellings but not to dwellings in a multiunit building. Indeed, as the Seventh Circuit observed in *Whitaker*, allowing police dogs to sniff the doors of apartments but not freestanding homes would be deeply troubling because it would apportion [constitutional] protections on grounds that correlate with income, race, and ethnicity." (Internal quotation marks omitted.) Id., 121. The court held that a canine sniff directed toward a home—whether freestanding or part of a multitenant structure—is a search for purposes of article first, § 7, of the Connecticut constitution and, therefore, requires a warrant issuing upon a court's finding of probable cause. Id., 122. The court, therefore, concluded that the defendant was entitled to suppression of the evidence seized from his residence as a fruit of the warrantless canine sniff, and affirmed the judgment of the trial court. Id., 122.

We disagree with the defendant's assertion that "[t]his case is indistinguishable from and is controlled by *Kono*." This case concerns the shared open walkway of a motel.[18] In *Kono*, the hallway was closed off, and

able, articulable suspicion." Id., 118. Finally, the court noted that only two state appellate courts, in Maryland and North Dakota, had concluded that a canine sniff of an apartment door in a multiunit building is not a search for fourth amendment purposes. Id., 118.

[18] The defendant also argues that "[a] person who inhabits a hotel room has a reasonable expectation of privacy that is equal to the reasonable expectation of privacy possessed by occupants of any residence." The defendant cites our Supreme Court's decision in *State* v. *Benton*, 206 Conn. 90, 536 A.2d 572 (1987), cert. denied, 486 U.S. 1056, 108 S. Ct. 2823, 100 L. Ed. 2d 924 (1988), for this proposition.

It is useful to elaborate on the guidance provided by *Benton*. In *Benton*, our Supreme Court concluded that "[p]ersons . . . residing in an apartment, or persons staying in a hotel or motel have the same fourth amendment rights to protection from *unreasonable* searches and seizures and the same *reasonable* expectation of privacy as do the residents of any dwelling." (Emphases in original.) Id., 95. The court went on to acknowledge, however, that "[t]he shared atmosphere and the nearness of one's neighbors in a hotel

located on the *inside of* the condominium complex structure, which was restricted by a locked door. It was accessible only by keycard access, and the police needed to obtain permission before entering the hallway. The open, shared walkway here, was located on the outside of the structure. It was open to the public, as well as completely illuminated and visible to anyone as far as fifty yards away, even at nighttime. Furthermore, no permission was required to traverse the walkway, evidenced by the ease with which the officers, and eventually Cooper, did so. We conclude that because of the nature of the walkway on which room 118 was located, *Kono* is distinguishable from the present case.

As the court in *Kono* noted, the determination of whether a defendant possesses a reasonable expectation of privacy in an area or thing to be searched is made on a case-by-case basis. See id., 90. We conclude that, under the facts of this case, the defendant has not shown a reasonable expectation of privacy on the outside of the door to his motel room. Furthermore, the defendant cites no authority to support his assertion that a canine sniff outside the door of a motel room, conducted from an open walkway, which is visible to and accessible by any member of the public, constitutes a search within the meaning of article first, § 7, of our state constitution.[19] In the absence of such authority, we decline to extend *Kono*'s reach to the facts of this case.

or motel or apartment in a multiple family dwelling, however, diminish the degree of privacy that one can reasonably expect or that society is prepared to recognize as reasonable." Id., 96. We conclude that, as part of our case-by-case determination of whether a reasonable expectation of privacy exists in an area to be searched; see *State* v. *Kono*, supra, 324 Conn. 89; that this case is one in which the nature of the location to be searched, the outside of a door located on an open, shared walkway, diminished the degree of privacy that the defendant reasonably could expect or that society is prepared to recognize as reasonable.

[19] We note that, upon review of each federal case where the court was presented with a similar issue, the court has held that a dog sniff of a hotel or motel room door, performed from a shared corridor or walkway, does not constitute a search within the meaning of the fourth amendment. See

Because the defendant's constitutional claim hinges on his interpretation of *Kono*,[20] in light of our conclusion that it is inapplicable to the facts of his case, we conclude that he has failed to demonstrate a constitutional violation.[21] Accordingly, the defendant's unpreserved state constitutional claim fails under *Golding*'s third prong. The defendant also is unable to prevail under the plain error doctrine, as he cannot demonstrate that

United States v. *Roby*, 122 F.3d 1120, 1125 (8th Cir. 1997) ("[The defendant] had an expectation of privacy in his Hampton Inn hotel room. But because the corridor outside that room is traversed by many people, his reasonable privacy expectation does not extend so far. Neither those who stroll the corridor nor a sniff dog needs a warrant for such a trip. As a result, we hold that a trained dog's detection of odor in a common corridor does not contravene the Fourth Amendment."); *United States* v. *Lewis*, United States District Court, Docket No. 1:15-CR-10 (TLS) (N.D. Ind. July 10, 2017) (concluding that dog sniff of defendant's hotel room door, which was located along open air walkway, was not search within meaning of fourth amendment, because of nature of walkway, "an unenclosed, common area that was readily accessible to the public at all hours"); *United States* v. *Marlar*, 828 F. Supp. 415, 419 (N.D. Miss. 1993) (concluding that defendant possessed a reasonable expectation of privacy in his motel room, but that dog sniff outside defendant's door, which "opened to the exterior of the building," did not infringe on that expectation of privacy), dismissed on other grounds, 68 F.3d 464 (1995).

[20] Because we determine that the search was lawful, we need not decide the applicability of the independent source doctrine, a doctrine which applies in the context of the exclusionary rule. See *State* v. *Brocuglio*, 264 Conn. 778, 786–87, 826 A.2d 145 (2003) ("As a general principle, the exclusionary rule bars the government from introducing at trial evidence obtained in violation of the fourth amendment to the United States constitution. . . . The rule applies to evidence that is derived from unlawful government conduct, which is commonly referred to as the fruit of the poisonous tree. . . . In *State* v. *Dukes*, 209 Conn. 98, 115, 547 A.2d 10 (1988), we concluded that article first, § 7, of the Connecticut constitution similarly requires the exclusion of unlawfully seized evidence." [Citations omitted; internal quotation marks omitted.]); *State* v. *Vivo*, 241 Conn. 665, 672, 697 A.2d 1130 (1997) ("[t]he independent source doctrine . . . [is a] recognized [exception] to the exclusionary rule").

[21] The state additionally argues that if this court determines that a dog sniff of the outside of a door to a motel room constitutes a search under our state constitution, we also should hold that such a search is constitutionally valid if supported by a reasonable and articulable suspicion, as opposed to probable cause. In light of our conclusion that the defendant has failed to show that a search occurred under the facts of this case, we decline to decide this issue.

an obvious error exists that affects the fairness and integrity of and public confidence in the judicial proceedings.

II

The defendant next claims that Sergeant Broems' conduct in opening the door to room 118 and conducting a visual sweep of the room was unlawful under the federal and state constitutions.[22] The state does not dispute that Sergeant Broems' conduct constituted a warrantless search within the meaning of the fourth amendment to the federal constitution and article first, § 7, of the state constitution. Rather, the state argues only that the search was justified by exigent circumstances—namely, the potential destruction of evidence. The defendant argues that "none of the officers who testified could identify any definite and specific reason for believing that someone was in the room who might destroy the evidence," and, therefore, the officers did not hold a reasonable belief that immediate action was necessary. We are not persuaded.

"Ordinarily, police may not conduct a search unless they first obtain a search warrant from a neutral magistrate after establishing probable cause. [A] search conducted without a warrant issued upon probable cause is per se unreasonable . . . subject only to a few specifically established and well-delineated exceptions. . . . These exceptions have been jealously and carefully drawn . . . and the burden is on the state to establish the exception. . . . Our law recognizes that there will be occasions when, given probable cause to search, resort to the judicial process will not be required of law enforcement officers. [For example], where exigent circumstances exist that make the procurement of a

[22] The defendant does not argue that article first, § 7, of the Connecticut constitution provides greater protection with respect to this claim.

search warrant unreasonable in light of the dangers involved . . . a warrant will not be required. . . .

"The term, exigent circumstances, does not lend itself to a precise definition but generally refers to those situations in which law enforcement agents will be unable or unlikely to effectuate an arrest, search or seizure, for which probable cause exists, unless they act swiftly and, without seeking prior judicial authorization." (Citations omitted; internal quotation marks omitted.) *State* v. *Owen*, 126 Conn. App. 358, 364–65, 10 A.3d 1100, cert. denied, 300 Conn. 921, 14 A.3d 1008 (2011). The test for determining whether exigent circumstances justify a warrantless search or seizure is "whether, under the totality of the circumstances, the police had reasonable grounds to believe that if an immediate arrest [or entry] were not made, the accused would be able to destroy evidence, flee or otherwise avoid capture, or might, during the time necessary to procure a warrant, endanger the safety or property of others. . . .

"[N]o single factor, such as a strong or reasonable belief that the suspect is present on the premises, will be determinative in evaluating the reasonableness of a police officer's belief that a warrantless entry or arrest was necessary. Rather than evaluating the significance of any single factor in isolation, courts must consider all of the relevant circumstances in evaluating the reasonableness of the officer's belief that immediate action was necessary." (Internal quotation marks omitted.) *State* v. *Kendrick*, supra, 314 Conn. 227, 229.

"It is well established in Connecticut . . . that the test for the application of the doctrine is objective, not subjective, and looks to the totality of the circumstances. . . . This is an objective test; its preeminent criterion is what a reasonable, well-trained police officer would believe, not what the arresting officer actually did believe. . . . The reasonableness of a police

officer's determination that an emergency exists is evaluated on the basis of facts known at the time of entry." (Citations omitted; internal quotation marks omitted.) *State* v. *Owen*, supra, 126 Conn. App. 365. "[T]he trial court's legal conclusion regarding the applicability of the exigent circumstances doctrine is subject to plenary review." *State* v. *Kendrick*, supra, 314 Conn. 222.

As a preliminary matter, we must first determine whether, at the time of Sergeant Broems' visual sweep, probable cause existed to search room 118. See *State* v. *Owen*, supra, 126 Conn. App. 366. We conclude that it did. "Whether the trial court properly found that the facts submitted were enough to support a finding of probable cause is a question of law. . . . The trial court's determination on [that] issue, therefore, is subject to plenary review on appeal. . . . Probable cause to search exists if: (1) there is probable cause to believe that the particular items sought to be seized are connected with criminal activity or will assist in a particular apprehension or conviction . . . and (2) there is probable cause to believe that the items sought to be seized will be found in the place to be searched. . . . Probable cause, broadly defined, [comprises] such facts as would reasonably persuade an impartial and reasonable mind not merely to suspect or conjecture, but to believe that criminal activity has occurred. . . . Reasonable minds may disagree as to whether a particular affidavit establishes probable cause." (Citations omitted; internal quotation marks omitted.) *State* v. *Pappas*, 256 Conn. 854, 864–65, 776 A.2d 1091 (2001).

"We consistently have held that [t]he quantum of evidence necessary to establish probable cause exceeds mere suspicion, but is substantially less than that required for conviction. . . . The existence of probable cause does not turn on whether the defendant could have been convicted on the same available evidence. . . . [P]roof of probable cause requires less than proof

by a preponderance of the evidence. . . . Probable cause, broadly defined, comprises such facts as would reasonably persuade an impartial and reasonable mind not merely to suspect or conjecture, but to believe that criminal activity has occurred. . . . The probable cause determination is, simply, an analysis of probabilities. . . . The determination is not a technical one, but is informed by the factual and practical considerations of everyday life on which reasonable and prudent [persons], not legal technicians, act. . . . Probable cause is not readily, or even usefully, reduced to a neat set of legal rules. . . . Reasonable minds may disagree as to whether a particular [set of facts] establishes probable cause. . . .

"The determination of whether probable cause exists under the fourth amendment to the federal constitution . . . is made pursuant to a totality of circumstances test. . . . The probable cause test then is an objective one." (Citations omitted; internal quotation marks omitted.) *State* v. *Johnson*, 286 Conn. 427, 435–36, 944 A.2d 297, cert. denied, 555 U.S. 883, 129 S. Ct. 236, 172 L. Ed. 2d 144 (2008). "In a warrantless arrest or search, as well as one made pursuant to a warrant, the reviewing court must pay great deference to the magistrate's determination of probable cause. . . . This court must not attempt a de novo review where there has already been a determination at a suppression hearing that probable cause exists. . . . When a trial court rules on a motion to suppress without making detailed findings of fact to support its ruling, an appellate court may look to the evidence produced in support of the ruling. . . . Where, as in this case, however, the trial court performs its judicial function conscientiously by detailing the facts which the state has established, we are not free to add facts which are not found and which are not undisputed." (Citations omitted; internal quotation marks omitted.) *State* v. *Velez*, 20 Conn. App. 168, 174,

565 A.2d 542 (1989), rev'd on other grounds, 215 Conn. 667, 577 A.2d 1043 (1990).

The defendant contends that "[e]ven construing the facts as broadly as possible, there is simply no probable cause to search the hotel room because the facts fail to establish a nexus between drug activity and the hotel room." We disagree and conclude that there was ample evidence that would persuade a reasonable person to believe that criminal activity had occurred. The evidence would also lead a reasonable person to conclude that there was a fair probability that contraband or evidence of that crime would be found in room 118. First, Sergeant Broems observed Taveras' quick visit to room 118, which led him to believe, on the basis of the location of the motel, the time of night, and the duration of the visit, that he had witnessed a drug transaction out of room 118. Sergeant Broems and Sergeant O'Brien then stopped the Yukon in which Taveras was traveling, and discovered narcotics on Taveras' person. That interaction led the police to the house of Taveras' grandmother, where they discovered items consistent with narcotics packaging. The police then learned that room 118 was registered to the defendant and another person by the name of Victor Taveras. When Sergeant O'Brien observed the defendant, the defendant made eye contact with him, changed direction and began walking east on East Main Street rather than continuing on Home Court, where Sergeant O'Brien was parked. After Sergeant O'Brien approached the defendant, the police discovered a large amount of cash and a key to room 118 on his person. When the police informed the defendant at that point that they had arrested Taveras and that "the jig is up," the defendant responded, "nothing in the room is mine," implying that something, with which the defendant did not want to be associated, was present in the room. On the basis of these facts known to the police, a reasonable person would believe that

criminal activity had occurred, and that room 118 contained evidence of such criminal activity.

Having determined that there existed probable cause to search room 118 at the time of Sergeant Broems' visual sweep, we now turn to the question of whether, under the totality of the circumstances, a reasonable, well trained police officer reasonably would have believed that immediate entry into room 118 was necessary to prevent the destruction of evidence. We answer that question in the affirmative. We agree with the trial court's conclusion that "when all the facts of this case as known by the police at the time of the warrantless entry by Broems are viewed objectively, the case meets the criteria for a finding of exigent circumstances."

On the basis of firsthand observations, the police had reason to suspect that drug related criminal activity was occurring in room 118. These suspicions were confirmed by a series of events, unfolding over the course of approximately two hours in the early hours of the morning of February 5, 2013. That course of events included police interactions with at least four people who were not taken into police custody before Sergeant Broems opened the door to room 118, including Brickman, Taveras' brother, Taveras' grandmother, and the hotel manager. Additionally, it was reasonable for the police to fear that even unknown passersby might become aware of the police investigation into room 118. Sergeant O'Brien, an experienced police officer, testified about his concerns that phone calls may have occurred between people aware of the investigation into the activity in room 118 and possible confederates, prompting the destruction of evidence inside of the room.

We find this court's decision in *State* v. *Reagan*, 18 Conn. App. 32, 556 A.2d 183, cert. denied, 211 Conn. 805, 559 A.2d 1139 (1989), persuasive on this point. In

Reagan, the state police were surveilling the defendant's home for possible drug activity. Id., 34. While surveilling the home, the police observed what appeared to be a drug transaction occurring between the defendant and a man, as well as a woman arriving to the home in a car, entering the house and leaving after less than one minute. Id. Following the man's departure from the home, the police stopped and searched his vehicle at a nearby gas station. Id. The police discovered narcotics in the man's vehicle and arrested him. Id. During the search and arrest, several people watched from a distance, including the woman who the officers earlier observed entering and leaving the defendant's home. Id. After arresting the man, the police applied for a search warrant, but because they thought it would take at least three hours, they "decided that a significant risk existed that the defendant would learn of [the man's] arrest and destroy any incriminating evidence," and entered the defendant's home before a warrant was issued. Id., 35.

The defendant moved to suppress all evidence obtained during the search as fruit of an illegal search and arrest. Id., 36. The trial court denied the motion to suppress, finding that the warrantless entry was justified by exigent circumstances, and this court affirmed. Id. This court concluded that the trial court properly found that the warrantless entry into the defendant's home and his subsequent arrest were justified by the existence of exigent circumstances, as "the possibility that a suspect knows or may learn that he is under surveillance or at risk of immediate apprehension may constitute exigent circumstances, on the theory that the suspect is more likely to destroy evidence, to attempt to escape or to engage in armed resistance." Id., 38. The court reasoned: "[I]n the present case, police detained and arrested an individual seen leaving the defendant's home. The arrest site was located on the

corner of the defendant's street, approximately one quarter of a mile from the defendant's home. Several people observed this arrest, one of whom was seen by police conversing with [the man]. In addition, there was testimony indicating that the arrest was observed by a woman seen by police at the defendant's home. Given the small size of the town, the proximity of the arrest to the defendant's home and the observation of that arrest by several people, we conclude that police had reasonable grounds to believe that if an immediate entry into the defendant's home were not made, the defendant would be alerted to the arrest of [the man] and destroy any incriminating evidence." Id., 39.

Similar to the facts of *Reagan*, there was a distinct possibility that someone who observed either the police stop of the Yukon, Taveras' arrest, or the police and canine presence at the motel, might inform someone involved with the criminal activity. The stop of the Yukon and the arrest of Taveras, a person seen leaving room 118 and seemingly known to the defendant, occurred a short distance from the motel. Brickman, Taveras' grandmother, and Taveras' brother were aware that the police arrested Taveras after he left the motel. The police located and arrested the defendant hours later at the home of Tavares' grandmother. Given the proximity of the arrest of Taveras to the motel and the knowledge of that arrest and the ensuing investigation by at least four people, the police had reasonable grounds to believe that if an immediate entry were not made into room 118, incriminating evidence may be destroyed.

Furthermore, Sergeant Broems, on the basis of his own training and experience, noted that from the time Taveras entered the room until the the police returned to the room with the defendant after 3 a.m., there was "nobody with eyes on" the room, which might have allowed an unknown person to enter room 118 and

destroy evidence contained therein. Although no one answered when the police knocked on the door earlier in the night, and there was no evidence confirming the presence of an additional person in room 118, these facts, coupled with the observation of a light on in the room, provided ample reason to believe that, absent swift action in opening the door to room 118 and performing a visual sweep, there was a significant risk of the destruction of evidence. It was reasonable for the police to believe that the delay necessary to obtain a search warrant may have resulted in the destruction of incriminatory evidence.

The court properly concluded that the search was lawful under the exigent circumstances exception to the warrant requirement.[23] Accordingly, the court properly denied the defendant's motion to suppress.

The judgment is affirmed.

In this opinion the other judges concurred.

BLOOMFIELD HEALTH CARE CENTER OF CONNECTICUT, LLC *v.* JASON DOYON (AC 40281)

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

Syllabus

The plaintiff nursing home sought to recover damages from the defendant, the conservator of the estate of J, for negligence, claiming that the defendant had breached his duty of care to the plaintiff by failing to apply for and to obtain on a timely basis Medicaid benefits on behalf of J that were necessary to pay for the cost of providing care and services

[23] Because we conclude that the search was lawful, we need not address the trial court's conclusion regarding the applicability of the independent source doctrine. See *State* v. *Sulewski*, 98 Conn. App. 762, 764 n.2, 912 A.2d 485 (2006) (concluding that this court need not address trial court's alternative ruling that evidence was admissible pursuant to independent source doctrine in light of conclusion that stop was lawful under *Terry* v. *Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 [1968]).

to J at its facility. The plaintiff had petitioned the Probate Court to appoint an involuntary conservator to oversee J's estate for the purpose of assisting him with his finances and Medicaid benefits application, and to ensure that it would be compensated for the necessary care it provided to him. The court adjudicated J incapable of managing his financial affairs, granted the plaintiff's petition and appointed the defendant as the conservator of J's estate. The court did not require a probate bond. The defendant then tendered $48,000 in proceeds from the sale of J's home to the plaintiff to be applied to J's outstanding bill, which totaled $124,000. J's only other source of income at that time was social security benefits he received each month, which the defendant began paying over to the plaintiff. Although J did not have sufficient funds or income remaining to pay the $370 per day required for his care, the defendant did not submit an application for J's Medicaid benefits until nine months after his appointment as conservator, and the Department of Social Services denied the application because the defendant did not provide certain information that the department had requested for its completion. Thereafter, the defendant filed a second application. That application was granted, and J's Medicaid benefits were made retroactive to a certain date, but he did not receive any benefits for the cost of his care prior to that date. The plaintiff subsequently commenced the present action, and the defendant filed a motion for summary judgment, which the trial court granted, concluding that the defendant was entitled to judgment as a matter of law because he did not owe any duty of care to the plaintiff solely as a result of his appointment as J's conservator. On the plaintiff's appeal to this court, *held* that the trial court improperly granted the defendant's motion for summary judgment, that court having incorrectly concluded that the defendant did not owe the plaintiff a duty to use reasonable care in performing his duties as conservator of J's estate, which necessarily included timely submitting J's application for Medicaid benefits in order to obtain available public assistance funds for the cost of J's care provided by the plaintiff: the harm suffered by the plaintiff was foreseeable as a matter of law based on the facts that the plaintiff petitioned the Probate Court to appoint an involuntary conservator to J to help him manage his estate, that the petition specifically alleged that J needed help completing an application for Medicaid benefits, that the defendant, as J's conservator, had exclusive access and control over J's assets, income and property, that when the defendant was appointed as conservator of J's estate, J already had accrued several thousands of dollars of debt to the plaintiff and that even though the defendant had tendered $48,000 in proceeds from the sale of J's house to the plaintiff and began paying over his social security checks, J still was unable to pay the $370 per day required to cover the cost of his care and continued to accrue debt to the plaintiff; moreover, because the defendant had disposed of J's assets and was familiar with his finances, he would have been acutely aware of these facts and that his

failure to obtain Medicaid benefits for J would result in J's being unable to pay for the necessary care provided to him by the plaintiff, and although he claimed that the harm to the plaintiff was not foreseeable because he was not in privity with the plaintiff, the plaintiff did not need to show that it was in privity with the defendant for this court to determine that the harm suffered by the plaintiff was foreseeable; furthermore, public policy supported recognizing that the defendant owed a duty to the plaintiff to use reasonable care in the administration and management of J's estate because the parties reasonably could have expected that the defendant would take the steps necessary to secure payment for the cost of J's care, which necessarily included timely completing Johnson's application for Medicaid benefits, and that the defendant could be held liable to the plaintiff if he failed to do so, particularly in light of the defendant's statutory (§ 45a-655 [a]) duties as a conservator of an estate, as well as the fact that the plaintiff's petition for a conservator specifically mentioned that J needed help obtaining Medicaid benefits, the benefits of encouraging conservators to carry out their duties with care and preventing financial harm outweighed any corresponding minimal increase in litigation, and many other states have enacted legislation that permits a third party to bring a statutory cause of action against a conservator if the conservator commits a tort in the course of the administration of the estate or the conservator otherwise is personally at fault for the party's loss, which indicated that the legislatures of those jurisdictions believed that third parties should have a right to recover for harm caused to them by a conservator's negligence.

Argued May 15—officially released October 9, 2018

Procedural History

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

Anne Jasorkowski, with whom, on the brief, was *Angelo Maragos*, for the appellant (plaintiff).

Lauren A. MacDonald, with whom, on the brief, was *Timothy R. Scannell*, for the appellee (defendant).

Opinion

PRESCOTT, J. In *Jewish Home for the Elderly of Fairfield County, Inc.*, v. *Cantore*, 257 Conn. 531, 532, 543–44, 778 A.2d 93 (2001) (*Jewish Home*), our Supreme Court recognized that a nursing home that has been harmed by the negligence of a conservator is entitled to recover, through an action on a probate bond, the losses it suffered as a result of the conservator's failure to timely file an application for Medicaid benefits on behalf of his or her ward. This appeal asks us to determine whether to recognize a similar right of recovery in a case where no probate bond was obtained.

This appeal arises out of an action by the plaintiff, Bloomfield Health Care Center of Connecticut, LLC, in which it alleged that the defendant, Jason Doyon, breached a duty to use reasonable care in managing the estate of his ward, Samuel Johnson. Specifically, the plaintiff argues that the defendant was negligent by failing to apply for and to obtain on a timely basis Medicaid benefits that were necessary to pay the plaintiff for the cost of Johnson's care at the plaintiff's nursing home. The plaintiff now appeals from the summary judgment rendered by the trial court in favor of the defendant. On appeal, the plaintiff claims that the court improperly concluded that the defendant did not owe it a duty of care and, thus, was entitled to judgment as a matter of law. We agree with the plaintiff and, accordingly, reverse the judgment of the court.

The record, viewed in the light most favorable to the plaintiff as the nonmoving party, reveals the following facts. The plaintiff operates a chronic care and convalescent nursing home facility in Bloomfield. On April 19, 2013, Johnson was admitted as a resident to the plaintiff's facility. Thereafter, the plaintiff provided care and services to Johnson at a rate of $360 per day. On

October 1, 2013, the cost of care increased to $370 per day.

On September 26, 2013, Johnson's daughter, who at the time was acting as his attorney-in-fact, filed an application for Medicaid benefits on behalf of Johnson. On November 26, 2013, Johnson's daughter sold his home. The net proceeds from the sale of the home totaled $48,000.

On January 8, 2014, the Department of Social Services (department) denied Johnson's application for Medicaid benefits for failure to provide required information. The information missing from the application included the disposition of the proceeds from the sale of his home, copies of bank statements, information regarding the surrender of his stocks, and proof that his assets totaled less than $1600.

On February 26, 2014, the plaintiff petitioned the Probate Court to appoint an involuntary conservator to oversee Johnson's estate for the purpose of assisting him with his finances and Medicaid application, and to ensure that it would be compensated for the necessary care it provided to him.[1] On April 8, 2014, the court adjudicated Johnson incapable of managing his financial affairs, granted the plaintiff's petition, and appointed the defendant as the conservator of Johnson's estate. The court dispensed with the requirement of a probate bond.

On April 15, 2014, the defendant tendered the $48,000 in proceeds from the sale of Johnson's home to the plaintiff to be applied to Johnson's outstanding bill, which totaled $124,000 at that time. After the proceeds

[1] General Statutes (Rev. to 2013) § 45a-648 provided, in relevant part, that "[a]n application for involuntary representation may be filed by any person alleging that a respondent is incapable of managing his or her affairs or incapable of caring for himself or herself and stating the reasons for the alleged incapability. . . ."

from the sale of Johnson's home were paid to the plaintiff, his only other source of income was $1363 that he received in social security benefits each month, which the defendant subsequently began paying over to the plaintiff.

Although Johnson did not have sufficient remaining funds or income to pay for his care, it was not until nine months later, on January 21, 2015, that the defendant submitted Johnson's application for Medicaid benefits. On February 17, 2015, the department told the defendant that Johnson's application was incomplete and requested that the defendant provide it with additional information by February 28, 2015, including the value of any of Johnson's remaining real property and bank account statements. The defendant failed to provide the department with the requested information, and, on March 24, 2015, Johnson's application was denied.

The defendant filed Johnson's second application for Medicaid benefits on August 12, 2015. The application was granted on September 24, 2015, and Johnson's Medicaid benefits were made retroactive to May 1, 2015. Johnson did not receive any Medicaid benefits for the cost of his care prior to that date. On October 21, 2015, Johnson died.

On February 1, 2016, the plaintiff commenced the present action. The plaintiff alleged in the operative complaint that the defendant's failure to apply for and to obtain on a timely basis Medicaid benefits for Johnson had violated a duty of care that he owed to the plaintiff. The plaintiff further alleged that the defendant's negligence caused it to suffer financial harm and loss, and therefore it requested monetary damages.[2]

[2] The plaintiff does not seek to recover the debt accrued to it by Johnson prior to the defendant's appointment as conservator of Johnson's estate.

On July 19, 2016, the defendant filed an answer to the plaintiff's complaint and special defenses. On September 21, 2016, the defendant filed a motion for summary judgment. In his memorandum of law in support of his motion, the defendant argued that he did not owe a duty of care to the plaintiff. Specifically, he argued that he owed a duty of care only to Johnson, his ward, and thus the plaintiff did not have standing to bring the action. The defendant also argued that he was entitled to quasi-judicial immunity for his actions.

In its memorandum in opposition to the defendant's motion for summary judgment, the plaintiff argued that the defendant owed it a duty of care under a common-law theory of negligence. Specifically, the plaintiff argued that it was readily foreseeable that Johnson would be unable to pay it for the cost of his care if the defendant failed to timely submit a Medicaid application on his behalf and, further, that the plaintiff would suffer harm as a result. The plaintiff also argued that public policy supported its claim that the defendant owed it a duty of care and that there was "no principled reason why a conservator should avoid liability for his negligence simply because there is no probate bond in a particular case." Finally, the plaintiff argued that the defendant was not entitled to quasi-judicial immunity because the Probate Court never expressly approved the defendant's actions with respect to Johnson's Medicaid application.

On March 13, 2017, the court issued its memorandum of decision granting the defendant's motion for summary judgment, concluding that "the law does not support the plaintiff's claim that the defendant, solely as a result of his appointment as a conservator, owed any duty to the plaintiff." The court reasoned that "the defendant's duty, and, in fact, his authority to pursue Medicaid benefits on behalf of his ward, does not arise out of any relationship between the plaintiff and him,

but solely from his appointment by the Probate Court as conservator, and his duties pursuant to that appointment." The court thus determined that the defendant did not owe the plaintiff a duty of care because "[t]he purpose of a conservator is not to manage the ward's estate for the benefit of his creditors but for the benefit of the ward." On March 31, 2017, the plaintiff timely filed the present appeal.

The plaintiff claims on appeal that the trial court improperly granted the defendant's motion for summary judgment because it incorrectly concluded that the defendant did not owe it a duty of care. Specifically, the plaintiff argues that the defendant owed it a duty to use reasonable care in managing Johnson's estate because (1) the harm caused to the plaintiff as a result of the defendant's negligence was foreseeable, and (2) public policy supports recognizing a duty of care in this context. We agree with the plaintiff that the defendant owed it a duty to use reasonable care to timely secure Medicaid benefits for Johnson.

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

fact. . . . [I]ssue-finding, rather than issue-determination, is key to the procedure. . . . Our review of the decision to grant a motion for summary judgment is plenary. . . . We therefore must decide whether the court's conclusions were legally and logically correct and find support in the record." (Internal quotation marks omitted.) *Barbee* v. *Sysco Connecticut*, LLC, 156 Conn. App. 813, 817–18, 114 A.3d 944 (2015).

We begin our analysis by first considering the defendant's role and general duties as conservator of Johnson's estate. General Statutes § 45a-655 sets forth the statutory duties of a conservator of an estate. Section 45a-655 (a) provides in relevant part: "A conservator of the estate appointed under section 45a-646, 45a-650, or 45a-654 shall, within two months after the date of the conservator's appointment, make and file in the Probate Court, an inventory, under penalty of false statement, of the estate of the conserved person, with the properties thereof appraised or caused to be appraised, by such conservator, at fair market value as of the date of the conservator's appointment. Such inventory shall include the value of the conserved person's interest in all property in which the conserved person has a legal or equitable present interest, including, but not limited to, the conserved person's interest in any joint bank accounts or other jointly held property. The conservator shall manage all the estate and apply so much of the net income thereof, and, if necessary, any part of the principal of the property, *which is required to support the conserved person* and those members of the conserved person's family whom the conserved person has a legal duty to support and *to pay the conserved person's debts*, and may sue for and collect all debts due the conserved person. . . ." (Emphasis added.)

Under certain circumstances, if a conservator is appointed to manage an individual's estate, a probate

bond is issued. A probate bond is a "bond with security given to secure the faithful performance by an appointed fiduciary of the duties of the fiduciary's trust and the administration of and accounting for all moneys and other property coming into the fiduciary's hands, as fiduciary, according to law." General Statutes § 45a-139 (a). Every probate bond is "conditioned for the faithful performance by the principal in the bond of the duties of the principal's trust and administration of and accounting for all moneys and other property coming into the principal's hands, as fiduciary, according to law . . . ." General Statutes § 45a-139 (b). If the assets of the ward's estate total twenty thousand dollars or more, the issuance of a probate bond is required. General Statutes § 45a-139 (c). A judge has discretion to waive the requirement of a probate bond if the assets of the estate total less than that amount, or under certain circumstances. See Probate Court Rules § 35.1 (b).

If a probate bond is issued and the conservator breaches his or her duties as fiduciary of the estate, a third party may bring an action on the bond to recover for the harm caused by the conservator's breach. In *Jewish Home*, our Supreme Court considered whether the plaintiff in that case, a nursing home facility, had "a right to bring an action on a probate bond when it suffer[ed] a loss as a result of a conservator's failure to ensure payment to the nursing home for his ward's care." *Jewish Home*, supra, 257 Conn. 532. J. Michael Cantore, Jr., had been appointed conservator of the person and estate of Diana Kosminer, a patient of the plaintiff nursing home. Id., 534. Cantore subsequently executed and filed with the Probate Court a probate bond in the amount of $50,000, which "was conditioned, as required by § 45a-139, on Cantore faithfully perform[ing] the duties of his trust and administer[ing] and account[ing] for all monies and other property coming into his hands, as fiduciary, according to law . . . ."

(Internal quotation marks omitted.) Id., 534–35. Cantore, however, failed to use the assets of Kosminer's estate to pay the nursing home for her care or to timely secure Medicaid benefits for her, which resulted in an unpaid balance to the nursing home of $63,000. Id., 536.

The nursing home subsequently brought an action against Cantore on the probate bond, alleging that he had a duty, "as Kosminer's conservator, to use the assets of her estate to pay for the care and services she had received from the plaintiff." Id., 533–34, 536. The nursing home further alleged that Cantore had a duty to apply promptly for Medicaid assistance when the estate's assets approached the $1600 Medicaid eligibility mark. Id., 536. Cantore filed a motion to strike the nursing home's complaint for failure to state a legally sufficient cause of action. Id. The trial court granted Cantore's motion to strike, and this court affirmed the court's judgment. Id.

On appeal to our Supreme Court, the nursing home argued that "the law imposed certain duties upon Cantore, as conservator of Kosminer's estate and person; he breached those duties by failing to ensure timely payment to the plaintiff through either the estate or through public assistance; the breach of those duties constituted a breach of the probate bond; and the plaintiff was aggrieved by those breaches." Id., 537. Cantore argued, however, that the "[nursing home] had no authority to bring an action for the breach of the probate bond because only parties acting as a representative of the estate or seeking recovery for the estate are entitled to bring such actions." Id.

In evaluating the plaintiff's claim, our Supreme Court first considered Cantore's duties as a conservator of the estate and conservator of the ward, respectively. Specifically, our Supreme Court noted that "[t]he statutory duties of a conservator are clearly defined in . . .

§ 45a-655, which delineates the duties of a conservator of the *estate*, and General Statutes § 45a-656, which prescribes the duties of a conservator of the *person*. A conservator of the estate shall manage all of the estate and apply so much of the net income thereof, and, if necessary, any part of the principal of the property, which is required to support the ward and those members of the ward's family whom he or she has the legal duty to support *and to pay the ward's debts* . . . . A conservator of the person has the duty to provide for the care, comfort, and maintenance of the ward . . . and the duty shall be carried out within the limitations of the resources available to the ward, either through his own estate or through private or public assistance. . . . In addition, where a statute imposes a duty and is silent as to when it is to be performed, a reasonable time is implied." (Citations omitted; emphasis in original; footnotes omitted; internal quotation marks omitted.) Id., 539–40.

Our Supreme Court then considered whether the complaint properly alleged a breach of Cantore's duties as conservator of Kosminer's estate and person. Id., 541. The complaint alleged that "Cantore failed to make timely payment to the plaintiff for the care and services it provided to Kosminer and failed to apply for [M]edicaid benefits on Kosminer's behalf once timely payment for the plaintiff's services had exhausted the assets of the estate. The complaint further alleged that these actions by Cantore resulted in a breach of his fiduciary duties as conservator of Kosminer's estate and person. Kosminer incurred a substantial debt as a result of the services she received from the [nursing home]. Cantore's failure to pay this debt, despite the estate's ample resources, constituted a breach of his duty under § 45a-655 (a) to use the assets of the estate to pay Kosminer's debts. Furthermore, Cantore's failure to ensure timely payment to the [nursing home] constituted a breach of

his duty under § 45a-656 (a) to provide for Kosminer's care through the estate or through other private or public assistance." Id. Our Supreme Court concluded, therefore, that the nursing home had properly alleged facts that, if proven, would establish that Cantore failed to fulfill his duties as conservator of Kosminer's estate and person. Id.

Our Supreme Court then considered the categories of plaintiffs that can bring an action on a probate bond to recover loss suffered as a result of a conservator's breach of his or her fiduciary duties pursuant to General Statutes (Rev. to 1995) § 45a-144. Id., 543. Specifically, our Supreme Court determined that the language of the statute "evince[d] the legislature's intent to create three separate categories of potential plaintiffs in a suit on a probate bond: first, a plaintiff bringing an action as representative of the estate; second, a plaintiff bringing an action in his own right; and third, a plaintiff bringing an action in the right of himself and all others having an interest in the estate . . . ." (Internal quotation marks omitted.) Id., 543. Our Supreme Court found that "[t]he [nursing home] fit squarely in the second category of potential plaintiffs authorized by § 45a-144 (a) to bring an action on the probate bond, namely, a plaintiff suing in its own right to recover in its own name for the breach of a probate bond," and concluded, therefore, that the complaint stated a legally sufficient cause of action. Id., 543–44.

In the present case, unlike in *Jewish Home*, no probate bond was issued. The plaintiff claims, nevertheless, that although it cannot bring an action against the defendant on a probate bond, it may still bring an action against the defendant under a common-law theory of negligence because the defendant in the present case, like Cantore, owed it a duty to use reasonable care to apply for and to obtain Medicaid benefits for Johnson and had breached that duty. The plaintiff argues that

"the absence of a probate bond . . . is not and should not be determinative of a [c]onservator's liability for his negligent actions under the common law" when the "establishment of a bond is predicated upon the amount of assets" in the estate.

"The essential elements of a cause of action in negligence are well established: duty; breach of that duty; causation; and actual injury." (Internal quotation marks omitted.) *Jarmie* v. *Troncale*, 306 Conn. 578, 589, 50 A.3d 802 (2012). "Duty is a legal conclusion about relationships between individuals, made after the fact, and imperative to a negligence cause of action. The nature of the duty, and the specific persons to whom it is owed, are determined by the circumstances surrounding the conduct of the individual. . . . Although it has been said that no universal test for [duty] ever has been formulated . . . our threshold inquiry has always been whether the specific harm alleged by the plaintiff was foreseeable to the defendant. The ultimate test of the existence of the duty to use care is found in the foreseeability that harm may result if it is not exercised. . . . [T]he test for the existence of a legal duty entails (1) a determination of whether an ordinary person in the defendant's position, knowing what the defendant knew or should have known, would anticipate the harm of the general nature of that suffered was likely to result, and (2) a determination, on the basis of a public policy analysis, of whether the defendant's responsibilities for its negligent conduct should extend to the particular consequences *or particular plaintiff in the case*." (Emphasis added; internal quotation marks omitted.) *Munn* v. *Hotchkiss School*, 326 Conn. 540, 548, 165 A.3d 1167 (2017). "[T]he determination of whether a duty exists . . . is a question of law." (Internal quotation marks omitted.) *Lodge* v. *Arrett Sales Corp.*, 246 Conn. 563, 571, 717 A.2d 215 (1998).

It is important, before conducting a duty analysis, to note that the common law is not static but dynamic, and often evolves to adapt to the changing conditions of society. See *Goodrich* v. *Waterbury Republican-American, Inc.*, 188 Conn. 107, 127, 448 A.2d 1317 (1982) (recognizing for first time action for invasion of privacy in Connecticut). Thus, when a plaintiff can show that the two requirements for the test of the existence of a legal duty of care have been met, our courts may recognize that the plaintiff can bring an action for negligence against the defendant. See *Munn* v. *Hotchkiss School*, supra, 326 Conn. 548–60 (recognizing that school had legal duty to warn students about or protect students against risk of serious insect-borne disease when organizing trip abroad); *Monk* v. *Temple George Associates, LLC*, 273 Conn. 108, 114–22, 869 A.2d 179 (2005) (parking lot owner owed reasonable duty to adequately light and monitor parking lot to nightclub patron who parked there).

I

FORESEEABILITY

The plaintiff argues that it was readily foreseeable that, if the defendant failed to timely obtain Medicaid benefits for Johnson, the plaintiff would suffer harm as a result because it would not be reimbursed for the cost of Johnson's care. The plaintiff contends that the entire purpose of its petition to the Probate Court was to assure access to Medicaid benefits for Johnson and that the defendant knew that Johnson did not have enough assets to pay for his care and was incurring debt to it at a rate of $370 per day. The plaintiff also contends that the defendant was the only person who had control over Johnson's estate and, consequently, the authority to obtain Medicaid benefits for him.

The defendant argues, however, that the harm suffered by the plaintiff was not foreseeable because the

defendant's only fiduciary responsibilities were to Johnson and not his creditors. Specifically, the defendant argues that he "could not have foreseen any harm to the [p]laintiff because [he] did not enter into any agreement, contract, or relationship with the [p]laintiff regarding [Johnson's] eligibility for [Medicaid] benefits." The defendant also disagrees with the plaintiff's assertion that the purpose of its petition to the Probate Court was to have a conservator appointed to help Johnson obtain Medicaid benefits.

"[F]oreseeability that harm may result if [a duty of care] is not exercised . . . is not meant that one charged with negligence must be found actually to have foreseen the probability of harm or that the particular injury which resulted was foreseeable, but the test is, would the ordinary [person] in the defendant's position, knowing what he knew or should have known, anticipate that harm of the general nature of that suffered was likely to result . . . ." *Jarmie* v. *Troncale*, supra, 306 Conn. 590. Ordinarily, "whether the injury is reasonably foreseeable . . . gives rise to a question of fact for the finder of fact . . . . foreseeability becomes a conclusion of law only when the mind of a fair and reasonable [person] could reach only one conclusion; if there is room for reasonable disagreement the question is one to be determined by the trier as a matter of fact." (Citation omitted; internal quotation marks omitted.) *Ruiz* v. *Victory Properties*, *LLC*, 315 Conn. 320, 330, 107 A.3d 381 (2015).

We conclude that the harm suffered by the plaintiff in the present case was foreseeable as a matter of law. The plaintiff petitioned the Probate Court to appoint an involuntary conservator to Johnson to help him manage his estate and noted in its petition that Johnson needed help completing a Medicaid application. Once appointed as Johnson's conservator, the defendant

alone had access and control over Johnson's assets, income and property.

Furthermore, it is undisputed that, when the defendant was appointed as conservator of Johnson's estate, Johnson already had accrued several thousands of dollars of debt to the plaintiff. It is also undisputed that, even though the defendant tendered the $48,000 in proceeds from the sale of Johnson's house to the plaintiff and began paying over his social security checks, Johnson still was unable to pay the $370 per day required to cover the cost of his care and, therefore, continued to accrue debt to the plaintiff. Having disposed of Johnson's assets and being familiar with his finances, the defendant would have been acutely aware of these facts and that his failure to obtain Medicaid benefits for Johnson would result in Johnson being unable to pay for the necessary care rendered to him by the plaintiff.

The defendant argues that the harm to the plaintiff was not foreseeable because the defendant was not in privity with the plaintiff. Our Supreme Court has determined, however, that a defendant may owe a duty of care to third parties under certain circumstances. See *Gazo* v. *Stamford*, 255 Conn. 245, 249–51, 765 A.2d 505 (2001) (defendant who contracted with Chase Bank to remove snow from sidewalk in front of building owed duty to third-party plaintiff who was injured as result of defendant's failure to properly remove snow and ice; relationship between defendant's alleged negligence and plaintiff's injury was direct and well within scope of foreseeability); *Lombard* v. *Edward J. Peters, Jr., P.C.*, 252 Conn. 623, 632–33, 749 A.2d 630 (2000) (defendant, acting as committee for foreclosure sale, owed plaintiff condominium owners duty to use reasonable care to properly identify property included in foreclosure sale; plaintiffs could properly maintain negligence action against defendant for misidentifying their garage as part of foreclosure property); *Coburn* v. *Lenox*

Homes, Inc., 173 Conn. 567, 574, 378 A.2d 599 (1977) (privity not required to bring negligence action; subsequent purchasers of home could bring negligence action against corporation that constructed it). Thus, the plaintiff need not show that it was in privity with the defendant for us to determine that the harm suffered by the plaintiff was foreseeable.

Rather, what is important is whether an ordinary person, standing in the shoes of the defendant, would or should have known that the harm of the general nature suffered by the plaintiff was likely to result. See *Lombard* v. *Edward J. Peters, Jr., P.C.*, supra, 252 Conn. 633. Thus, considering that (1) the plaintiff petitioned the Probate Court to have a conservator appointed, (2) the petition specifically alleged that Johnson needed assistance completing his Medicaid application, (3) the defendant knew of Johnson's growing debt to the plaintiff and that Johnson could not pay the plaintiff for the cost of his care, and (4) the defendant had the exclusive authority to access and manage Johnson's finances, we conclude, as a matter of law, that the harm to the plaintiff was foreseeable.

II

PUBLIC POLOCY

In light of our conclusion that the harm suffered by the plaintiff was reasonably foreseeable as a matter of law, we next turn to consider whether public policy supports recognizing that the defendant owed to the plaintiff a duty to use care in the administration and management of Johnson's estate, which included timely completing Johnson's application for Medicaid benefits. Indeed, "[a] simple conclusion that the harm to the plaintiff was foreseeable . . . cannot by itself mandate a determination that a legal duty exists. Many harms are quite literally foreseeable, yet for pragmatic reasons, no recovery is allowed. . . . A further inquiry must

be made, for we recognize that duty is not sacrosanct in itself . . . but is only an expression of the sum total of those considerations of policy [that] lead the law to say that the plaintiff is entitled to protection. . . . The final step in the duty inquiry, then, is to make a determination of the fundamental policy of the law, as to whether the defendant's responsibility should extend to such results." (Internal quotation marks omitted.) *Munn* v. *Hotchkiss School*, supra, 326 Conn. 549–50.

"[I]n considering whether public policy suggests the imposition of a duty, we . . . consider the following four factors: (1) the normal expectations of the participants in the activity under review; (2) the public policy of encouraging participation in the activity, while weighing the safety of the participants; (3) the avoidance of increased litigation; and (4) the decisions of other jurisdictions." (Internal quotation marks omitted.) Id., 550. "[This] totality of the circumstances rule . . . is most consistent with the public policy goals of our legal system, as well as the general tenor of our [tort] jurisprudence." (Internal quotation marks omitted.) *Ruiz* v. *Victory Properties, LLC*, supra, 315 Conn. 337. We also note the three fundamental purposes of our tort compensation system, which are the "compensation of innocent parties, shifting the loss to responsible parties or distributing it among appropriate entities, and deterrence of wrongful conduct . . . ." (Internal quotation marks omitted.) *Lodge* v. *Arett Sales Corp.*, supra, 246 Conn. 578–79.

A

We begin by considering the normal expectations of the participants in the activity under review. The plaintiff argues that, although it "certainly did not expect to recover the debt which accrued prior to [the defendant's] appointment, [it] did expect that funds were

going to be provided and made available for . . . Johnson's care, and [that the defendant] would obtain funds for his support by way of the Medicaid program" because it "set out to [have] appoint[ed] a conservator for that purpose."

Before we begin our analysis, we note that our statutes themselves are a source of public policy, and may militate in favor of recognizing a common-law duty of care when doing so advances the general policies and objectives of the statute. See *Williams Ford, Inc.* v. *Hartford Courant Co.*, 232 Conn. 559, 580–82, 657 A.2d 212 (1995). Thus, in determining the normal expectations of the parties, our appellate courts have often looked to "Connecticut's existing body of common law and statutory law relating to th[e] issue. See, e.g., [*Ruiz* v. *Victory Properties*, supra, 315 Conn. 337–38] (considering existing common-law principles and statutory requirements in determining whether apartment building landlord owed duty to keep yard clear of debris that could be thrown by children); *Greenwald* v. *Van Handel*, 311 Conn. 370, 376–77, 88 A.3d 467 (2014) (noting [our Supreme Court's] recognition in equity and contractual contexts of certain 'common-law maxims' before considering whether to extend them to professional negligence claim against therapist arising from plaintiff's arrest for possession of child pornography); *Jarmie* v. *Troncale*, supra, 306 Conn. 603–605 (reviewing Connecticut medical malpractice case law and statutes governing health-care providers in determining whether physician owed plaintiff, who was injured in automobile accident with physician's patient, common-law duty to inform patient of driving risks associated with her medical condition)." *Lawrence* v. *O & G Industries, Inc.*, 319 Conn. 641, 651, 126 A.3d 569 (2015).

In considering whether the plaintiff reasonably could have expected that the defendant would have obtained

available funds for the cost of Johnson's care, then, we first look to the statutory duties of a conservator of an estate, which are outlined in § 45a-655 (a). Section 45a-655 (a) provides that the defendant had a statutory duty to use Johnson's estate to support him as well as pay his debts, which, in Johnson's case, included his significant and growing debt to the plaintiff. Moreover, § 45a-655 (d) provides, in relevant part, that, "[i]n the case of any person receiving public assistance, state-administered general assistance or Medicaid, the conservator of the estate shall apply toward the cost of care such person any assets exceeding limits on assets set by statute or regulation adopted by the Commissioner of Social Services. . . ."

In the present case, Johnson did not have enough assets in his estate to pay the plaintiff for the cost of his care. Because Johnson was unable to pay for his care, the only way that the defendant could use Johnson's estate to support him and to pay his debt to the plaintiff would be to spend down Johnson's remaining assets such that he was eligible for Medicaid and, thereafter, timely complete Johnson's application for Medicaid benefits. See *Ross* v. *Giardi*, 237 Conn. 550, 555–74, 680 A.3d 113 (1996) (discussing applicability of resource spend down methodology to Medicaid benefits). The defendant clearly had the authority, pursuant to statute, to take such actions. Section 45a-655 (a) grants the conservator of the estate access to the ward's assets and financial records and the authority to manage his estate. Furthermore, § 45a-655 (d) contemplates that the conservator of the ward's estate will assist the ward in qualifying for Medicaid benefits, specifically. It is a logical extension of the plain language of the statute, then, to conclude that the parties could expect that the defendant would timely submit Johnson's application for Medicaid benefits in the event that he was unable to pay the plaintiff for the cost of his care.

In addition to the statutory duties of a conservator of an estate outlined in § 45a-655 (a), the Connecticut Standards of Practice for Conservators (2018), standard 17 I explicitly provides, in relevant part, that "[w]ith the proper authority and within the resources available to the conserved person, the conservator of the estate shall have the following duties . . . E. *The conservator shall seek public and insurance benefits that are beneficial for the conserved person.* . . . ."[3] (Emphasis added.) Standard 17 I E suggests that it is widely understood by conservators in Connecticut that they are able to—and, in fact, have a duty to—seek public assistance for their ward when necessary.

Moreover, we also find compelling in evaluating the normal expectation of the parties the fact that the plaintiff's petition for involuntary conservatorship specifically noted that Johnson needed help completing his application for Medicaid benefits. This allegation put the defendant on notice that (1) one of the purposes of his appointment was to help Johnson obtain Medicaid benefits, and (2) the plaintiff, specifically, would incur loss if the defendant failed to do so.

It is reasonable, then, considering the defendant's statutory duties under § 45a-655 (a) and the authority granted in him thereunder, as well as the fact that the plaintiff's petition for a conservator specifically mentioned that Johnson needed help obtaining Medicaid benefits, that the plaintiff would have expected the defendant, as conservator of Johnson's estate, to take steps necessary to pay the portion of Johnson's debt to the plaintiff that accrued after he was appointed and to secure any available public funding that would help pay for the cost of his care. See *Jewish Home*, supra,

[3] See Office of the Probate Court Administrator, Connecticut Standards of Practice for Conservators (2018), available at http://www.ctprobate.gov/Documents/Connecticut%20Standards%20of20Practice%20for%20Conservators.pdf (last visited October 3, 2018).

257 Conn. 540–42 (plaintiff nursing home correctly expected that conservator of patient's estate and person would timely secure payment for cost of patient's care considering conservator's statutory duties);[4] see also *Jarmie* v. *Troncale*, supra, 306 Conn. 604 (plaintiff could not expect that physician owed general public duty to warn patient that her condition might affect her ability to drive because no statute or regulation imposed such duty).

The defendant argues, however, that in the event that he failed to timely submit Johnson's application for Medicaid benefits, he could not have expected that he would be held personally liable to the plaintiff for his failure to do so. Rather, he contends that, because there was no direct relationship between the plaintiff and the defendant,[5] it was the normal expectation of the parties

[4] Unlike the defendant in *Jewish Home*, who was appointed as conservator of the ward's estate and person, the defendant in the present case was appointed conservator of Johnson's estate only. Our Supreme Court in *Jewish Home* relied on both § 45a-655 (a), which sets forth the duties of a conservator of the estate, and § 45a-656 (a), which sets forth the duties of a conservator of the person, in concluding that Cantore owed the plaintiff nursing home a duty to timely complete his ward's application for Medicaid benefits. Id., 539–43. Section 45a-656 (c) provides that the conservator of the person shall carry out his or her duties "either through the conserved person's own estate or through private or public assistance." At the time *Jewish Home* was decided, this language was included in subsection (a) of § 45a-656. *Jewish Home*, supra, 257 Conn. 540. For the reasons set forth in part II A of this opinion, we conclude that the fact that § 45a-656 references public assistance in this way does not undermine our ultimate determination that the conservator of the estate has a duty to assist the ward in applying for and obtaining public assistance.

[5] The defendant also cites *Krawczyk* v. *Stingle*, 208 Conn. 239, 543 A.2d 733 (1988), seemingly for the proposition that Connecticut's statutory scheme does not warrant holding conservators liable to third-party creditors of the ward. Our Supreme Court in *Krawczyk* considered whether an attorney could be held liable to the intended beneficiaries of his client's estate for his failure to arrange for timely execution of the client's estate planning documents. Id., 240. The court concluded that the defendant attorney could not be held liable to the beneficiaries because he did not owe them a duty of care. Id., 245–48. In its analysis of this issue, our Supreme Court noted that "[d]etermining when attorneys should be held liable to parties with

"that any claim by the [p]laintiff . . . for money owed by the ward for the [p]laintiff's services would be brought against the ward's estate and not the [d]efendant." We disagree with the defendant.

At the outset, we note that there is a fundamental inconsistency in applying the defendant's argument to our inquiry regarding the normal expectations of the parties. The sole issue in this case is whether the defendant owed the plaintiff a duty to use reasonable care in timely securing public assistance to pay for the services rendered to Johnson by the plaintiff. If we do agree with the plaintiff that the defendant owed it a duty of care and, therefore, that it properly could bring a negligence action against him, it would be the first time

whom they are not in privity is a question of public policy." Id., 245. The court then went on to explain that, in addressing whether an attorney should be held liable to a third party, "courts have looked principally to whether the primary or direct purpose of the transaction was to benefit the third party. . . . Additional factors considered have included the foreseeability of harm, the proximity of the injury to the conduct complained of, the policy of preventing future harm and the burden on the legal profession that would result from the imposition of liability." (Citations omitted.) Id., 245–46.

In its analysis, the court placed significant weight on the fact that "[a] central dimension of the attorney-client relationship is the attorney's duty of [e]ntire devotion to the interest of the client. . . . This obligation would be undermined were an attorney to be held liable to third parties if, due to the attorney's delay, the testator [client] did not have an opportunity to execute estate planning documents prior to death. Imposition of liability would create an incentive for an attorney to exert pressure on a client to complete and execute estate planning documents summarily. Fear of liability to potential third party beneficiaries would contravene the attorney's primary responsibility to ensure that the proposed estate plan effectuate[d] the client's wishes . . . ." (Citations omitted; internal quotation marks omitted.) Id., 246.

Krawczyk is easily distinguishable for two reasons. First, the analysis in that case is controlled by the unique nature of the relationship between an attorney and his or her client, which is characterized by the attorney's duty of steadfast devotion to the interests of the client. See id.; see also Rules of Professional Conduct 1.7. Second, the imposition of liability here would not undermine the relationship between a conservator and the ward in the same way—in fact, doing so would arguably advance that relationship, because it would encourage conservators to carry out their duties to the ward with due care. See part II B of this opinion.

that this notion was expressly recognized by either of our appellate courts.

Because of this, our inquiry regarding the normal expectations of the parties cannot begin and end with the question of whether our appellate courts have considered previously the legal viability of this exact action. To conclude as such would render our inquiry pointless, as we only consider the normal expectations of the parties when we ask for the first time whether the defendant in a particular case owed the plaintiff a duty of care. Presumably, then, every time a plaintiff brought a negligence action against a defendant alleging breach of a duty that has not been explicitly recognized by our appellate courts, the defendant could simply make an argument that it was not the normal expectation of the parties that the defendant could be held personally liable to the plaintiff for his or her negligence. We must focus, instead, not on whether the defendant could have expected that the plaintiff could bring a negligence action against him, specifically, but on the broader inquiry of whether the defendant could have expected that he would be held liable to a nursing home, in some way, for the type of misconduct alleged in the present case.

Our Supreme Court's decision in *Jewish Home*, supra, 257 Conn. 531 is instructive on this point. Our Supreme Court concluded in that case that a conservator could be held liable to a nursing home, specifically, for the losses it incurred as a result of the conservator's failure to timely secure Medicaid benefits for his ward. Id., 539–44. It is true that the nursing home in *Jewish Home* brought an action on a probate bond, rather than an action in negligence. What is significant for the purpose of our analysis, however, is that our Supreme Court recognized that a conservator could be held liable (1) to a nursing home, and (2) for the exact type of misconduct alleged in the present case.

The fact that the plaintiff in the present case and the plaintiff in *Jewish Home* are both nursing homes is significant because nursing homes are unique and differ from other creditors of an estate. This difference is primarily due to the critical nature of the services they provide to the ward—namely, shelter, food, and care to a vulnerable segment of our population.

Moreover, nursing homes are also unique because, unlike other service providers, they are very limited in their ability to refuse to provide or discontinue service to individuals who are indigent. Indeed, Connecticut by statute has imposed strict rules that govern the circumstances under which a nursing home[6] can (1) refuse to admit an indigent patient, or (2) involuntarily discharge a patient. General Statutes § 19a-533 (b) provides in relevant part: "A nursing home which receives payment from the state for rendering care to indigent persons shall: (1) *Be prohibited from discriminating against indigent persons who apply for admission to such facility on the basis of source of payment.* Except as otherwise provided by law, all applicants for admission to such facility shall be admitted in the order in which such applicants apply for admission. . . ." (Emphasis added.) Subsection (b) (3) of § 19a-533 further prohibits nursing homes from "requiring that an indigent person pay any sum of money or furnish any other consideration, including but not limited to the furnishing of an agreement by the relative, conservator or other responsible party of an indigent person which obligates such party to pay for care rendered to an indigent person as a condition for admission of such indigent person . . . ."

General Statutes § 19a-535 governs the circumstances under which a nursing home may involuntarily

[6] General Statutes § 19a-533 (a) defines a "nursing home" in relevant part as "any chronic and convalescent facility or any rest home with nursing supervision . . . which has a provider agreement with the state to provide services to recipients of funds obtained through Title XIX of the Social Security Amendments of 1965 . . . ."

discharge a patient. Section 19a-535 (b) provides, in relevant part, that "[a] facility shall not transfer or discharge a resident from the facility except to meet the welfare of the resident which cannot be met in the facility, or unless the resident no longer needs the services of the facility due to improved health, the facility is required to transfer the resident pursuant to section 17b-359 or 17b-360, or the health or safety of individuals in the facility is endangered, or *in the case of a self-pay resident*, for the resident's nonpayment or arrearage of more than fifteen days of the facility room rate, or the facility ceases to operate. . . ." (Emphasis added.) Section 19a-535 (a) (5) provides, in relevant part, that a "self-pay resident means *a resident who is not receiving state or municipal assistance to pay for the cost of care at a facility*, but shall not include a resident who has filed an application with the Department of Social Services for Medicaid coverage for facility care but has not received an eligibility determination from the department on such application, provided that the resident has timely responded to requests by the department for information that is necessary to make such determination . . . ." (Emphasis added; internal quotation marks omitted.)

Thus, pursuant to §§ 19a-533 and 19a-535, a nursing home may not refuse to admit a patient simply because he or she is indigent, nor may a nursing home discharge a patient who is reliant on Medicaid or in the process of obtaining Medicaid benefits but otherwise unable to pay for the cost of his or her care. In other words, the nursing home's hands are metaphorically tied—in the case that a patient is indigent and unable to pay for the cost of care, the nursing home itself cannot apply on behalf of the patient for public assistance yet must continue to provide services to the patient at its own expense. This predicament highlights just how critical it is to the nursing home that a conservator, once

appointed, performs his or her duties in a timely and attentive fashion.[7]

Moreover, with respect to the defendant's argument that he could not expect that he would be held liable for the plaintiff's loss because no probate bond was issued, we reiterate that the type of misconduct alleged by the plaintiff against the defendant in the present case is almost identical to that complained of by the plaintiff in *Jewish Home*, supra, 257 Conn. 535, 543–44. Our Supreme Court concluded in *Jewish Home* that the plaintiff nursing home could maintain an action on a probate bond against a conservator for his failure to timely complete an application for Medicaid benefits on behalf of his ward. Id., 540–44. Thus, the defendant should have at least been on notice that his failure to submit timely Johnson's application for Medicaid benefits could give rise to some sort of liability. Indeed, it would be unreasonable for the defendant to believe that the plaintiff would be left without a remedy simply because no probate bond was obtained.

Finally, the defendant argues that the parties could not have expected that he would be held personally liable to the plaintiff for his failure to timely submit

[7] We also note that, historically, many nursing homes have struggled to remain solvent. See General Statutes § 17b-339 (establishing nursing home financial advisory committee to "examine the financial solvency of nursing homes on an ongoing basis and to support the Departments of Social Services and Public Health in their mission to provide oversight to the nursing home industry on issues concerning the financial solvency of and quality of care provided by nursing homes"); see also Conn. Joint Standing Committee Hearings, Public Health, Pt. 10, 2017 Sess., p. 4780 (president and chief executive officer of Connecticut Association of Health Care Facilities noting that, in many larger urban nursing home facilities, percentage of Medicaid residents is close to 70 percent and that industry is in period of financial instability); Conn. Joint Standing Committee Hearings, Public Health, Pt. 6, 2009 Sess., p. 1763-65 (executive vice president of Connecticut Association of Health Care Facilities discussing in relation to Senate Bill No. 845, titled "An Act Concerning Oversight of Nursing Homes," insolvent nursing homes in state).

Johnson's application for Medicaid benefits because he was acting as an agent of the Probate Court and thus is entitled to quasi-judicial immunity. A conservator is entitled to quasi-judicial immunity, however, only when his or her actions are expressly authorized or approved by the Probate Court. See *Gross* v. *Rell*, 304 Conn. 234, 251–52, 40 A.3d 240 (2012).

"[W]hen the Probate Court has expressly authorized or approved specific conduct by the conservator, the conservator is not acting on behalf of the conservatee, but as an agent of the Probate Court." *Gross* v. *Rell*, supra, 304 Conn. 251. Thus, "when the conservator has obtained the authorization or approval of the Probate Court for his or her actions on behalf of the conservatee's estate, the conservator cannot be held personally liable." Id., 251–52.

In cases where "the conservator's acts are not authorized or approved by the Probate Court, however . . . [there is] no reason to depart from the common-law rule that the conservator of the estate is not acting as the agent of that court, but as the fiduciary of the conservatee, and, as such, may be held personally liable." Id., 253–54. "A conservator is a fiduciary and acts at his peril and on his own personal responsibility *unless and until* his actions in the management of the ward's estate are approved by the Probate Court." (Emphasis added; internal quotation marks omitted.) *Zanoni* v. *Hudon*, 48 Conn. App. 32, 37, 708 A.2d 222, cert. denied, 244 Conn. 928, 711 A.2d 730 (1998); see also *Elmendorf* v. *Poprocki*, 155 Conn. 115, 120, 230 A.2d 1 (1967) ("[e]ven if it was proper and necessary for the conservatrix to utilize the plainitiff's services in the management of her ward's estate, the liability for the value of the services rested on her personally, until they were subsequently approved by the Probate Court").

The defendant has failed to show that any of his actions with respect to his failure to obtain Medicaid benefits for Johnson were specifically ratified by the Probate Court. In other words, the defendant has not directed our attention to any order of the Probate Court that excused his obligation to timely submit Johnson's application for Medicaid benefits. Rather, in support of his argument that he is entitled to quasi-judicial immunity, the defendant simply makes the conclusory legal assertion that "[i]t was the expectation of the parties that [he] was acting with quasi-judicial immunity as he was performing his duties pursuant to his Probate Court appointment as conservator." Because our case law provides that a conservator is entitled to quasi-judicial immunity only if the specific act or acts at issue were approved by the court, the defendant's failure to show that even one act of his was ratified by the court is fatal to his argument. See *Gross* v. *Rell*, supra, 304 Conn. 256–57 (rejecting claims that conservators are entitled to quasi-judicial immunity even when acts are not authorized or approved by Probate Court simply because statutory safeguards exist to ensure proper behavior by conservator and that conservators, like guardian ad litems, are entitled to quasi-judicial immunity for discretionary acts); see also *Elmendorf* v. *Poprocki*, supra, 155 Conn. 119 (conservator was powerless to sell ward's estate without prior express authorization of Probate Court); compare *Zanoni* v. *Hudon*, supra, 48 Conn. App. 36–37 (conservator was not individually liable for breach of contract because Probate Court approved contract of sale and conservator, therefore, was acting as agent of Probate Court).

We conclude, therefore, that the parties reasonably could have expected that the defendant (1) would take the steps necessary to secure payment for the cost of Johnson's care, which necessarily included timely completing Johnson's application for Medicaid benefits,

and (2) could be held liable to the plaintiff if he failed to do so. The first factor of the public policy prong of our duty analysis therefore weighs heavily in support of the plaintiff's claim that the defendant owed it a duty of care.

B

Next, because they are analytically related, we consider together the second and third factors, namely, the public policy of encouraging participation in the activity, while weighing the safety of the participants,[8] and the avoidance of increased litigation. See *Lawrence* v. *O & G Industries*, *Inc.*, supra, 319 Conn. 658. With respect to these two factors, the plaintiff argues that, if we decline to recognize that a conservator can be held personally liable to it for his or her breach of statutory duties, it would lessen any incentive on conservators to perform their duties efficiently and adequately, and thus undermine the purpose of allowing nursing homes to petition to have a conservator appointed in the first place. The plaintiff further argues that, with respect to the consideration of increased litigation, any concern that recognizing a duty in this context would increase significantly a conservator's exposure is misplaced because a conservator already has certain statutory duties that require him or her to timely secure funding for the ward's care. The defendant argues, however, that recognizing a duty in this context would chill, rather than encourage, individuals to take on the role of conservator because it would increase a conservator's liability.

[8] Generally, our cases that have applied this test have referred to the "safety of the participants" because those cases involve activities that typically result in physical rather than financial harm. *See Lawrence* v. *O & G Industries*, *Inc.*, supra, 319 Conn. 659. That phraseology is somewhat inapt in circumstances, such as here, involving only allegations of financial harm. Thus, when we address the "safety" of the participants, we refer to the risk of financial harm presented by the alleged negligence.

We recognize that, with respect to the third factor which contemplates the concern of increased litigation, "[i]t is [often] easy to fathom how affirmatively imposing a duty on the defendants . . . could encourage similarly situated future plaintiffs to litigate on the same grounds; that is true *anytime* a court establishes a potential ground for recovery." (Emphasis in original.) *Monk* v. *Temple George Associates*, LLC, supra, 273 Conn. 120. Because of this, in considering these two factors, our Supreme Court at times has employed a balancing test to determine whether, in the event that a duty of care is recognized by the court, the advantages of encouraging participation in the activity under review outweigh the disadvantages of the potential increase in litigation. See id., 119–120 (concluding that desirability of promoting local business if duty was recognized outweighed relatively small potential increase in litigation); see also *Lawrence* v. *O & G Industries*, *Inc.*, supra, 319 Conn. 658–61 (concluding that recognition of duty would cause increase in litigation with no corresponding increase in safety on industrial and construction work sites.); *Jarmie* v. *Troncale*, supra, 306 Conn. 613–14 ("expanding the duty of a health care provider to an unforeseen victim of a patient's unsafe driving [w]ould interfere significantly with a health care provider's discretion to treat and counsel patients in accordance with an assessment of the patient's individual needs," while inevitably increasing number of actions against health care providers). Thus, the relevant inquiry in the present case is whether recognizing a duty in this context would further encourage conservators to use reasonable care in their administration of the ward's estate and, if so, whether the advantages of encouraging such behavior would outweigh the negative effects of a corresponding increase in litigation.

Our statutory scheme—or lack thereof—with respect to conservator liability has created a liability "loophole." Conservators are able to escape liability in cases

in which no probate bond is issued even if they act negligently in carrying out their duties.[9] As discussed in part II A of this opinion, § 45a-655 (a) imposes certain statutory duties on conservators. Interestingly enough, however, our statutes do not provide any corresponding statutory cause of action to third parties who are harmed by a conservator's negligent failure to perform his or her duties when no probate bond is issued. Thus, it is likely that recognizing that a conservator can be held liable for his or her negligence even without a probate bond would incentivize conservators to carry out their duties in a timely manner and with due care, whereas someone else who is already exposed to this type of liability would not be so incentivized. See *Lawrence* v. *O & G Industries, Inc.*, supra, 319 Conn. 659 ("[W]e observe that expanding the defendants' liability in this industrial accident context to include the purely economic damages suffered by other workers on site appears likely to increase the pool of potential claimants greatly. At the same time, the recognition of such a duty fails to provide a corresponding increase in safety, given that companies like the defendants are subject to extensive state and federal regulation, and already may be held civilly liable to a wide variety of parties who may suffer personal injury or property damage as a result of their negligence in the industrial or construction context." [Footnote omitted.]).

Furthermore, we do not agree with the defendant that allowing the plaintiff to bring a negligence action against him would discourage individuals from accepting the role of conservator of the estate. As we discussed in part II A of this opinion, the conservator of the estate already has a duty to pay their ward's debt and to use the assets of the estate to support the ward,

[9] Pursuant to § 35.1 (b) of the Probate Court Rules, the Probate Court has broad discretion to waive the requirement of a probate bond.

which necessarily includes timely securing any available public assistance if the ward lives in a nursing home and is unable to pay for the cost of his or her care. See General Statutes § 45a-655 (a); *Jewish Home*, supra, 257 Conn. 538–44; Office of the Probate Court Administrator, Connecticut Standards of Practice for Conservators (2018), standard 17 I E, available at http://www.ctprobate.gov/Documents/Connecticut%20Standards%20of20Practice%20for%20Conservators.pdf (last visited October 3, 2018). We are therefore not imposing any additional duties on the conservator of the estate that he or she is not already required to perform. See *Gazo* v. *Stamford*, supra, 255 Conn. 254 (rejecting snow removal company's public policy argument that recognizing duty to third parties "would be too burdensome because independent contractors would be liable to innumerable third parties, thereby creating a disincentive to contractors from doing this kind of business" and concluding that "[a]lthough we agree that contractors may be liable to parties whom they could not have necessarily identified specifically when entering into the original contract, they always have had a duty to perform their work in a nonnegligent manner, and our conclusion does no more than to hold contractors liable to those parties foreseeably injured by their negligence").

The defendant also argues that recognizing a duty in this context would increase litigation. Although we agree that recognizing such a duty would expose conservators to a new *type* of liability, we conclude that any corresponding increase in litigation would be minimal and not enough to outweigh the advantages of encouraging conservators to perform their obligations with due care. First, there likely would be no need to bring an action against a conservator in his or her personal capacity in cases where a probate bond was issued because, in those cases, an action could be

brought on the bond. Second, the nature of the relationship between a conservator and a nursing home is not normally contentious or fertile ground for litigation in the first instance. See *Gross* v. *Rell*, supra, 304 Conn. 258 (Our Supreme Court considered whether conservators, like guardians ad litem, should be entitled to quasi-judicial immunity for discretionary acts and concluded: "The role of a guardian ad litem for children in the inherently hostile setting of a marital dissolution proceeding . . . is distinguishable . . . from the role of a court-appointed conservator. It is all but inevitable that, in a dissolution proceeding, at least one of the parties will be disgruntled by the guardian ad litem's conduct towards the children and his or her recommendations concerning their best interests. Accordingly, without immunity, the guardians would act like litigation lightning rods. . . . In contrast, *it is not all but inevitable that conservators will act as litigation lighting rods for third party claims* because there is no such inherent conflict between the conservatee's interests and the interests of others." [Citation omitted; emphasis added; internal quotation marks omitted.]).

Finally, with respect to the "safety" of the participants of the activity, we find it particularly worrisome that, if we decline to recognize that the defendant owed the plaintiff a duty in the present case, the plaintiff and other nursing homes similarly situated will be left without a remedy that would allow them to recover losses sustained as a result of a conservator's negligence in cases where no probate bond is issued. The defendant argues that the plaintiff could have (1) requested the issuance of the probate bond itself, or (2) pursued a claim directly against Johnson's estate. We disagree with the defendant that the pursuit of either of these alternatives would suffice to make the plaintiff whole.

We find the defendant's suggestion that the nursing home that houses the ward, rather than the conservator of that ward's estate, should be required to ask the court to issue a probate bond to be unfair and unrealistic, as it would require a nursing home to monitor probate proceedings to ensure that a probate bond has been issued for each of its patients for which a conservator has been appointed. Imposing this obligation seems unnecessary considering that the issuance of a probate bond is already mandated by statute in certain circumstances. See General Statutes § 45a-139 (c); see also Probate Court Rules § 35.1 (b). Moreover, this potential avenue of recovery exists only if a nursing home acts preemptively on an assumption that a conservator will act negligently which, once again, seems unnecessary considering that a conservator already has certain statutory duties that require the conservator to pay the ward's debts and to use the estate to support the ward. See General Statutes § 45a-655 (a).

Pursuing a direct claim against a ward's estate would likewise be a fruitless endeavor for the plaintiff and other similarly situated nursing homes that encounter this issue because, typically, the ward's estate is insolvent. To obtain Medicaid benefits, an applicant must have less than $1600 in assets. Furthermore, because the cost of care at a nursing home is so expensive, even those individuals that have a considerable amount of assets in their estate likely will not be able to pay for the long-term costs of care. In those instances, the conservator should "spend down" the ward's assets so that the ward becomes eligible to receive Medicaid benefits, meaning that the ward's estate becomes insolvent for all practical purposes. See *Ross* v. *Giardi*, supra, 237 Conn. 555–74. Therefore, pursuing a third-party claim against the estate would often be fruitless.

Having considered all the relevant concerns of the parties, we conclude that the benefits of encouraging

conservators to carry out their duties with care and preventing financial harm outweigh any corresponding minimal increase in litigation. Thus, the second and third factors support the plaintiff's claim that the defendant owed it a duty of care.

C

The fourth and final factor that we consider in conducting our public policy analysis is the law of other jurisdictions on this issue. See *Jarmie* v. *Troncale*, supra, 306 Conn. 615. The plaintiff and the defendant both agree, and our independent research confirms, that no other reported decisions from other jurisdictions have decided the exact issue in this case, i.e., whether a conservator can be held personally liable to a nursing home facility or other third-party creditor, under a common-law theory of negligence, for failure to use care in performing his or her duties.

Several of our sister states, however, have enacted legislation that allows a third party to bring a *statutory* cause of action against a conservator if the conservator commits a tort in the course of the administration of the estate or the conservator otherwise is personally at fault for the party's loss. See Ala. Code § 26-2A-157 (b) (1975) ("[t]he conservator is personally liable for obligations arising from ownership or control of property of the estate or for torts committed in the course of administration of the estate if personally at fault"); Ariz. Rev. Stat. Ann. (1997) § 14-5429 (B) (same); Colo. Rev. Stat. § 15-1.5-112 (2) (b) (1999) (custodial trustee liable to third parties for obligations arising from control of custodial trust property or for tort committed in course of administration of custodial trust where custodial trustee is personally at fault); D.C. Code § 21-2074 (b) (2001) ("[t]he conservator is personally liable for obligations arising from ownership or control of property of the estate or for torts committed in the

course of administration of the estate . . . if personally at fault"); Haw. Rev. Stat. § 560:5-430 (b) (2004) (same); Idaho Code Ann. § 68-1312 (2) (b) (1989); Mass. Gen. Laws ch. 190b, § 5-428 (b) (2009) (conservator can be held personally liable if personally at fault for obligations arising from ownership or control of property of estate or torts committed in course of administration of estate); Minn. Stat. § 524.5-430 (b) (2003); Mo. Rev. Stat. § 475.132 (2) (1983); N.J. Stat. Ann. § 3b:13A-29 (1983); N.C. Gen. Stat. § 33B-12 (b) (2) (1995); S.C. Code Ann. § 62-5-429 (b) (1976); W. Va. Code § 44A-3-14 (c) (2000).

The recognition by so many of our sister states of this statutory cause of action is significant with respect to our public policy analysis. Statutes do not exist in a vacuum, and "it is well established that statutes are a useful source of policy for common-law adjudication, particularly when there is a close relationship between the statutory and common-law subject matters." (Internal quotation marks omitted.) *Hopkins* v. *O'Connor*, 282 Conn. 821, 844, 925 A.2d 1030 (2007) (recognizing need for consistency between statutory scheme and common law and declining to extend common-law absolute immunity to officer's actions where statute imposed criminal liability for same actions); see also *DeMaria* v. *DeMaria*, 247 Conn. 715, 721, 724 A.2d 1088 (1999) (considering statutory definition of "cohabitation" in determining meaning of that term as used in dissolution judgment; statute was useful source of common-law policy and could be used as definitional source); *Williams Ford, Inc.* v. *Hartford Courant Co.*, supra, 232 Conn. 580–82 (concluding that policy underlying statute should apply to negligent misrepresentation as matter of common law). Indeed, statutes "are now central to the law in the courts, and judicial lawmaking must take statutes into account virtually all of the time . . . ." (Internal quotation marks omitted.)

Hopkins v. *O'Connor*, supra, 845. We can therefore glean from the fact that so many of our sister states have recognized this statutory cause of action that the legislatures of those states believed that third parties should have a right to recover for harm caused to them by a conservator's negligence.

The defendant argues that the fact that no other states have considered whether a third party can bring an action against a conservator under a common-law theory of negligence weighs against recognizing that the defendant owed the plaintiff a duty of care. The fact that those states allow a third party to bring a statutory, rather than a common-law, cause of action is of no consequence to our consideration of whether public policy favors recognizing a duty of care. Instead, the relevant observation for purposes of the present analysis is that other jurisdictions recognize that principles of fairness weigh in favor of providing a third party with a remedy in the event that a conservator acts negligently and, as a result of that negligence, causes a third party to suffer harm. The fourth prong of our public policy analysis therefore also supports the plaintiff's claim that the defendant owed it a duty of care in the present case.

III

CONCLUSION

We therefore conclude, having considered whether the harm suffered by the plaintiff was foreseeable and all relevant public policy concerns, that the defendant owed the plaintiff a duty to use reasonable care in performing his duties as conservator of Johnson's estate, which necessarily included timely submitting Johnson's application for Medicaid benefits in order to obtain available public assistance funds for the cost of Johnson's necessary and critical care provided by the plaintiff.

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

In this opinion the other judges concurred.

ANDREA ROBLES ET AL. *v.* WEST AVENUE DENTAL, P.C., ET AL.
(AC 39747)

Sheldon, Prescott and Bear, Js.

Syllabus

The plaintiff, a former employee of the defendants, sought to recover damages from the defendants for, inter alia, injuries she suffered as a result of the defendants' negligent supervision of one of the plaintiff's coworkers, who sexually harassed her at work over an extended period of time. Following a trial, a jury returned a verdict for the plaintiff on her claim of negligent supervision. Before accepting the verdict, the court announced to counsel, without objection, that it would review the jury's interrogatories, worksheet and verdict forms to ensure that the documents were in order. After conducting its review, the court reported that it had found inconsistencies in the verdict form and interrogatories. Specifically, the jury had indicated that it found liability on the count alleging negligent supervision but had awarded zero damages to the plaintiff. The court reviewed for the jury the rule in Connecticut that, for a negligence claim, there needed to be an actual injury, and, if the jury found that there were no damages, then the verdict should be for the defendants. The court further stated that the jury could reconsider its award of damages. The parties did not object to the court's finding that the verdict was inconsistent or except to its clarifying instructions to the jury. Prior to excusing the jury, the court granted a request from the defendants' counsel for a sidebar discussion, and, immediately following, it gave further instructions to the jury, to which there was no exception from either party. After the jury had been excused to resume deliberations, the defendants' counsel explained for the record that the concern she had expressed at the sidebar conference was that the jury should be reminded that the plaintiff was required to prove that she had suffered actual harm in order to establish a claim of negligent supervision. Thereafter, the jury returned a verdict for the plaintiff on the count of negligent supervision and awarded her damages, and the court accepted that verdict without objection from counsel. Thereafter, the trial court rendered judgment for the plaintiff, from which the defendants appealed to this court. The only claim of error that the defendants did not abandon for failure to brief it adequately was their claim that

the court misconstrued the jury's original verdict as ambiguous and erred in returning the jury for further deliberations with instructions that it could not return a plaintiff's verdict without awarding the plaintiff damages, instead of accepting and rendering judgment for the plaintiff on the original verdict. *Held* that the defendants having failed to preserve that claim at trial, they could not seek review of it on appeal; the defendants did not object to the jury instructions given by the court, to the court's determination that the jury's initial verdict was inconsistent or to its resulting decision to return the jury for further deliberations to clarify its verdict instead of accepting that verdict as it was returned, and, therefore, they had no right to seek appellate review of the alleged errors in the court's rulings.

Argued May 30—officially released October 9, 2018

Procedural History

Action to recover damages for, inter alia, the defendants' alleged negligent supervision, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk and tried to the jury before *Povodator*, *J.*; verdict and judgment for the plaintiffs, from which the named defendant et al. appealed to this court. *Affirmed.*

Kristan Peters-Hamlin, for the appellants (named defendant et al.).

Daniel D. Dauplaise, with whom, on the brief, was *Victoria deToledo*, for the appellee (named plaintiff).

Opinion

PER CURIAM. The defendants West Avenue Dental, P.C., and Hrishikesh Gogate[1] appeal from the judgment of the trial court, rendered after a jury trial, awarding damages to the plaintiff Andrea Robles,[2] their former

[1] Tunxis Hill Dental, P.C., was also named as a defendant but is not a party to this appeal. In this opinion we refer to West Avenue Dental, P.C., and Gogate as the defendants.

[2] The complaint was initially filed by two plaintiffs, Robles and a former female coworker. After the trial, the female coworker settled with the defendants, and this appeal pertains only to Robles.

employee, for injuries she suffered due to the defendants' negligent supervision of one of her male coworkers, who sexually harassed her at work over an extended period of time. The defendants challenge the judgment on the ground that the verdict on which it was rendered was returned after the court erroneously determined that it could not accept the jury's original plaintiff's verdict awarding Robles $0 in damages because that verdict was inherently inconsistent, and, thus, improperly required the jury to conduct further deliberations to resolve the alleged inconsistency instead of accepting the original verdict and rendering judgment on it. The defendants claim on appeal that the court erred in concluding that the jury's original verdict was inherently inconsistent, and, thus, in refusing to accept and render judgment on that verdict. They argue that an award of $0 in damages was reasonable in this case because the damages claimed by Robles were largely speculative and unproved, and any damages she did prove could have been reduced by the jury under the court's instructions on their special defense of failure to mitigate damages. Finally, the defendants, claiming that the court erred in instructing the jury that it must award Robles at least some damages if it found the defendants liable for negligent supervision, ask this court to restore the original plaintiff's verdict awarding Robles $0 in damages. Robles, in opposition to the defendants' claim, argues principally that the defendants are not entitled to prevail on that claim because they failed to assert it at trial, and, thus, they failed to preserve it for appellate review. In light of the following facts and procedural history, we agree with Robles that the defendants' present claim was not preserved at trial and, thus, that it cannot be reviewed on appeal.

Robles and one of her former female coworkers filed a twenty-two count complaint against the defendants arising, inter alia, from the defendants' alleged failure to

supervise one of their male coworkers who repeatedly sexually harassed them while they were in the defendants' employ. Eleven counts of the complaint were brought on behalf of Robles.

After a lengthy trial, the jury found in favor of the defendants on ten of Robles' eleven counts against them. This appeal concerns only her seventh count, in which she pleaded the claim of negligent supervision on which she prevailed at trial. In that count, Robles alleged, inter alia, that the defendants failed to properly supervise one of her male coworkers whom they had a duty to supervise, and thereby allowed him to engage in sexually inappropriate conduct toward her, that the defendants were aware or should have been aware of her coworker's sexually inappropriate conduct toward her but failed take action to stop it, and, that as a result of the defendants' failure to take action to stop her coworker's sexually harassing conduct toward her, she suffered financial losses and emotional distress. The jury was instructed on that count, in relevant part, as follows: "A claim for negligent supervision . . . establishes direct liability for an employer who fails to exercise reasonable care in supervising . . . an employee. In order to prevail on a negligent supervision claim, [the] [plaintiff] must . . . prove that [she] suffered an injury due to the defendant[s'] failure to supervise an employee whom the defendant[s] had [a] duty to supervise. . . .

"[W]ith respect to the [claim] of negligent supervision . . . proof of an actual injury is a necessary part of the claim. The [plaintiff] [is] not entitled to recover under negligence-based claims if [she does] not also prove an actual injury—something more than a technical or nominal injury. . . ." (Internal quotation marks omitted.) The jury was provided a copy of the jury charge and a set of interrogatories, a worksheet and verdict forms to complete during its deliberations.

The jury initially filled out the interrogatories regarding Robles' negligent supervision claim as follows: "Did [Robles] prove, by a preponderance of the evidence that the defendants were negligent in their supervision of [her male coworker]? Yes. . . .

"Did the defendants prove that [Robles] . . . was negligent, as alleged by the defendants? Yes. . . .

"The parties proved that the respective negligence of the parties is as follows (must add up to 100 [percent]): Negligence of defendants: 50 [percent]; negligence of [Robles]: 50 [percent]. . . .

"Did [Robles] . . . prove that she was injured or damaged as a result of such negligent supervision? No."

When the jury returned to the courtroom after sending out a note informing the court that it had reached a verdict, the court announced that it would first review the verdict form and interrogatories by itself "to make sure there are no problems," and then, if it found that those documents were in order, it would begin the formal procedure of taking the verdict. Neither Robles nor the defendants objected to the court's announced decision to review the verdict form and interrogatories by itself to determine if they were in order before taking the verdict, or asked the court if they could view the verdict form and interrogatories before the court made its determination and took whatever action it deemed necessary before taking the verdict.

After completing its review, the court announced that it had found certain inconsistencies in the verdict form and interrogatories that it would require the jury to resolve before a verdict could be taken. To that end, without hearing from the parties, it instructed the jury as follows: "On interrogatory number seven, you indicate that you found there to be certain percentages of liability, but then you indicate that there was—you

answered no to the issue of damages, but then you put on a plaintiff's verdict form zero.

"The rule in Connecticut is for a negligence claim, there needs to be an actual injury in order to find for the plaintiff.

"So if you are not finding any damages sustained by the plaintiff, then I think [the verdict] should be for the defendant[s] on that claim.

"If you are feeling that there should be some kind of damages award[ed], that's something you can obviously reconsider, but the point is there is an inconsistency between saying you are finding for the plaintiff on a negligence claim, but finding zero damages.

"It either needs to be some damages or a determination for the defendant[s] on that claim, which in turn would implicate potentially the verdict form that you used." The court also noted an inconsistency in the jury's worksheet answers, and instructed the jury to review the worksheet as well. Neither Robles nor the defendants objected to the court's finding of inconsistencies in the original verdict or excepted to its instructions as to how the jury should resolve those inconsistencies and clarify its verdict.

Before the court excused the jury to return to the jury room, counsel for the defendants asked to address the court concerning the instruction it had just given, suggesting that she could do so at the bench. The court granted her request without objection by Robles' counsel, then held a sidebar discussion with counsel. Immediately after the sidebar, the court turned to the jury and further instructed it that, "the issue [on the interrogatory addressing the claim of negligent supervision was] . . . unless [the jury found] damages as part of the package, [it could not] find for the plaintiff. It's either [the] plaintiff has proven damages as part of the claim

in which case it's [the] plaintiff's award on that count, or if the plaintiff hasn't proven damages [the verdict is] required to be for the defendant[s]." Neither party excepted to the court's post-sidebar instruction or sought further relief from the court after that instruction was given.

After the court excused the jury to resume its deliberations, counsel for the defendants explained for the record the substance of the concern that she had expressed to the court at sidebar, which was that the jury should be reminded that Robles was required to prove that she had suffered actual harm in order to establish her claim of negligent supervision. Counsel did not state that she had objected to the court's determination that there were inherent inconsistencies in the jury's original verdict, or its decision to require the jury to deliberate further to resolve those inconsistencies instead of accepting that verdict and rendering judgment on it.

In the jury's final verdict, which the court accepted and recorded without objection by either party, it found that Robles had proved that she was actually injured or damaged as a result of the defendants' negligent supervision of her sexually abusive male coworker. Accordingly, on the basis of its further finding that she had suffered total damages of $11,900 as a result of such negligent supervision,[3] it awarded her damages of $5950 after reducing her total damages by 50 percent on the basis of comparative negligence.

In this appeal, the defendants initially set forth three claims of error in their preliminary statement of issues: (1) that the court erred in instructing the jury that it must correct its original verdict of zero damages

[3] The jury found that Robles had suffered $0 in economic damages and $11,900 in noneconomic damages as a result of the defendants' negligent supervision.

because it had found liability for negligent supervision and must instead award damages to Robles, despite the highly speculative nature of her claim, based on the court's misunderstanding of the law of inconsistent verdicts; (2) that the court erred by so instructing the jury without first consulting with counsel and then by refusing to allow the defendants to make a record of their objection to the instruction before dismissing the jury; and (3) the court erred by telling the jury that it must award damages if it found liability by failing to instruct the jury that it was permitted to award nominal damages. In their brief, however, the defendants presented argument and analysis as to only the first of those claims, which they rearticulated as follows: "Robles' claim of injury was entirely speculative, and unsupported by expert testimony; therefore, the jury's award of zero damages was not ambiguous, and the court erred in requiring the jury to find some damages in order to support its finding of liability." As relief for the court's alleged error, the defendants ask this court to "restore the jury's original verdict of $0 damages to Robles, and hold that Robles should be awarded nothing." So presented, the only claim of error that the defendants have not abandoned by failing to brief it[4] is that the court misconstrued the jury's original verdict as ambiguous and, thus, erred in returning the jury for further deliberations with instructions that it could not return a plaintiff's verdict without awarding Robles damages instead of accepting and rendering judgment for Robles on that original verdict. Robles responds to the foregoing claim by arguing principally that the defendants have no right to seek appellate review of that claim because they failed to make that claim at trial. We agree with Robles that the defendants failed

[4] See, e.g., *Harris* v. *Bradley Memorial Hospital & Health Center, Inc.*, 306 Conn. 304, 319, 50 A.3d 841 (2012) ("[a]n appellant who fails to brief a claim abandons it" [emphasis omitted; internal quotation marks omitted]), cert. denied, 569 U.S. 918, 133 S. Ct. 1809, 185 L. Ed. 2d 812 (2013).

to preserve the only claim they have briefed on appeal and, thus, that they have no right to seek appellate review of that claim.

Appellate review of claims of error regarding jury instructions and inconsistent verdicts is limited in scope to objections raised by counsel at trial. See C. Tait & E. Prescott, Tait's Handbook of Connecticut Evidence (5th Ed. 2014) § 1.30.1, pp. 95–96. In order to preserve their claims of error, the defendants must have objected when the jury instruction was given; see, e.g., *State* v. *Gebhardt*, 83 Conn. App. 772, 780, 851 A.2d 391 (2004) (appellate review of evidentiary rulings is limited to specific legal issue raised by objection of trial counsel); or filed a suitable request to charge. See *Ulbrich* v. *Groth*, 310 Conn. 375, 424, 78 A.3d 76 (2013) ("[i]t is well settled . . . that a party may preserve for appeal a claim that an instruction . . . was . . . defective either by: (1) submitting a written request to charge covering the matter; or (2) taking exception to the charge as given" [internal quotation marks omitted]). In light of the defendants' complete failure to object to the court's determination that the jury's initial verdict was inconsistent or to its resulting decision to return the jury for further deliberations to clarify its verdict instead of accepting that verdict as it was returned, the defendants have no right to seek appellate review of alleged errors in such judicial rulings and actions at this time.

The judgment is affirmed.

MEMORANDUM DECISIONS

CONNECTICUT APPELLATE REPORTS

VOL. 185

ANGEL GONZALEZ *v.* COMMISSIONER
OF CORRECTION
(AC 40457)

Lavine, Prescott and Harper, Js.

Argued September 20—officially released October 9, 2018

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

Per Curiam. The appeal is dismissed.

ANDRES R. SOSA *v.* COMMISSIONER
OF CORRECTION
(AC 40665)

Lavine, Sheldon and Bright, Js.

Argued September 21—officially released October 9, 2018

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

Per Curiam. The appeal is dismissed.

KEVIN LINDSAY *v.* COMMISSIONER
OF CORRECTION
(AC 40386)

Elgo, Bright and Sullivan, Js.

Argued September 24—officially released October 9, 2018

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

Per Curiam. The judgment is affirmed.

LAWRENCE GRANT *v.* COMMISSIONER OF CORRECTION
(AC 40069)

Prescott, Elgo and Moll, Js.

Argued September 21—officially released October 9, 2018

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

Per Curiam. The judgment is affirmed.

SHANNON ROBERSON *v.* COMMISSIONER OF CORRECTION
(AC 40614)

Alvord, Prescott and Moll, Js.

Argued September 24—officially released October 9, 2018

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

Per Curiam. The appeal is dismissed.

ELTON FERRUA *v.* NAPOLI FOODS, INC., ET AL.
(AC 40709)

Alvord, Prescott and Moll, Js.

Argued September 24—officially released October 9, 2018

Plaintiff's appeal from the Compensation Review Board.

Per Curiam. The decision is affirmed. The plaintiff's claims on appeal are inadequately briefed and thus we decline to review them. *Pryor* v. *Pryor*, 162 Conn. App. 451, 458, 133 A.3d 463 (2016).

BAYVIEW LOAN SERVICING, LLC
v. ALMAN BECKFORD ET AL.
(AC 39866)

Prescott, Elgo and Moll, Js.

Submitted on briefs September 21—officially released October 9, 2018

Named defendant's appeal from the Superior Court in the judicial district of Hartford, *Dubay*, *J.*

Per Curiam. The judgment is affirmed and the case is remanded for the purpose of setting new law days.

STATE OF CONNECTICUT *v.* DAVID BAILEY
(AC 40589)

Keller, Elgo and Eveleigh, Js.

Argued September 25—officially released October 9, 2018

Defendant's appeal from the Superior Court in the judicial district of Hartford, *Dewey*, *J.*

Per Curiam. The judgment is affirmed.

BENJAMIN JENKINS *v.* COMMISSIONER
OF CORRECTION
(AC 40860)

Alvord, Moll and Bear, Js.

Argued September 26—officially released October 9, 2018

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

Per Curiam. The judgment is affirmed.

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claim that trial court improperly declined to hold plaintiff in contempt for having failed to pay defendant one half of tax refunds he received from individual federal and state tax returns for 2010; claim that trial court abused its discretion in denying motion to modify order that allocated parties' obligation to pay guardian ad litem's fees; whether defendant failed to prove substantial change in circumstances since court's allocation of parties' obligation to pay guardian ad litem's fees that necessitated reduction in defendant's 20 percent share of payment of fees; claim that trial court abused its discretion in reducing plaintiff's child support obligation; claim that trial court improperly failed to hear defendant's cross motion for modification of child support; claim that trial court improperly failed to order plaintiff to pay to defendant full amount of past due alimony for 2012.

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Wiggins *v.* Commissioner of Correction (Memorandum Decision) 901

SUPREME COURT PENDING CASES

The following appeal is assigned for argument in the Supreme Court on October 19, 2018.

INDEPENDENT PARTY OF CT - STATE CENTRAL et al. *v.* DENISE MERRILL, SECRETARY OF STATE et al., SC 20160/20165
Judicial District of Hartford

Elections; Political Parties; Whether Trial Court Properly Determined that 2006 Bylaws Were Not Operative Bylaws for Minor Political Party That Gained Statewide Status in 2008; Whether Trial Court Properly Ordered Secretary of State to Accept Only Endorsements and Nominations Made Under 2010 Bylaws. The plaintiffs in this action are the Independent Party of CT-State Central, the Danbury faction of the Independent Party of Connecticut, and its officers. The Danbury faction has been engaged in a long-standing dispute with the party's Waterbury faction. In 2006, the Danbury faction filed bylaws to govern its operations with the Secretary of State. At the time, the Independent Party consisted of local parties throughout the state rather than one statewide party because, in order for a minor political party to gain official statewide status, it must obtain one percent of the vote in a statewide election. The Independent Party gained statewide minor party status after its presidential candidate obtained one percent of the vote in the 2008 general election. In 2010, the Waterbury faction held a meeting to ratify bylaws for the Independent Party as a statewide party. The proposed bylaws were unanimously approved and submitted to the Secretary of State. The Independent Party conducted its business and nominated its candidates in accordance with the 2010 bylaws for several years with no objection. In 2016, however, the Danbury faction and the Waterbury faction nominated different candidates for the Independent Party's endorsement. The Secretary of State informed both factions that she would not place either of their nominees on the ballot unless one nominee withdrew. The plaintiffs subsequently brought an action against the defendants Michael Telesca and Rocco Frank, Jr., who are officers of the statewide party elected under the 2010 bylaws. The plaintiffs sought declaratory and injunctive relief to establish their control of the statewide party and argued that the 2006 bylaws were the operative party bylaws under General Statutes § 9-374, which governs the filing of minor political party rules. The defendants filed a counterclaim that sought similar relief as to the authority of the 2010 bylaws. The trial court found in favor of the defendants, concluding that the 2006 bylaws could not be the operative party bylaws under

§ 9-374 where the Independent Party did not gain official statewide status until 2008 and that the plaintiffs adopted the 2010 bylaws by waiver. Among the trial court's orders was that the Secretary of State "must accept only the nominations and endorsements of the Independent Party/Independent Party of Connecticut, made pursuant to the 2010 bylaws." SC 20165 is the plaintiffs' appeal from the judgment. The plaintiffs claim that the trial court erred in concluding that the 2010 bylaws are the operative party bylaws. SC 20160 is a writ of error brought from the trial court's judgment by candidates for state representative who received unopposed endorsements from the Danbury faction. They claim that the trial court erred in ordering the Secretary of State to accept only endorsements and nominations made under the 2010 bylaws and argue that the order prevents them from being placed on the ballot for the 2018 general election on the Independent Party line. They request that the Secretary of State be ordered to accept the Danbury faction's endorsements and to print ballots for the 2018 general election listing them on the Independent Party line.

The summary appearing here is not intended to represent a comprehensive statement of the facts of the case, nor an exhaustive inventory of issues raised on appeal. This summary is prepared by the Staff Attorneys' Office for the convenience of the bar. It in no way indicates the Supreme Court's view of the factual or legal aspects of the appeal.

John DeMeo
Chief Staff Attorney

NOTICES

Notice of Certification as Authorized House Counsel

Upon recommendation of the Bar Examining Committee, in accordance with § 2-15A of the Connecticut Practice Book, notice is hereby given that the following individuals have been certified by the Superior Court as Authorized House Counsel for the organization named:

Certified as of September 21, 2018:

Elizabeth Garrett	GE Capital - Energy Financial Services
Meredith Grauer	Nielsen
Scott Hendler	Viking Global Investors
Lee S. Schumer	Charter Communications
Jennison C. Smith	Portfolio Advisors, LLC
Kevin Tang	Gartner, Inc.

Certified as of September 24, 2018:

Mark J. Beachy	Travelers Insurance Company
Jason K. Petrek	UTC Aerospace Systems
Justin Smith	Voya Financial

Hon. Patrick L. Carroll III
Chief Court Administrator

Notice of Suspension of Attorney

Pursuant to § 2-54 of the Connecticut Practice Book, notice is hereby given that on September 24, 2018 in Docket Number HHD-CV-17-6074515-S Thomas Willcutts, juris # 302886 of Hartford, CT was suspended from the practice of law for a period of two years retroactive to the date of the interim suspension, April 11, 2017.

1. The respondent must comply with Practice Book § 2-47B (Restrictions on the activities of Deactivated Attorneys) unless otherwise ordered by the court. It is anticipated that respondent may file an application pursuant to this section and, if in compliance with the practice book and in proper order, the petitioner does not object subject to a hearing and an order of the court.

2. Prior to reinstatement in Connecticut, the respondent must satisfy any Connecticut bar requirements and otherwise must be in good standing and must demonstrate this fact to disciplinary counsel.

3. The trustee in this matter, appointed by the court order dated April 11, 2017 shall continue to fulfill his duties until released by order of a court.

4. Prior to reinstatement in Connecticut, the respondent shall satisfy any bar requirements and shall be in good standing and must demonstrate this fact to the disciplinary counsel. The respondent will be reinstated on April 11, 2019 unless disciplinary counsel files an objection to reinstatement prior to that date, in which event the qualifications of the respondent for reinstatement under this order will be heard and determined by the Court. The respondent does not have to apply for readmission through Practice Book § 2-53.

5. For the first two years of practice following reinstatement the respondent must be associated with another attorney in the same office. The respondent shall have no signing authority over the IOLTA account maintained by his office during this time period. The respondent shall provide disciplinary counsel with the name of the law firm, identify all attorneys associated with the law firm and the name of the attorneys associated with the law firm and the names of the attorneys that are signatories on the IOLTA account. The respondent shall update this information within 30 days of any change.

James T. Graham
Judge

Notice of Pendency of Reinstatement Application

In accordance with Section 2-53 of the Connecticut Practice Book, notice is hereby given that the following individual has filed an application for reinstatement to the bar:

Michelle Holmes

The Standing Committee on Recommendations for Admission to the Bar of Fairfield County will commence a hearing on the above application on Monday, October 15, 2018 at 10 AM at Bridgeport Superior Court, 1061 Main Street, Bridgeport, CT 06604 and such future dates as are necessary to conclude the matter.

Please contact Carolyn R. Linsey, Chairperson (203-576-2374) for further information regarding the matter or if you have an objection to the application.

OFFICE OF STATE ETHICS

Office of State Ethics advisory opinions are published herein pursuant to General Statutes Sections 1-81 (3) and 1-92 (5) and are printed exactly as submitted to the Commission on Official Legal Publications.

Advisory Opinion No. 2018-3, September 20, 2018

Questions Presented: **The petitioner's principal question is whether a Department of Public Health (''DPH'') Board Member may accept compensation as a consultant or expert witness in civil medical malpractice claims while concurrently serving on the DPH Board that regulates healthcare professionals.**[1]

Brief Answer: **We conclude that a DPH board member may engage in private consultancy/ expert witness work, provided he or she meets the four part test set forth in this opinion.**

At its July 2018 regular meeting, the Citizen's Ethics Advisory Board granted the petition for an advisory opinion submitted by Commissioner Raul Pino, of the Department of Public Health (''DPH''). The Board now issues this advisory opinion, which interprets the Code of Ethics for Public Officials[2] (''Ethics Code''), is binding on the Board concerning the person who requested it and who acted in good-faith reliance thereon, and is based on the facts provided by the petitioner.

Facts

The following facts, as set forth by the petitioner, are relevant to this opinion:

> The Department of Public Health (''DPH'') respectfully petitions the Citizen's Ethics Advisory Board for an advisory opinion concerning the application of the Code of Ethics for Public Officials, Connecticut General Statutes Section 1-79 *et seq*., to certain circumstances involving professional members of the professional healthcare boards and commissions identified pursuant to Section 19a-14(b) of the General Statutes (e.g., Connecticut Medical Examining Board, Connecticut State Board of Examiners for Nursing, Dental Commission, Board of Examiners for Psychologists, etc.) (collectively, ''DPH Boards'').
>
> As the Office of State Ethics recognized in Advisory Opinion No. 1994-16, while a particular member of a DPH Board is not compensated for service to a professional board or commission, he or she is a ''public official'' as that term is defined in the Code of Ethics and exercises the power of the state. *See* Conn. Gen. Stat. §§ 1-79 (11). *See also* Ethics Commission Declaratory Ruling 1985-B, *In re Michael J. Zazzaro, D.M.D.* Likewise, the DPH controls ''the allocation, disbursement and budgeting of funds appropriated to the department for the operation of

[1] The Petitioner also asks an ancillary question, namely, whether any distinction exists under the Ethics Code if a current DPH Board member serves as a paid expert consultant for either a defendant healthcare practitioner or a plaintiff patient in a civil medical malpractice case. The conclusion reached in this opinion with respect to the principal question renders this ancillary question moot.

[2] Chapter 10, part I, of the General Statutes.

the boards and commissions'' which are ''within the Department of Public Health.'' Conn. Gen. Stat. § 19a-14(a)(1). DPH Board authority includes hearing and deciding matters concerning the suspension or revocation of healthcare licenses and adjudicating complaints against practitioners and imposing sanctions when appropriate. See, e.g., Advisory Opinion No. 1994-16; Declaratory Ruling 1985-B; Conn. Gen. Stat. §§ 20-8a(f) (Medical Board); 20-90(b) (Nursing Board); 20-103a(b) (Dental Commission); 20-186a (Psychology Board).

In Advisory Opinion No. 1994-16, the Office of State Ethics opined, in part, that a then current attorney member of the Connecticut Medical Examining Board was prohibited, under the Code of Ethics for Public Officials, from ''representing anyone with regard to an investigation which might ultimately be resolved by that board'' as ''the acceptance of such employment in his private capacity would violate Conn. Gen. Stat. '' 1-84 (b), which prohibits the acceptance of outside employment by a public official if such employment would impair his independence of judgment with regard to his official duties.'' In addition, the board member's ''effectiveness, if not his impartiality, as a [DPH Board] member would most certainly be jeopardized by his acceptance of private casework subject to [the DPH Board's] jurisdiction.'' *Citing* Advisory Opinion No. 1993-10.

Moreover, the Office of State Ethics found that the acceptance of such employment ''would also be an inappropriate use of office in violation of Conn. Gen. Stat. § 1-84 (c) [(no public official . . . shall use his public office or position . . . to obtain financial gain for himself)]'' as the individual's position as a board member ''lends his private practice in this area a credibility among potential clients which does not arise from his expertise alone, but rather results from this use of office, however inadvertent.'' Advisory Opinion No. 1994-16.

The DPH respectfully requests an advisory opinion as to whether an equivalent conclusion results with respect to a healthcare practitioner – currently serving on a DPH Board – who may accept compensation as a paid consultant/expert for parties to civil medical malpractice claims (*e.g.,* a current physician member of the Medical Board is offered compensation as an expert consultant for a defendant physician in a medical malpractice case; a current dentist member of the Dental Commission is offered compensation as an expert consultant for a plaintiff patient in a dental malpractice case). Finally, the DPH respectfully requests that the advisory opinion address whether any distinction exists under the Code of Ethics for Public Officials (in particular, consideration of Conn. Gen. Stat. § 1-84 (c)) should a current DPH Board member serve as a paid expert consultant for (i) a *defendant healthcare practitioner* or (ii) a *plaintiff patient* in a civil medical malpractice case.

Analysis

As a preliminary matter, considering the manner of their appointment and the state regulatory authority they exercise,[3] members of the professional healthcare boards and commissions identified in § 19a-14(b) of the General Statutes (collec-

[3] See General Statutes §§ 20-8a, 20-128a, 20-88, 20-103a, 20-186, 20-196, 20-139a, 20-235a, 20-208, 20-35, 20-25, 20-51, 20-268, and 20-67.

tively referred to as ''DPH Boards'')[4] are ''public officials'' for purposes of the Ethics Code[5] and, therefore, must adhere to its provisions, including the outside employment rules.

This Board and its predecessor agency, the State Ethics Commission (''Commission''), consistently noted, that the Ethics Code does not contain a blanket prohibition against outside employment, but it does impose significant restrictions on that employment. The Ethics Code has two long-established provisions that govern the outside employment activities of public officials and state employees. First, under General Statutes § 1-84 (b), a public official or state employee shall not ''accept other employment which will either impair his independence of judgment as to his official duties or employment or require him, or induce him, to disclose confidential information acquired by him in the course of and by reason of his official duties.''[6] Second, under General Statutes § 1-84 (c), a public official or state employee shall not ''use his public office or position or any confidential information received through his holding such public office or position to obtain financial gain for himself . . . .''[7] Generally, these provisions prohibit outside employment in a situation in which an outside employer can benefit from the state employee's official actions—for example, the state employee, in his state job, has supervisory, contractual or regulatory authority over the outside employer.[8]

The issue of privately compensated consultancy and expert testimony work by members of state boards and other governmental institutions has been addressed in a number of formal and informal opinions.

In Advisory Opinion No. 1994-16, specifically cited by the Petitioner, a member of the Connecticut Medical Examining Board (''CMEB'') was prohibited from engaging in representation of individuals who may possibly come before the medical board on which he serves. Such representation, the Commission reasoned, would impair the member's independence of judgment with regard to his official duties in violation of § 1-84 (b).[9] Further, the Commission concluded that the board member's service on the medical board lends his private work a credibility before potential clients and, as such, results in the use of office, however inadvertent, in violation of § 1-84 (c).[10]

Similarly, a member of the Dental Commission was restricted from becoming a paid consultant ''whose duties include inspecting dental facilities and investigating dental professionals concerning matters which might result in disciplinary proceeding before the [Dental] Commission,'' as such work would impair the member's independence of judgment in violation of § 1-84 (b).[11]

[4] Connecticut Medical Examining Board; Connecticut State Board of Examiners for Optometrists; Connecticut State Board of Examiners for Nursing; Dental Commission; Board of Examiners of Psychologists; Connecticut Board of Veterinary Medicine; Connecticut State Board of Examiners for Opticians; Connecticut State Board of Examiners for Barbers and Hairdressers and Cosmeticians; Connecticut Board of Examiners of Embalmers and Funeral Directors; State Board of Naturopathic Examiners; State Board of Chiropractic Examiners; Connecticut Board of Examiners in Podiatry; Board of Examiners of Electrologists; and Connecticut State Board of Examiners for Physical Therapists.

[5] General Statutes § 1-79 (11).

[6] General Statutes § 1-84 (b).

[7] General Statutes § 1-84 (c).

[8] Regs., Conn. State Agencies § 1-81-17.

[9] Advisory Opinion No. 1994-16, Connecticut Law Journal, Vol. 56, No. 11, p. 2B (September 13, 1994).

[10] Id.

[11] Declaratory Ruling 1985-B.

In contrast, in Advisory Opinion No. 89-8, a member of the State Board of Chiropractic Examiners was permitted to provide licensed insurance carriers paid professional assessments of patient records in order to determine whether chiropractic treatment was appropriate. The member was also permitted to engage in no fee blind peer reviews of other individuals practicing chiropractic medicine in Connecticut where the identity of the chiropractor and patient was not revealed.[12] The reason for permitting such activity was the board member's commitment to abstain from any matters involving his private assessments and reviews.

Although abstention from matters involving prior private consultancy or expert witness work mitigates impairment-of- independence-of-judgment concerns under the Ethics Code, such private work remains problematic under the ''use of office'' provision of § 1-84 (c) when private work is offered based on a board member's official authority rather than his or her expertise. This concern is highlighted whenever outside counsel seeks to bolster their cases by hiring state officials as expert witnesses or consultants, thus raising questions about the use of office by a hired state employee or official, regardless of how inadvertent.

Illustrative of this concern is Request for Advisory Opinion No. 3068 (2002), in which the estate of a man who died, while undergoing pre-employment physical assessment testing for the Department of Corrections, hired a training officer with the Connecticut Police Academy as its expert on proper pre-employment testing procedures. In the opinion, a staff attorney of the former State Ethics Commission noted that, although it was apparent that the training officer had significant experience testifying as an expert witness, it was equally apparent that his ''position with the state will add credibility to his work for the Estate, especially where, as in this case, the Estate is making a claim against [his] ultimate employer, the state of Connecticut.'' The staff attorney further noted in the opinion that ''one of the reasons that the Estate hired [the training officer as an expert witness] is because of his State position, e.g., his state position adds credibility to his testimony in support of a claim against the state.''[13]

In Request for Advisory Opinion No. 3185 (2003), the question was whether a member of the state Home Inspection Licensing Board (''HILB'') could serve as a compensated expert witness in a case pending in Superior Court, but not before the HILB. The board member was permitted to do so, provided that the following considerations were met: ''(1) the individual in question had previously been used as an expert witness prior to his acceptance of a seat on the [HILB]; (2) the request to serve as such a witness comes because of his prior expertise and not as a result of his [HILB] position, and; (3) there is no foreseeable chance that the matter will come before the [HILB].''[14] The opinion noted further that ''the board member should not accept this work if the matter was at one time before the [HILB] prior to the Superior Court action,'' and ''in order to avoid a use of office under [§] 1-84 (c), the number of cases taken by the board member should remain consistent with his caseload prior to his acceptance of the [HILB] position.''[15]

Here, the Petitioner's inquiry asks this Board to determine whether the conclusion reached in Advisory Opinion No. 1994-16 applies to DPH Board members who may accept compensation as paid consultants and/or experts in civil malpractice claims. In that opinion, as noted above, the prohibition on private consultancy/

[12] Advisory Opinion No. 1989-8, Connecticut Law Journal, Vol. 50, No. 40, p. 1C (April 4, 1989).
[13] Request for Advisory Opinion No. 3068 (2002).
[14] Request for Advisory Opinion No. 3185 (2003).
[15] Id.

expert witness work by a member of the CMEB was imposed because matters on which the member was to provide private expert consultancy were likely to come before the CMEB and, therefore, exposed him to violations of § 1-84 (b) and (c). Although we affirm the conclusions reached in that opinion, the scope of the Petitioner's inquiry may extend to scenarios where matters under review of a DPH Board member, who acts as an expert consultant/witness in a private capacity, may or may not come before the regulatory board.

In order to capture a broad range of situations, beyond the specific one addressed in Advisory Opinion No. 1994-16, we adopt a four part test, elements of which are set forth in Request for Advisory Opinion No. 3185 (2003), noted above. Under this test, a DPH board member may engage in private consultancy/ expert witness work provided he or she meets the following criteria:

1) a DPH Board member had previously been used as an expert witness prior to his or her acceptance of a seat on a DPH Board;

2) the request to serve as a consultant and/or expert witness is made because of a DPH Board member's prior expertise and not as a result of his or her DPH Board position;

3) there is no foreseeable chance that the matter on which consultancy and/or expert witness service will be provided will come before the DPH Board to which he or she has been appointed. In the event the matter does come before the DPH Board, the DPH Board member shall recuse himself or herself; and

4) a DPH Board member should not accept private consultancy/expert witness work if the matter on which he or she is to provide private expertise was at one time before the DPH Board on which he or she now serves.

Conclusion

Based on the foregoing, we conclude that a DPH board member may engage in private consultancy/ expert witness work, provided he or she meets the four part test set forth in this opinion.

By order of the Board,

Dated 9/27/18 Dena M. Castricone

Chairperson /~~Vice Chairperson~~