ELIZABETH BUCCI *v.* CITY OF BRIDGEPORT
(AC 46399)

Elgo, Suarez and Keller, Js.

Syllabus

The plaintiff sought to recover damages from the defendant city for injuries she sustained in connection with a motor vehicle accident. On the night of the accident, after finishing their shifts, C and G, police officers employed by the defendant, drove separately to a restaurant, where C consumed alcoholic beverages. When they left the establishment, C was visibly intoxicated. As G was following C to his home, C's vehicle crossed into the plaintiff's lane of travel and collided with her vehicle. The plaintiff claimed that the defendant was liable for G's allegedly negligent conduct in allowing C to operate his vehicle while under the influence of alcohol pursuant to the applicable statute (§ 52-557n) and for failing to properly screen C prior to hiring him as a member of the police department. The trial court granted the defendant's motion for summary judgment and denied the plaintiff's motion for summary judgment, and the plaintiff appealed to this court. *Held*:

1. The trial court properly determined that a genuine issue of material fact did not exist as to whether G was acting within the scope of his employment or official duties so as to subject the defendant to a claim for the plaintiff's injuries pursuant to § 52-557n (a) (1) (A): the affidavits submitted by the defendant in connection with its motion for summary judgment demonstrated that G was not engaged in any official duty of his employment or doing something incidental to it at the time of his allegedly negligent conduct, as G and C had been off duty for approximately four hours prior to the accident, they drove their personal vehicles to the restaurant, they were not in uniform and did not have badges, identifying insignia or service weapons on their person at the restaurant, they had not been attending a party sponsored by the police department, and they did not perform any police services while at the restaurant; moreover, contrary to the plaintiff's assertions, G's violations of the police department's policies and procedures did not constitute violations of his official duties pursuant to statute (§ 54-1f) but, rather, were violations of his overall responsibility and ethical character.
2. The trial court properly determined that the plaintiff's claim regarding the defendant's negligent hiring of C was barred by the applicable statute of limitations (§ 52-584): because C was hired in 2011 and the present case was commenced in 2019, C was hired more than three years before the institution of the present action; moreover, the court properly determined that the plaintiff had waived her claim that the continuing course of conduct doctrine tolled the statute of limitations as it was procedurally defective because, instead of affirmatively pleading the doctrine in avoidance of the defendant's statute of limitations special defense, she asserted it for the first time in her memorandum of law in opposition to the defendant's motion for summary judgment; furthermore, the court properly rejected the plaintiff's continuing course of conduct argument on substantive grounds as the plaintiff failed to allege that she had a special relationship with the defendant or to demonstrate that a genuine issue of material fact existed with respect to whether the defendant committed some later, actual or affirmative wrongful act related to the initial hiring of C.

Argued February 7—officially released August 27, 2024

Procedural History

Action to recover damages for personal injuries sustained as a result of, inter alia, the defendant's alleged negligence, brought to the Superior Court in the judicial district of Fairfield, where the court, *Welch, J.*, granted the defendant's motion to strike the second count of the plaintiff's complaint; thereafter, the court, *Hon.*

Barry K. Stevens, judge trial referee, granted the defendant's motion for summary judgment, denied the plaintiff's motion for summary judgment, and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Stephanie Z. Roberge, for the appellant (plaintiff).

Bruce L. Levin, associate city attorney, for the appellee (defendant).

Opinion

SUAREZ, J. The plaintiff, Elizabeth Bucci, appeals from the judgment rendered by the trial court following its granting of a motion for summary judgment that was filed by the defendant, the city of Bridgeport, and its denial of her motion for summary judgment. On appeal, the plaintiff claims that, in granting the defendant's motion for summary judgment, the court improperly (1) concluded that a genuine issue of material fact did not exist with respect to whether Bridgeport Police Officer Anthony Gianpoalo[1] was acting within the scope of his employment or official duties, and (2) determined that her claim based on the defendant's negligent hiring of Bridgeport Police Officer John Carrano was barred by the applicable statute of limitations.[2] We affirm the judgment of the trial court.

[1] Gianpoalo's name is alternatively spelled "Gianpaolo" in the record and in the parties' appellate briefs. We will use the spelling Gianpoalo because that is how his name appears on his affidavit that was submitted to the court in connection with the defendant's motion for summary judgment.

[2] The plaintiff also claims on appeal that the court erred in "holding [that] the discretionary function doctrine barred [her August 5, 2021 amended] complaint." The court, however, did not grant the defendant's summary judgment motion on this ground. Accordingly, we need not address this issue in light of our conclusions that the court correctly determined that a genuine issue of material fact did not exist as to whether Gianpoalo and Carrano were acting within the scope of their employment and that the plaintiff's claim of negligent hiring was barred by the statute of limitations. *Lashgari* v. *Lashgari*, 197 Conn. 189, 196, 496 A.2d 491 (1985) ("we need not address other issues raised on appeal if the trial court has correctly decided an issue that is sufficient to sustain the judgment" (emphasis omitted)). Moreover, in light of our decision to affirm the court's judgment

The following procedural history is relevant to our resolution of this appeal. In November, 2019, the plaintiff commenced this action against the defendant. In her complaint, subsequently amended on August 5, 2021 (amended complaint), the plaintiff brought a cause of action, sounding in negligence, based on the conduct of Gianpoalo.[3] In count one of her amended complaint, the plaintiff alleged the following facts: "At all times relevant . . . [Carrano] . . . [and Gianpoalo] . . . were employed by the defendant . . . . [O]n the evening of December 22, 2017 . . . Carrano and other police officers . . . were attending a holiday party held by the . . . Bridgeport Police Department at Vazzy's Pasta & Pizza [in Bridgeport (Vazzy's)] . . . . Between approximately 10 p.m. on December 22, 2017, and 12:08 a.m. on December 23, 2017, [Carrano] consumed alcoholic beverages and became visibly intoxicated while attending said party. . . .

"On December 23, 2017, at approximately 12:08 a.m., [Carrano] left [Vazzy's] intoxicated and was accompanied by [Gianpoalo] . . . . [Gianpoalo] . . . permitted [Carrano] to drive his motor vehicle when [he] knew or should have known that [Carrano] was intoxicated. . . . [Gianpoalo] . . . made a plan to follow [Carrano] to his destination when he knew or should have known that [Carrano] was intoxicated and undertook to follow him as planned. . . .

"On December 23, 2017, at approximately 12:08 a.m., the plaintiff . . . was operating her motor vehicle in a northerly direction on Broadridge Avenue, at or near the intersection of Emerald Place, in Bridgeport . . . .

granting the defendant's summary judgment motion, we need not address the court's denial of the plaintiff's motion for summary judgment.

[3] Although the plaintiff referred to Gianpoalo as Officer Doe in her amended complaint, by the time that the court subsequently ruled on the defendant's motion for summary judgment, it was undisputed that Officer Doe referred to Gianpoalo. For the purposes of clarity, all references to Officer Doe in the plaintiff's amended complaint have been changed to Gianpoalo.

[A]s the plaintiff . . . proceeded northbound on Broadridge Avenue, the vehicle operated by [Carrano], suddenly and without warning, crossed over the yellow line into the plaintiff's lane of travel and violently collided into the front of her vehicle, resulting in significant front end damage which required the plaintiff to be extricated from the vehicle. . . . The plaintiff . . . and [Carrano] were both transported by ambulance from the scene of the accident to Bridgeport Hospital for an evaluation of their injuries. . . . Following an investigation by the Stratford Police Department, it was discovered that [Carrano's] blood alcohol content was 0.25 . . . at the time he was being treated at Bridgeport Hospital following the collision.

* * *

"As a . . . result [of the accident], the plaintiff . . . incurred considerable expenses for emergency medical care, hospitalization, physicians' visits, diagnostic studies, physical rehabilitation, surgical intervention, follow-up therapy, and medicines . . . ."

In her amended complaint, the plaintiff alleged that, pursuant to General Statutes § 52-557n,[4] the defendant, through its agents, servants, and/or employees, was liable for the damages she sustained as a result of the accident. Specifically, the plaintiff alleged that the defendant was liable because Gianpoalo allowed Carrano to operate his motor vehicle while under the influence of alcohol in violation of General Statutes §§ 14-222 and 14-227a[5] and several Bridgeport Police Depart-

[4] General Statutes § 52-557n provides in relevant part: "(a) (1) Except as otherwise provided by law, a political subdivision of the state shall be liable for damages to person or property caused by: (A) The negligent acts or omissions of such political subdivision or any employee, officer or agent thereof acting within the scope of his employment or official duties . . . ."

[5] General Statutes § 14-222 provides in relevant part: "(a) No person shall operate any motor vehicle upon any public highway of the state . . . recklessly . . . ."

General Statutes § 14-227a provides in relevant part: "(a) No person shall operate a motor vehicle while under the influence of intoxicating liquor or any drug or both. A person commits the offense of operating a motor vehicle

ment policies.[6] The plaintiff also alleged that the defendant was liable because Gianpoalo failed to prevent Carrano's operation of his motor vehicle in violation of General Statutes § 54-1f,[7] as Gianpoalo did not arrest Carrano when he had reasonable grounds to believe that Carrano was committing a felony. The plaintiff further alleged that the defendant was liable for failing to properly screen Carrano prior to hiring him as a member of the Bridgeport Police Department. In count three of her amended complaint,[8] the plaintiff pleaded in the alternative that, in the event the court finds that the defendant's actions were discretionary, Gianpoalo's duty to act was so clear and unequivocal that discretionary act immunity does not apply to the defendant.

On September 2, 2021, the defendant filed an answer in response to the plaintiff's amended complaint. In its answer, the defendant admitted to some of the plaintiff's allegations, denied some of the allegations, and left the plaintiff to her proof as to other allegations. In particular, the defendant admitted that it employed Carrano and Gianpoalo as Bridgeport police officers and that the officers were at Vazzy's between approxi-

while under the influence of intoxicating liquor or any drug or both if such person operates a motor vehicle (1) while under the influence of intoxicating liquor or any drug or both, or (2) while such person has an elevated blood alcohol content. For the purposes of this section, 'elevated blood alcohol content' means a ratio of alcohol in the blood of such person that is eight-hundredths of one per cent or more of alcohol, by weight . . . ."

[6] The policies that the plaintiff alleged Gianpoalo violated include 1.1.7 Law Enforcement Code of Ethics, 1.1.7.2 Performance of the Duties of a Police Officer, 1.1.7.9 Private Life, 1.3.4 Knowledge of Department Rules and Regulations, 1.3.5 Violation of Rules, 1.3.7 Conformance to Laws, and 1.3.21 Unbecoming Conduct.

[7] General Statutes § 54-1f provides in relevant part: "(b) Members of . . . any local police department . . . shall arrest, without previous complaint and warrant, any person who the officer has reasonable grounds to believe has committed or is committing a felony."

[8] On October 13, 2020, and July 2, 2021, the court, *Welch*, *J.*, struck count two of the plaintiff's original and substitute complaints, respectively. Thereafter, the plaintiff left count two intentionally blank in her amended complaint. The plaintiff does not challenge the court's granting of the defendant's motion to strike in this appeal.

mately 8:30 p.m. and 11:45 p.m. on December 22, 2017, but denied that they were attending a holiday party held by the Bridgeport Police Department. The defendant also admitted that, between approximately 10 p.m. and 11:45 p.m. that evening, Carrano consumed alcoholic beverages and left Vazzy's intoxicated, accompanied by Gianpoalo. Moreover, the defendant admitted that, at approximately 12:08 a.m. on December 23, 2017, the vehicle operated by Carrano crossed over the yellow line into the plaintiff's lane of travel and violently collided into the front of her vehicle. The defendant further admitted that the plaintiff and Carrano were transported by ambulance from the scene of the accident to Bridgeport Hospital and that Carrano had a blood alcohol content of 0.25 at the time he was treated at the hospital. In addition, by way of a special defense, the defendant alleged that the plaintiff operated her motor vehicle in violation of General Statutes § 14-36.[9]

On September 13, 2021, the plaintiff filed a reply to the defendant's special defense raised in its September 2, 2021 answer, denying the defendant's allegations contained therein. On May 20, 2022, the defendant filed a request for leave to amend its answer and special defense to include two additional special defenses. Specifically, the defendant alleged that the plaintiff's claim that the defendant negligently hired Carrano was barred by the statute of limitations, as this action was commenced more than three years from the defendant's

[9] General Statutes § 14-36 provides in relevant part: "(c) . . . (2) The youth instruction permit shall entitle the holder, while such holder has the permit in his or her immediate possession, to operate a motor vehicle on the public highways, provided such holder is under the instruction of, and accompanied by, a person who holds an instructor's license . . . or a person twenty years of age or older who has been licensed to operate, for at least four years preceding the instruction, a motor vehicle of the same class as the motor vehicle being operated and who has not had his or her motor vehicle operator's license suspended by the commissioner during the four-year period preceding the instruction. . . ."

hiring of Carrano. The defendant also alleged that the plaintiff's claims were barred by governmental immunity. On May 27, 2022, the plaintiff filed an objection to the defendant's request to amend its answer and special defense, arguing that the request would cause undue delay and significant prejudice to the plaintiff. On June 20, 2022, the court, *Welch*, *J.*, overruled the plaintiff's objection and allowed the defendant to amend its answer to include the two additional special defenses. Later, the court permitted the defendant to file a fourth special defense based on an allegation that the plaintiff had released any claim sounding in negligence against Carrano.[10]

On July 6, 2022, the defendant filed a motion for summary judgment and a supporting memorandum of law. In its motion for summary judgment, the defendant argued that Carrano and Gianpoalo were off duty during the events alleged in the plaintiff's amended complaint and were not acting within the scope of their employment pursuant to § 52-557n (a) (1) (A). See footnote 4 of this opinion. The defendant also argued that the plaintiff's claim of negligence for its hiring of Carrano was barred by the statute of limitations pursuant to General Statutes § 52-584.[11] The defendant further

[10] On July 12, 2022, the defendant filed a second request to amend its answer to include a fourth special defense alleging that, "[t]o the extent that the negligence of . . . Carrano is an element of any claim or cause of action, that claim or cause of action is barred by the plaintiff having released Carrano for $50,000 consideration." On July 27, 2022, the plaintiff filed an objection to the defendant's request to amend, arguing that the defendant's request to amend its answer would cause an unreasonable delay and was unnecessary. On August 8, 2022, the court overruled the plaintiff's objection and allowed the defendant to amend its answer to include its fourth special defense.

[11] General Statutes § 52-584 provides in relevant part: "No action to recover damages for injury to the person . . . caused by negligence . . . shall be brought but within two years from the date when the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered, and except that no such action may be brought more than three years from the date of the act or omission complained of . . . ."

asserted that the plaintiff's claim of negligence involved discretionary acts for which there is governmental immunity, and the plaintiff had not claimed that any exception to governmental immunity applied. In support of its motion, the defendant submitted multiple exhibits including, inter alia, affidavits from Carrano, Gianpoalo, Bridgeport Police Captain Kevin Gilleran, Kristine Kelley Dwyer (a manager of Vazzy's), and the former Bridgeport Chief of Police Armando Perez; the deposition transcript of the acting Bridgeport Chief of Police Rebeca Garcia; and a letter of findings and discipline imposed on Gianpoalo by the internal affairs division of the Bridgeport Police Department.

In both Carrano's and Gianpoalo's affidavits, the officers stated that, on December 22, 2017, at approximately 8 p.m., they were dismissed from their detail, removed their police uniforms, and dressed in civilian attire. Thereafter, they drove their personal vehicles to Vazzy's. At Vazzy's, the officers did not have any identifying insignia, service weapons, or police badges on their persons. They also stated that there were no police holiday parties, or parties held by the defendant, at Vazzy's on December 22, 2017, nor did the defendant provide the officers with alcoholic beverages, encourage their drinking, or compensate them for being at Vazzy's. The affidavits by Dwyer and Perez further supported the officers' statements that there were no holiday parties at Vazzy's involving the Bridgeport Police Department on that date. Dwyer also averred that Carrano and Gianpoalo were not in uniform and did not have any police markings on their clothing at Vazzy's that evening. Furthermore, Gianpoalo averred that he and Carrano left Vazzy's at approximately 11:40 p.m., and, shortly before midnight, he witnessed Carrano's vehicle veer into the northbound lane, striking the plaintiff's vehicle.

On September 2, 2022, the plaintiff filed a motion for summary judgment and supporting memorandum of law, and an objection to the defendant's motion for summary judgment and supporting memorandum of law. In her memorandum of law in support of her summary judgment motion, the plaintiff argued the defendant was liable to her, pursuant to § 52-557n, because "following the policies and procedures of the Bridgeport Police Department is part of an officer's official duties." Specifically, the plaintiff asserted that, "[a]lthough [Gianpoalo] was off duty at the time he knowingly permitted and facilitated his intoxicated fellow police officer to drive on December 23, 2017, he was nonetheless acting within the scope of his employment or official duties." In support of her argument, the plaintiff relied on the testimony from the deposition of Garcia where she affirmed that following the policies and procedures of the Bridgeport Police Department is part of an officer's official duties. The plaintiff also referenced the findings from the Bridgeport Police Department's internal affairs investigation and suspension of Gianpoalo for violating the police department's policies and procedures regarding his conduct on December 23, 2017, while he was off duty. Moreover, the plaintiff argued that § 54-1f mandated Gianpoalo to intervene and arrest Carrano to stop him from operating his motor vehicle while he was visibly intoxicated.

In her memorandum of law in support of her objection to the defendant's summary judgment motion, the plaintiff, for the first time, asserted that her negligent hiring claim was not barred by the statute of limitations on the basis of the continuing course of conduct doctrine. Specifically, she argued that "Carrano was unfit to serve as a police officer from the day he was hired and every day thereafter. . . . The [defendant's] ministerial duty to keep an unfit police officer from the police force continued from . . . Carrano's date of hire until

his resignation. The actionable harm that occurred as a result of that breach occurred on December 23, 2017, and the plaintiff instituted this action well within the applicable statute of limitations." (Citation omitted; emphasis omitted.)

On November 15, 2022, the defendant filed a memorandum of law in opposition to the plaintiff's motion for summary judgment. In its memorandum, the defendant argued that "[t]he statute [of limitations] is not extended on the unpleaded grounds of continuing course of conduct because there was no special relationship—in fact, no relationship at all—between the [defendant] and the plaintiff. Nor is there a special relationship between either Carrano and Gianpoalo with either the [defendant] or the plaintiff when they are off duty."

On November 21 and 28, 2022, the court, *Stevens*, *J.*, held oral argument on the plaintiff's and the defendant's respective motions for summary judgment. On March 17, 2023, the court issued a memorandum of decision granting the defendant's summary judgment motion and denying the plaintiff's summary judgment motion. In its memorandum of decision, the court stated that "[a] dispositive issue for the [plaintiff's] claims against [the defendant] is whether [Carrano and Gianpoalo] were 'acting within the scope of [their] employment or official duties' within the meaning of § 52-557n." The court concluded that the defendant had produced sufficient evidence to satisfy its initial burden of showing the absence of any genuine issue of material fact that Gianpoalo and Carrano were not acting within the scope of their employment. In support thereof, the court referenced the affidavits submitted by the defendant, which confirmed that, on December 22, 2017, the officers were off duty when they arrived at Vazzy's. Accordingly, the court shifted the burden to the plaintiff to "provide an evidentiary foundation to demonstrate the existence of

a genuine issue of material fact." (Internal quotation marks omitted.)

In its memorandum of decision, the court stated that the plaintiff essentially argued, in opposition to the defendant's position, that Bridgeport police officers always have a duty to follow the policies and procedures of the Bridgeport Police Department, and, therefore, Gianpoalo and Carrano were acting within the scope of their official duties during the events of the automobile accident. The court rejected the plaintiff's argument, explaining that such an argument would "dissolve the distinction between an employee's official and unofficial acts because under [the plaintiff's] reasoning all personal and private activities, no matter how attenuated from the employer's legitimate business concerns, could be labeled as official duties." Accordingly, the court concluded that the defendant was entitled to summary judgment as a matter of law regarding the allegedly negligent conduct of Carrano and Gianpoalo.

As to the plaintiff's negligent hiring claim with respect to Carrano, the court concluded that it was barred by the statute of limitations, pursuant to § 52-584. Specifically, the court agreed with the defendant that, because Carrano was hired on April 25, 2011, and the present case was filed in 2019, Carrano was hired more than three years before the institution of the present action, and, thus, her negligent hiring claim was time barred. Furthermore, the court rejected the plaintiff's continuing course of conduct argument on both procedural and substantive grounds. The court noted that the plaintiff had asserted the doctrine only in response to the defendant's motion for summary judgment and that her reliance on the doctrine was not reflected anywhere in the pleadings prior to the filing of the defendant's summary judgment motion. Therefore, pursuant to

Practice Book § 10-57,[12] the court held that, "[b]ecause the continuing course of conduct doctrine was not pleaded or timely raised, the doctrine must be deemed waived."

Moreover, the court determined that, "even if [the plaintiff] had properly asserted the continuing course of conduct doctrine, this argument would fail as a matter of law because she has not satisfied all of the elements necessary for its application." Specifically, the court explained that, "in order to establish that a duty continued to exist after the alleged[ly] wrongful hiring of Carrano, [the plaintiff] must provide 'evidence of either a special relationship between the parties giving rise to such a continuing duty or some later wrongful conduct of a defendant, related to the prior act.' " The court concluded that the plaintiff had not alleged or shown that a special relationship existed between the parties. The court also determined that, even if the plaintiff had established that the defendant's initial hiring of Carrano was negligent, the plaintiff failed to show that the defendant committed some later, actual or affirmative wrongful act related to its prior negligent conduct. The court held that "the continuing course of conduct doctrine cannot be invoked in a situation that merely or solely involves an initial wrong that continues unabated or uncorrected until it reaches and harms a victim. Such a concept would absorb the statute of limitations to such an extent that the limitation period would be rejected in virtually all the cases for which it would appropriately apply." This appeal followed. Additional procedural history will be set forth as necessary.

Before addressing the merits of the plaintiff's claims, we begin by setting forth the applicable standard of

[12] Practice Book § 10-57 provides in relevant part: "Matter in avoidance of affirmative allegations in an answer or counterclaim shall be specially pleaded in the reply. . . ."

review and relevant legal principles. "In seeking summary judgment, it is the movant who has the burden of showing the nonexistence of any issue of fact. The courts are in entire agreement that the moving party for summary judgment has the burden of showing the absence of any genuine issue as to all the material facts, which, under applicable principles of substantive law, entitle him to a judgment as a matter of law. The courts hold the movant to a strict standard. To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. . . . As the burden of proof is on the movant, the evidence must be viewed in the light most favorable to the opponent. . . . When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue. . . . Once the moving party has met its burden, however, the opposing party must present evidence that demonstrates the existence of some disputed factual issue. . . . It is not enough, however, for the opposing party merely to assert the existence of such a disputed issue. Mere assertions of fact . . . are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court under Practice Book § [17-45]. . . . Our review of the trial court's decision to grant [or to deny a] motion for summary judgment is plenary." (Internal quotation marks omitted.) *Kuselias* v. *Zingaro & Cretella, LLC*, 224 Conn. App. 192, 207–208, 312 A.3d 118, cert. denied, 349 Conn. 916, 316 A.3d 357 (2024).

I

The plaintiff first claims that, in rendering summary judgment in favor of the defendant, the court improperly concluded that a genuine issue of material fact did

not exist with respect to whether Gianpoalo was acting within the scope of his employment or official duties. The plaintiff argues that "[t]he evidence supports a finding that [Gianpoalo's] conduct on December 22, 2017, was a violation of his official duties." Specifically, the plaintiff contends that the policies and procedures of the Bridgeport Police Department and the results of its internal affairs investigation support the fact that Gianpoalo violated his official duties as a matter of law under § 52-557n. In further support thereof, the plaintiff refers to the testimony of Garcia, who, in her deposition, affirmed that following the policies and procedures of the Bridgeport Police Department is part of an officer's official duties. We are not persuaded.

The following additional procedural history is relevant to our resolution of the plaintiff's claim. On December 7, 2021, and June 21, 2022, the plaintiff's attorney conducted remote depositions of Garcia, the acting Bridgeport chief of police. At her December 7, 2021 deposition, the plaintiff's attorney asked Garcia whether "abiding by or following the policies and procedures of the . . . Bridgeport Police Department is part of an officer's official duties . . . ." Garcia responded in the affirmative. Thereafter, during her June 21, 2022 deposition, the plaintiff's attorney asked Garcia whether Gianpoalo's violations of the Bridgeport Police Department's policies and procedures, as found by its internal affairs investigation, were "violation[s] of [Gianpoalo's] official duties as a police officer . . . ." Garcia clarified that "[the violations] were not part of [his] official duties per se, because he was not working at the time that this incident occurred. . . . If he would have been working, it would be part of his official duties. . . . He was comporting himself in . . . his private life, so it was not his official duties. . . . The private life is in concert with being a police officer, but it's not

an official duty. An official duty is if you're actually working within your capacity as a police officer.

* * *

"[T]here is such a thing as an officer being off duty and not being held as a police officer himself or herself; they're not working within their official capacity . . . ." Garcia explained that the policies and procedures of the Bridgeport Police Department are not part of an officer's official duties but, rather, "part of the ethical makeup of that officer and [his] responsibility."

In its March 17, 2023 memorandum of decision, the court referenced this portion of Garcia's testimony, stating that "Garcia explains that the general responsibilities of a police officer and the issues of a police investigation present separate questions than whether Gianpoalo was acting in an official capacity at the time of the accident. . . . Garcia explains that the policies and procedures of the Bridgeport Police Department, which Gianpoalo is said to have violated, are part of the overall police officer's responsibility and ethical character. She specifically does not categorize the violations as part of Gianpoalo's, or any other officer's, official duties and distinguishes between the policies and procedures which govern private life and official police conduct." (Citation omitted.)

On appeal, the plaintiff argues that, "although [Gianpoalo] was off duty, because he failed to intervene to prevent a fellow officer from driving while intoxicated, he violated his official duties thereby subjecting the defendant . . . to a claim for the plaintiff's injuries pursuant to . . . § 52-557n." We are not persuaded.

The following legal principles are relevant to our resolution of the plaintiff's claim. "Section 52-557n (a) provides that a local government will not be liable for the negligent acts or omissions of an employee unless

the employee was acting within the scope of his employment or official duties. In determining whether an employee has acted within the scope of employment, courts look to whether the employee's conduct: (1) occurs primarily within the employer's authorized time and space limits; (2) is of the type that the employee is employed to perform; and (3) is motivated, at least in part, by a purpose to serve the employer. . . . Ordinarily, it is a question of fact as to whether a wilful tort of the servant has occurred within the scope of the servant's employment . . . [b]ut there are occasional cases [in which] a servant's digression from [or adherence to] duty is so clear-cut that the disposition of the case becomes a matter of law. . . . More specifically, we have held that a police officer's actions occurred in the course of duties if [the actions] took place (1) within the period of employment, (2) at a place where the employee could reasonably be, and (3) while the employee is reasonably fulfilling the duties of employment or doing something incidental to it." (Citation omitted; internal quotation marks omitted.) *Doe* v. *Flanigan*, 201 Conn. App. 411, 431–32, 243 A.3d 333, cert. denied, 336 Conn. 901, 242 A.3d 711 (2020).

In the present case, the affidavits by Carrano, Gianpoalo, and Gilleran set forth undisputed evidence that Gianpoalo and Carrano were released from their detail at approximately 8 p.m. on December 22, 2017, and were off duty for approximately four hours prior to the time of the accident or the allegedly negligent conduct. Moreover, the affidavits by Gianpoalo, Carrano, and Dwyer support the conclusion that the officers drove their personal vehicles to Vazzy's, were not in uniform, and did not have their badges, identifying insignia, or service weapons on their person at Vazzy's. The affidavits also revealed that the officers were not attending a Bridgeport Police Department sponsored holiday party that evening, nor did they perform any police services

while at Vazzy's. These submissions demonstrated that, at the time of Gianpoalo's allegedly negligent conduct, he was not engaged in any official duty of his employment or doing something incidental to it. On the basis of the aforementioned evidence, the court properly concluded that the defendant had produced sufficient evidence to satisfy its initial burden of showing an absence of any genuine issue of fact that Gianpoalo was not acting within the scope of his employment as a police officer at the time of his allegedly negligent conduct.

Moreover, in its March 17, 2023 memorandum of decision, the court rejected the plaintiff's argument that Gianpoalo's violations of the policies and procedures of the Bridgeport Police Department illustrate that he violated his official duties. The court noted that "the general responsibilities of a police officer and the issues of a police [internal affairs] investigation present separate questions than whether Gianpoalo was acting in an official capacity at the time of the accident. . . . Garcia explains that the policies and procedures of the Bridgeport Police Department, which Gianpoalo is said to have violated, are part of the overall police officer's responsibility and ethical character. She specifically does not categorize the violations as part of Gianpoalo's, or any other officer's, official duties and distinguishes between the policies and procedures which govern private life and official police conduct." (Citation omitted.) In doing so, the court reasoned that "[the plaintiff's] argument would dissolve the distinction between an employee's official and unofficial acts because under her reasoning all personal and private activities, no matter how attenuated from the employer's legitimate business concerns, could be labeled as official duties."

The plaintiff argues that the court's analysis too narrowly defines what constitutes "official duties." In support of her argument, the plaintiff cites to this court's decision in *State* v. *Ramirez*, 61 Conn. App. 865, 871,

767 A.2d 778, cert. denied, 256 Conn. 903, 772 A.2d 599 (2001), for the principle that the actions of off-duty police officers have been found by this court to be part of their official duties. The plaintiff's reliance on *Ramirez*, however, is misplaced, as that case is factually distinguishable from the present case. In *Ramirez*, an off-duty police officer was assaulted in a nightclub after attempting to break up an altercation. Id., 867–68. During the altercation, the officer specifically identified himself as a police officer, and, after the altercation appeared to have been settled, the officer turned his back to use the restroom. Id., 868. The defendant then struck the officer in the back of the head, causing the officer to fall to the floor, and proceeded to kick him repeatedly in the face. Id. The defendant subsequently was arrested and convicted, inter alia, of assault of a peace officer. Id., 867. On appeal, this court held that, "[u]nder the circumstances of this case, there was sufficient evidence for the jury to find that [the officer] was acting within the scope of his duty as a police officer." Id., 871. This court stated that, although the officer was not in uniform and did not display a badge, he identified himself as a police officer and performed his obligation as a police officer. Id. Specifically, this court reasoned that "[a] police officer has the duty to enforce the laws and to preserve the peace. . . . The test is whether the [police officer] is acting within that compass or is engaging in a personal frolic of his own." (Internal quotation marks omitted.) Id.

In the present case, the plaintiff did not present evidence that Gianpoalo was performing his duties as a police officer at any time after being released from his detail on December 22, 2017. The undisputed evidence produced by the defendant illustrates that the officers were in civilian clothing, drove their personal vehicles to and from Vazzy's, did not identify themselves in any way as police officers, and did not perform any police

services at Vazzy's. Unlike the officer in *Ramirez*, Gianpoalo was " 'engaging in a personal frolic of his own' " at the time of the accident. Id. Accordingly, we conclude that the court properly determined that a genuine issue of material fact did not exist as to whether Gianpoalo was acting within the scope of his employment or official duties.

II

Next, the plaintiff claims that the court improperly determined that her claim for the defendant's negligent hiring of Carrano was barred by the statute of limitations. Specifically, the plaintiff argues that the court misapplied the continuing course of conduct doctrine on both procedural and substantive grounds. Contrary to the court's conclusion, the plaintiff asserts that, procedurally, she sufficiently pleaded the doctrine in her amended complaint. The plaintiff also contends that, substantively, the act of Carrano driving while intoxicated constituted an affirmative wrongful act that was related to the defendant's initial negligence of hiring Carrano. We disagree.

The following standard of review and legal principles are relevant to our resolution of this claim. "The question of whether a party's claim is barred by the statute of limitations is a question of law, which this court reviews de novo. . . . The issue, however, of whether a party engaged in a continuing course of conduct that tolled the running of the statute of limitations is a mixed question of law and fact. . . . We defer to the trial court's findings of fact unless they are clearly erroneous." (Internal quotation marks omitted.) *Medical Device Solutions, LLC* v. *Aferzon*, 207 Conn. App. 707, 754–55, 264 A.3d 130, cert. denied, 340 Conn. 911, 264 A.3d 94 (2021).

"[I]n the context of a motion for summary judgment based on a statute of limitations special defense, [the defendant] typically [meets its] initial burden of show-

ing the absence of a genuine issue of material fact by demonstrating that the action had commenced outside of the statutory limitation period. . . . When the plaintiff asserts that the limitations period has been tolled by an equitable exception to the statute of limitations, the burden normally shifts to the plaintiff to establish a disputed issue of material fact in avoidance of the statute. . . . Put differently, it is then incumbent upon the party opposing summary judgment to establish a factual predicate from which it can be determined, as a matter of law, that a genuine issue of material fact exists." (Internal quotation marks omitted.) *Kuselias* v. *Zingaro & Cretella, LLC*, supra, 224 Conn. App. 208.

"Our Supreme Court has recognized . . . that the statute of limitations and period of repose contained in . . . § 52-584 may be tolled, in the proper circumstances, under . . . the continu[ing] course of conduct doctrine . . . thereby allowing a plaintiff to bring an action more than three years after the commission of the negligent act . . . . [T]he continuing course of conduct doctrine reflects the policy that, during an ongoing relationship, lawsuits are premature because specific tortious acts or omissions may be difficult to identify and may yet be remedied. . . . For example, the doctrine is generally applicable under circumstances where [i]t may be impossible to pinpoint the exact date of a particular negligent act or omission that caused injury or where the negligence consists of a series of acts or omissions and it is appropriate to allow the course of [action] to terminate before allowing the repose section of the statute of limitations to run . . . .

"It is axiomatic that [w]hen the wrong sued upon consists of a continuing course of conduct, the statute does not begin to run until that course of conduct is completed. . . . [I]n order [t]o support a finding of a continuing course of conduct that may toll the statute of limitations there must be evidence of the breach of a duty that remained in existence after the commission

of the original wrong related thereto. That duty must not have terminated prior to commencement of the period allowed for bringing an action for such a wrong. . . . Where [our Supreme Court has] upheld a finding that a duty continued to exist after the cessation of the act or omission relied upon, there has been evidence of either a special relationship between the parties giving rise to such a continuing duty or some later wrongful conduct of a defendant related to the prior act. . . . Furthermore, [t]he doctrine of continuing course of conduct as used to toll a statute of limitations is better suited to claims where the situation keeps evolving after the act complained of is complete . . . .

"In deciding whether the trial court properly granted the [defendant's] motion for summary judgment, we must determine if there is a genuine issue of material fact with respect to whether the defendant: (1) committed an initial wrong upon the plaintiff, and (2) whether a duty continued to exist after the cessation of the act or omission relied upon by (a) evidence of a special relationship between the parties giving rise to such a continuing duty or (b) some later wrongful conduct of the [defendant] related to the prior act." (Citations omitted; internal quotation marks omitted.) *Macellaio* v. *Newington Police Dept.*, 145 Conn. App. 426, 434–36, 75 A.3d 78 (2013).

"Practice Book § 10-57 provides in relevant part that [m]atter in avoidance of affirmative allegations in an answer or counterclaim shall be specially pleaded in the reply. . . . Under § 10-57, the continuing course of conduct doctrine is a matter that must be pleaded in avoidance of a statute of limitations special defense." (Internal quotation marks omitted.) *Flannery* v. *Singer Asset Finance Co., LLC*, 312 Conn. 286, 300, 94 A.3d 553 (2014). "Beyond the trial courts' discretion to overlook violations of the rules of practice in the absence of a timely objection from the opposing party . . . it may

be just to reach the merits of a plaintiff's claim to a toll of the statute of limitations, even when not properly pleaded pursuant to . . . § 10-57, if the issue is otherwise put before the trial court and no party is prejudiced by the lapse in pleading. For example, in *Bellemare* v. *Wachovia Mortgage Corp.*, [94 Conn. App. 593, 607, 894 A.2d 335 (2006), aff'd, 284 Conn. 193, 931 A.2d 916 (2007), this court] deemed it just to reach the merits of a plaintiff's claim that the statute of limitations was tolled by the continuing course of conduct doctrine, despite the plaintiff's failure to plead the doctrine properly pursuant to . . . § 10-57, when the plaintiff asserted the doctrine's applicability for the first time in a pleading filed in opposition to the defendant's motion for summary judgment, observing that however imperfectly, the plaintiff placed the issue before the court . . . ." (Citation omitted; internal quotation marks omitted.) *Flannery* v. *Singer Asset Finance Co., LLC*, supra, 301–302.

In the present case, the plaintiff asserted the continuing course of conduct doctrine, for the first time, in her memorandum of law in opposition to the defendant's motion for summary judgment. She did not affirmatively plead the doctrine as a matter in avoidance of the defendant's statute of limitations special defense. Therefore, the court found that the plaintiff waived her continuing course of conduct claim as it was procedurally defective. The court nevertheless exercised its discretion and considered the substance of the plaintiff's claim.[13]

[13] "We previously have afforded trial courts discretion to overlook violations of the rules of practice and to review claims brought in violation of those rules . . . . It necessarily follows, therefore, that, when a party properly objects to a violation of the rules of practice, the trial court *may disregard* the improperly raised claim if doing so is not an abuse of discretion." (Citation omitted; emphasis added.) *Schilberg Integrated Metals Corp.* v. *Continental Casualty Co.*, 263 Conn. 245, 273–74, 819 A.2d 773 (2003). The issue of whether the court properly exercised its discretion in addressing the merits of the plaintiff's claim is not raised by the parties on appeal. See *State* v. *Connor*, 321 Conn. 350, 362, 138 A.3d 265 (2016) ("appellate courts generally do not consider issues that were not raised by the parties").

In addressing the merits of the plaintiff's claim, the court stated that "[n]o special relationship between the parties has been either alleged or shown. Furthermore, assuming arguendo that [the plaintiff] has established an initial wrong in the hiring of Carrano (a finding that the court expressly does not make), she has failed to show that the [defendant] committed some later, actual or affirmative, wrongful act that related to any such prior conduct. . . . Contrary to [the plaintiff's] apparent position, the continuing course of conduct doctrine cannot be invoked in a situation that merely or solely involves an initial wrong that continues unabated or uncorrected until it reaches and harms a victim." (Citation omitted.)

It is undisputed that the plaintiff has failed to allege that she has a special relationship with the defendant. Instead, she argues merely that Carrano's act of driving while intoxicated on December 23, 2017, was an affirmative wrongful act directly related to the defendant's hiring of Carrano. Even if we were to assume that the plaintiff established that the defendant negligently hired Carrano, her continuing course of conduct claim fails as a matter of law because, as the court concluded, she has failed to demonstrate that a genuine issue of material fact exists with respect to whether *the defendant* committed some later, actual or affirmative wrongful act related to its initial hiring of Carrano. The plaintiff has attempted to demonstrate only that Carrano, acting in his individual capacity, committed a wrongful act by driving while intoxicated. Accordingly, we conclude that court properly determined that the plaintiff's claim for the defendant's negligent hiring of Carrano was barred by the statute of limitations.

The judgment is affirmed.

In this opinion the other judges concurred.

JPMORGAN CHASE BANK, N.A. *v.* FRED N. DURANTE (AC 46512)

Elgo, Moll and Seeley, Js.

Syllabus

The defendant guarantor appealed to this court from the trial court's granting of a motion for approval of trial and appellate court costs and attorney's fees filed by the plaintiff note holder pursuant to the terms of the promissory note, following judgment rendered in its favor on its breach of guarantee claim. The defendant claimed that the plaintiff's motion was not timely filed pursuant to the rule of practice (§ 11-21) governing motions for attorney's fees and was made without any showing of excusable neglect to permit the late filing. *Held*:

1. The plaintiff could not prevail on its claim that Practice Book § 11-21 did not apply to its motion for contractual attorney's fees, as opposed to statutory attorney's fees: the text of Practice Book § 11-21 makes it clear that the rule applies to attorney's fees sought postjudgment and not to those attorney's fees assessed as a component of damages, and to the extent there is ambiguity as to whether the rule governs contractual attorney's fees, the commentary to the rule and dicta in *Meadowbrook Center, Inc.* v. *Buchman* (328 Conn. 586) support this court's construction that postjudgment motions for contractual attorney's fees are subject to the rule; moreover, to the extent that the plaintiff contended that the trial court's award of attorney's fees constituted an award of damages, the plaintiff did not identify any support in the record for that proposition, it did not suggest any legal theory that could support a postjudgment award of contractual attorney's fees incurred entirely in connection with the prosecution of the plaintiff's breach of guarantee claim as damages, and the fact that the plaintiff sought attorney's fees for the first time postjudgment and following an appeal without remand readily distinguished the court's award of attorney's fees from an award of attorney's fees assessed as a component of damages, and, accordingly, Practice Book § 11-21 applied, as a matter of fact, to the plaintiff's motion, such that the motion was untimely filed.
2. The trial court abused its discretion in entertaining the plaintiff's untimely request for trial court and appellate attorney's fees: although the plaintiff argued that the fact that the clerk of the trial court did not enter the judgment or a document titled "judgment" constituted excusable neglect for its late filing of its motion for trial court attorney's fees, that contention incorrectly articulated the relevant portion of Practice Book § 11-21 by substituting the entry of judgment for the rendering of judgment, and, regardless of whether a separate document titled "judgment" was entered, there could not reasonably be any ambiguity or confusion

regarding the fact that the trial court had rendered a final judgment when it granted the plaintiff's motion for summary judgment, and the fact that the defendant took a timely appeal, in which the plaintiff participated, added further support to this conclusion; moreover, the plaintiff provided no additional reason for the untimely filing with respect to appellate attorney's fees and, because the plaintiff failed to present the trial court with any viable reason for its delay in moving for appellate attorney's fees it therefore made a legally insufficient showing to support an excusable neglect finding.

Argued March 7—officially released August 27, 2024

Procedural History

Action to recover damages for breach of guarantee, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Rosen*, *J.*, granted the plaintiff's motion for summary judgment and rendered judgment thereon, from which the defendant appealed to this court, *Moll*, *Cradle*, and *Clark*, *Js.*, which affirmed the judgment of the trial court; subsequently, the court, *Rosen*, *J.*, granted the plaintiff's motion for attorney's fees and costs, and the defendant appealed to this court. *Reversed*; *judgment directed.*

John M. Hendele IV, with whom, on the brief, was *Gerard N. Saggese III*, for the appellant (defendant).

Walter J. Onacewicz, with whom, on the brief, was *Mitchell J. Levine*, for the appellee (plaintiff).

Opinion

MOLL, J. The defendant, Fred N. Durante, also known as Fred N. Durante, Jr., appeals from the judgment of the trial court granting the motion for approval of trial court and appellate costs and attorney's fees filed by the plaintiff, JPMorgan Chase Bank, N.A. On appeal, the defendant claims that the court improperly granted the plaintiff's motion because it was untimely under

Practice Book § 11-21[1] and was made without any showing of excusable neglect to permit the late filing. We agree and, accordingly, reverse the judgment of the trial court.

The following facts, which are undisputed, and procedural history are relevant to our resolution of this appeal. On December 9, 2019, the plaintiff commenced the present action against the defendant. In its one count second amended complaint (complaint), the plaintiff asserted one claim of breach of guarantee. In support of its claim, the plaintiff alleged in relevant part that (1) Fred N. Durante, Jr., General Contractor, Inc. (borrower), became indebted to the plaintiff on June 20, 2008, in the original principal amount of $250,000 pursuant to a promissory note evidencing a business line of credit (note), (2) the note was secured by a continuing unlimited guarantee (guarantee) executed by the defendant that same day, (3) the borrower defaulted under the terms of the note, and (4) the defendant failed and refused to make payment for the amounts due under the note and the guarantee.[2] The

[1] Practice Book § 11-21 provides: "Motions for attorney's fees shall be filed with the trial court within thirty days following the date on which the final judgment of the trial court was rendered. If appellate attorney's fees are sought, motions for such fees shall be filed with the trial court within thirty days following the date on which the Appellate Court or Supreme Court rendered its decision disposing of the underlying appeal. Nothing in this section shall be deemed to affect an award of attorney's fees assessed as a component of damages."

[2] Copies of the note and the guarantee were attached to the complaint, each of which appended and incorporated by reference an ancillary document titled "Additional Terms" (additional terms), containing certain definitions of various contractual terms. The guarantee provides in relevant part: "[The defendant], as primary obligor and not merely as surety, absolutely and unconditionally guarantees to the [plaintiff] the performance of and full and prompt payment of the Indebtedness when due, whether at stated maturity, by acceleration or otherwise. The [defendant] will also reimburse [the plaintiff] for any Collection Amounts, including, without limitation, reasonable attorney['s] fees, costs and other Collection Amounts, [the plaintiff] may pay in collecting from [the] [b]orrower or [the defendant] . . . ." The additional terms define "Indebtedness" in part as "any and all liabilities,

defendant filed an answer and special defenses on August 24, 2020.

Relevant to this appeal, on July 29, 2021, the plaintiff filed a motion for summary judgment as to the defendant's liability under the note and the guarantee and as to the plaintiff's damages in the amount of $225,803.25 (comprising the principal balance and accrued interest). Following a hearing, on January 18, 2022, the court, *Rosen*, *J.*, issued a memorandum of decision in which it granted the plaintiff's motion for summary judgment, stating in conclusion that "[j]udgment shall enter in favor of the plaintiff in the amount of $225,803.25."[3] The trial court's electronic case detail reflects a separate docket entry (with no corresponding separate document), with the description "Summary Judgment-Plaintiff," entered on January 18, 2022. Thereafter, the court denied, inter alia, the defendant's motion to open the judgment, whereupon the defendant appealed therefrom to this court. On February 14, 2023, this court affirmed the judgment of the trial court. See *JPMorgan Chase Bank, N.A.* v. *Durante*, 217 Conn. App. 903, 288 A.3d 689 (2023). There was no motion for reconsideration or petition for certification to appeal that followed. See Practice Book §§ 71-5 and 84-1.

Approximately six weeks later, on March 29, 2023, the plaintiff filed its motion, titled "motion for approval

obligations and debts of every kind and character, plus interest, costs and fees, including Collection Amounts, arising thereon, of [the] [b]orrower, or any one of them, to [the plaintiff] . . . ." The additional terms define "Collection Amounts" in relevant part as "any fees, charges, costs and expenses, including reasonable [attorney's] fees (including fees and expenses of counsel for [the plaintiff] that are employees of [the plaintiff] or its affiliates, to the extent not prohibited by law) and court costs, that [the plaintiff] may pay in collecting from [the borrower or the defendant] . . . ."

[3] We note that, in its memorandum of decision, the court also stated, inter alia: "At oral argument [on the plaintiff's motion for summary judgment], the plaintiff waived any claim to costs, attorney's fees or additional interest." Because the defendant has not raised the issue of waiver in the present appeal, we do not address it further.

of costs and attorney's fees." In its motion, the plaintiff represented that (1) the court's memorandum of decision granting the motion for summary judgment "stated that '[j]udgment shall enter in favor of the plaintiff in the amount of $225,803.25,' " (2) the note "provides for reasonable attorney['s] fees and court costs," and (3) it had incurred "$25,360 [in] attorney's fees and $495.78 [in] court costs . . . ." In support of its motion, the plaintiff appended a bill of costs and an affidavit of its counsel, Walter Onacewicz, with accompanying exhibits, including invoices detailing its attorney's fees and costs.

On April 13, 2023, the defendant filed a memorandum in opposition to the plaintiff's motion. The defendant argued therein that the motion (1) was untimely under Practice Book § 11-21 and (2) alternatively, even if timely, (a) sought relief under the note against the wrong party and (b) otherwise was not supported by evidence sufficient to justify awarding the plaintiff its attorney's fees and costs relating to the litigation. On April 19, 2023, the plaintiff filed a reply memorandum, accompanied by an amended affidavit of its counsel that more fully described the legal services rendered. In its reply memorandum, the plaintiff argued, with respect to the timeliness of the motion, that § 11-21 applies only to motions for statutory (and not contractual) attorney's fees and that, therefore, the rule did not apply to its motion so as to render it untimely. The plaintiff argued alternatively that, even if § 11-21 were applicable, its motion was properly before the court because the fact that "the clerk of the court has not yet entered the judgment or any document [titled] '[j]udgment' " constituted excusable neglect and, therefore, the court properly exercised its discretion and permitted the motion. See *Meadowbrook Center, Inc.* v. *Buchman*, 328 Conn. 586, 606, 181 A.3d 550 (2018) (adopting excusable neglect test, reviewed under abuse

of discretion standard, to permit untimely filing pursuant to § 11-21).

On April 24, 2023, the court held a hearing on the plaintiff's motion. On April 25, 2023, the court granted the plaintiff's motion, stating simply that "[t]he plaintiff established that it is entitled to costs of collection, including reasonable attorney's fees, in the amount of $25,360, plus costs of $495.78, for a total of $25,855.78." This appeal followed. Additional procedural history will be set forth as necessary.

On appeal, the defendant claims that the trial court erred in granting the plaintiff's motion because it was untimely pursuant to Practice Book § 11-21. Specifically, the defendant claims that the plaintiff was required under § 11-21 to file a motion for (1) its trial court attorney's fees within thirty days following the court's January 18, 2022 decision on its motion for summary judgment (i.e., on or before February 17, 2022) and (2) its appellate attorney's fees within thirty days following this court's February 14, 2023 decision in the defendant's prior appeal (i.e., on or before March 16, 2023). Thus, the defendant argues, the plaintiff's motion, filed on March 29, 2023, was untimely with respect to both trial court and appellate attorney's fees. The defendant further argues that the plaintiff did not demonstrate excusable neglect to permit the late filing. See *Meadowbrook Center, Inc.* v. *Buchman*, supra, 328 Conn. 606. The plaintiff counters that § 11-21 applies only to motions for statutory attorney's fees and not contractual attorney's fees, as here. Alternatively, the plaintiff argues that, even if § 11-21 applies, it demonstrated excusable neglect, such that the court properly exercised its discretion to permit the late filing. We agree with the defendant and address his claim in two parts.

I

We must first consider the threshold issue of whether Practice Book § 11-21 applies to the plaintiff's motion. The defendant argues that § 11-21 does apply, thereby rendering the plaintiff's motion untimely, because the rule (1) may encompass postjudgment motions for contractual attorney's fees, as stated by our Supreme Court in *Meadowbrook Center, Inc.* v. *Buchman*, supra, 328 Conn. 603 n.8, and (2) does not exempt the attorney's fees awarded here. The plaintiff argues, to the contrary, that the rule does not apply to the plaintiff's motion "for contractual attorney's fees awarded as damages." We agree with the defendant.

We begin with the standard of review. "The interpretive construction of the rules of practice is to be governed by the same principles as those regulating statutory interpretation. . . . The interpretation and application of a statute, and thus a Practice Book provision, involves a question of law over which our review is plenary. . . . In seeking to determine [the] meaning [of a statute or a rule of practice, we] . . . first . . . consider the text of the statute [or rule] itself and its relationship to other statutes [or rules]. . . . If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence . . . shall not be considered. . . . When [the provision] is not plain and unambiguous, we also look for interpretive guidance to the . . . history and circumstances surrounding its enactment, to the . . . policy it was designed to implement, and to its relationship to existing [provisions] and common law principles governing the same general subject matter . . . . We recognize that terms [used] are to be assigned their ordinary meaning, unless context dictates otherwise. . . . Put differently, we follow the clear meaning of unambiguous rules, because [a]lthough we are directed

to interpret liberally the rules of practice, that liberal construction applies only to situations in which a strict adherence to them [will] work surprise or injustice." (Citations omitted; internal quotation marks omitted.) *Meadowbrook Center, Inc.* v. *Buchman*, supra, 328 Conn. 594–95.

We now consider the text of Practice Book § 11-21, which provides: "Motions for attorney's fees shall be filed with the trial court within thirty days following the date on which the final judgment of the trial court was rendered. If appellate attorney's fees are sought, motions for such fees shall be filed with the trial court within thirty days following the date on which the Appellate Court or Supreme Court rendered its decision disposing of the underlying appeal. Nothing in this section shall be deemed to affect an award of attorney's fees assessed as a component of damages."

As a textual matter, we observe that the rule clearly distinguishes between (1) attorney's fees sought postjudgment (i.e., those sought after the final judgment rendered by the trial court and/or those sought after a decision by one of our reviewing courts disposing of the appeal) and (2) those attorney's fees "assessed as a component of damages," which we construe to mean attorney's fees awarded as part of the original judgment or those permitted as damages on remand following an appeal. By making this distinction, the rule brings within its scope the former and excludes the latter. See *Mangiante* v. *Niemiec*, 98 Conn. App. 567, 576, 910 A.2d 235 (2006) ("[t]he time limits of Practice Book § 11-21 do not apply to a trial court's award of attorney's fees as damages"). With regard to the former, however, the rule makes no attempt to distinguish between postjudgment attorney's fees sought pursuant to statute and those sought pursuant to contract. Section 11-21 requires simply that any motion requesting (1) an award of trial court attorney's fees be filed "within thirty days following the

date on which the final judgment of the trial court was rendered," and (2) an award of appellate attorney's fees be filed "within thirty days following the date on which the Appellate Court or Supreme Court rendered its decision disposing of the underlying appeal." In this way, the language of the rule provides a strong indication that it is intended to capture both sources. Because the rule does not clearly state this intention, however, we recognize that an ambiguity exists with respect to it.

Accordingly, to the extent there is ambiguity as to the reach of Practice Book § 11-21, such that we may consider extratextual evidence for interpretive guidance, we now turn to the official commentary to § 11-21, set forth in the 1999 revision of the Practice Book.[4] In doing so, we recognize that "[w]e do not place the same weight on commentaries as we would place on expressed rules." *Henry* v. *Statewide Grievance Committee*, 111 Conn. App. 12, 20, 957 A.2d 547 (2008); see also id. ("[c]ommentaries are routinely used for purposes of persuasive consideration, to guide or assist the court as to the meaning of a rule or statute or for instructive guidance to analyze an issue further"). Nevertheless, the commentary supports our construction that postjudgment motions for *contractual* attorney's fees are subject to the rule. The official commentary to § 11-21 provides in relevant part that the rule "limits the time period within which postjudgment

[4] The explanatory notes section in the 1999 Practice Book provides in pertinent part: "The Commentaries were prepared by the drafters of proposed amendments to the rules and are included in this volume for informational purposes only. *Commentaries are not adopted by the Judges and Justices when they vote to adopt proposed rule changes. . . .*" (Emphasis in original.) Practice Book (1999), explanatory notes, p. v.

We note that this explanatory note relates only to commentary to the rules of practice and not commentary to the Rules of Professional Conduct. See *Cohen* v. *Statewide Grievance Committee*, 339 Conn. 503, 513–14, 261 A.3d 722 (2021) (unlike with respect to rules of practice, judges of Superior Court have formally adopted commentary to Rules of Professional Conduct).

motions for [attorney's] fees may be filed and is aimed principally at statutory [attorney's] fees but, where appropriate, *may be applied in situations where* [*attorney's*] *fees are founded upon an enforceable provision in a contract.* . . ." (Emphasis added.) Practice Book (1999) § 11-21, commentary.

Finally, we observe that, consistent with our conclusion herein, in *Meadowbrook Center, Inc.* v. *Buchman*, supra, 328 Conn. 603 n.8, our Supreme Court stated, albeit in dicta,[5] that it is "[accurate] . . . that [Practice Book] § 11-21 applies to motions for attorney's fees that are authorized by contract as well as statute . . . ." See also id., 603 (court applied particular factor under *Electrical Contractors, Inc.* v. *Ins. Co. of the State of Pennsylvania*, 314 Conn. 749, 764, 104 A.3d 713 (2014), in manner to avoid construction of § 11-21 "that would permit a relatively minor or nonprejudicial delay in filing to divest a party of a right granted *by contract* or statute" (emphasis added)).

In support of its argument that Practice Book § 11-21 does not apply to its motion, the plaintiff relies on the final sentence of the rule: "Nothing in this section shall be deemed to affect an award of attorney's fees assessed as a component of damages." In so doing, the plaintiff cursorily contends that the trial court's award of attorney's fees in the present action constituted an award of damages. This contention fails.

First, the plaintiff has not identified any support in the record for the proposition that the court's award of contractual attorney's fees was an award of *damages*.

[5] Although *Meadowbrook Center, Inc.*, involved the application of Practice Book § 11-21 to a motion for *statutory* attorney's fees; see *Meadowbrook Center, Inc.* v. *Buchman*, supra, 328 Conn. 588; we look to the court's statement on the question before us as persuasive authority. See *Voris* v. *Molinaro*, 302 Conn. 791, 797 n.6, 31 A.3d 363 (2011) ("[a]lthough dicta is not binding precedent . . . we may look to dicta as persuasive authority" (citation omitted)).

Indeed, the record reflects that, when the court rendered summary judgment in favor of the plaintiff on its one count complaint for breach of guarantee, it awarded damages in the amount of $225,803.25, which exclusively comprised the principal balance under the note and accrued interest. This court subsequently affirmed the judgment, in a memorandum decision, without remand. See *JPMorgan Chase Bank, N.A.* v. *Durante*, supra, 217 Conn. App. 903.

Second, the plaintiff also has not suggested any legal theory, and we cannot conceive of any, that could support a *postjudgment* award of contractual attorney's fees—incurred entirely in connection with the prosecution of the plaintiff's breach of guarantee claim—as damages. "The general rule of law known as the American rule is that attorney's fees and ordinary expenses and burdens of litigation are not allowed to the successful party absent a contractual or statutory exception. . . . This rule is generally followed throughout the country. . . . Connecticut adheres to the American rule. . . . There are few exceptions. For example, a specific contractual term may provide for the recovery of attorney's fees and costs . . . or a statute may confer such rights." (Internal quotation marks omitted.) *Bruno* v. *Whipple*, 215 Conn. App. 478, 492–93, 283 A.3d 26 (2022). Under the American rule, it is generally presumed that attorney's fees and costs do not constitute damages. See *Summit Valley Industries, Inc.* v. *Local 112, United Brotherhood of Carpenters & Joiners of America*, 456 U.S. 717, 722–23, 102 S. Ct. 2112, 72 L. Ed. 2d 511 (1982); see also *In re Nalle Plastics Family Ltd. Partnership*, 406 S.W.3d 168, 173 (Tex. 2013) ("While attorney's fees for the prosecution or defense of a claim may be compensatory in that they help make a claimant whole, they are not, and have never been, damages. Not every amount, even if compensatory, can be considered damages. Like attorney's fees, court costs

make a claimant whole, as does [prejudgment] interest. Yet it is clear that neither costs nor interest qualify as compensatory damages."); cf. 22 Am. Jur. 2d 416, Damages § 450 (2023) ("[L]itigation costs incurred by a party in separate litigation may sometimes be an appropriate measure of compensatory damages against another party. Such recovery is ordinarily allowed as an item of damage flowing from the present defendant's wrongful act and not specifically as attorney's fees." (Footnote omitted.)).

In the present action, the attorney's fees at issue were incurred entirely in connection with the prosecution of the plaintiff's breach of guarantee claim and, thus, do not constitute damages. Moreover, the fact that the plaintiff sought attorney's fees for the first time *post-judgment and following an appeal without remand* readily distinguishes the court's award of attorney's fees here from "an award of attorney's fees assessed as a component of damages" (to which Practice Book § 11-21 does not apply). That is, awards of attorney's fees captured by the exemption set forth in Practice Book § 11-21 include, by way of example only, (1) attorney's fees explicitly awarded as common-law punitive damages; see *Palmieri* v. *Cirino*, 226 Conn. App. 431, 441, A.3d (2024); (2) attorney's fees awarded as damages pursuant to the trial court's equitable authority; see *Mangiante* v. *Niemiec*, supra, 98 Conn. App. 576–77 (citing 1 D. Dobbs, Remedies (2d Ed. 1973) § 3.10 (3), p. 402); (3) attorney's fees awarded in connection with a plaintiff's successful application for the discharge of a mechanic's lien pursuant to General Statutes § 49-51 (a), which "clearly contemplates those fees as a component of damages"; *Torrance Family Ltd. Partnership* v. *Laser Contracting, LLC*, 94 Conn. App. 526, 528 n.1, 893 A.2d 460 (2006); and (4) attorney's fees awarded as compensatory damages for common-law

vexatious litigation; *Vandersluis* v. *Weil*, 176 Conn. 353, 360, 407 A.2d 982 (1978).

We conclude, on the basis of our analysis of Practice Book § 11-21, the commentary to the rule, and the clear statement by our Supreme Court in *Meadowbrook Center, Inc.*, that § 11-21 may apply, as a matter of law, to postjudgment motions for attorney's fees sought pursuant to contract and that § 11-21 does apply, as a matter of fact, to the plaintiff's motion, such that it was untimely filed.[6]

II

Having concluded that Practice Book § 11-21 applies to the plaintiff's motion, we turn to the defendant's claim that the court abused its discretion in entertaining the late filing. The defendant argues that the plaintiff did not satisfy the excusable neglect standard, adopted in *Meadowbrook Center, Inc.* v. *Buchman*, supra, 328 Conn. 606, to permit the trial court to entertain the late filing. In response, the plaintiff contends that the lack of an entry of a separate document titled "judgment" following the court's summary judgment decision created confusion and constituted excusable neglect to justify the late filing with respect to its request for both trial court and appellate attorney's fees. We agree with the defendant.

Before reaching the defendant's claim on the merits, we briefly address the applicable standard of review.

[6] That is, because the plaintiff's motion was filed on March 29, 2023, it was not filed, with respect to its request for trial court attorney's fees, "within thirty days following the date on which the final judgment of the trial court was rendered" (i.e., on or before February 17, 2022, following the court's January 18, 2022 decision on the plaintiff's motion for summary judgment). Practice Book § 11-21. Moreover, with respect to the plaintiff's request for appellate attorney's fees, the motion was not filed "within thirty days following the date on which the Appellate Court . . . rendered its decision disposing of the underlying appeal" (i.e., on or before March 16, 2023, following this court's February 14, 2023 decision disposing of the defendant's prior appeal). Practice Book § 11-21.

The court's acceptance of the late filing of the plaintiff's motion under the excusable neglect standard is reviewed for abuse of discretion. See *Meadowbrook Center, Inc.* v. *Buchman*, supra, 328 Conn. 606. Although Practice Book § 11-21 requires that parties file motions for attorney's fees within thirty days following the date on which (1) the trial court rendered its final judgment or (2) this court or our Supreme Court rendered its decision disposing of the underlying appeal, as applicable, "§ 11-21 is directory and, therefore, affords the trial court discretion to entertain untimely motions for attorney's fees in appropriate cases." Id., 604.

In exercising its discretion in determining whether to allow an untimely filing pursuant to Practice Book § 11-21, a trial court employs the "excusable neglect" standard. This standard is "an elastic concept, which implies a determination that is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission . . . . Factors to be considered in evaluating excusable neglect include [1] the danger of prejudice to the [nonmovant], [2] the length of the delay and its potential impact on judicial proceedings, [3] the reason for the delay, including whether it was within the reasonable control of the movant, and [4] whether the movant acted in good faith." (Internal quotation marks omitted.) *Meadowbrook Center, Inc.* v. *Buchman*, supra, 328 Conn. 606; see also id. (adopting four factor balancing test to assess excusable neglect—set forth in *Pioneer Investment Services Co.* v. *Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 385, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993) (*Pioneer*), and widely used by federal courts—because it is consistent with existing Connecticut case law governing trial court's exercise of its discretion in determining whether to entertain untimely filing).

We note that, in granting the plaintiff's motion, the court did not expressly make any excusable neglect findings to permit the untimely filing. Although we do not presume error on the part of the court; see *State* v. *James K.*, 209 Conn. App. 441, 465, 267 A.3d 858 (2021) ("the burden rests with the appellant to demonstrate reversible error" (internal quotation marks omitted)), aff'd, 347 Conn. 648, 299 A.3d 243 (2023); we are compelled to conclude, on this record, that the court's consideration of the plaintiff's late motion constituted an abuse of its discretion. For ease of analysis, although the plaintiff's requests for trial court and appellate attorney's fees were embedded in the same motion, we address them separately in light of the different timing requirements set forth in Practice Book § 11-21.

A

We first address the defendant's claim that the court abused its discretion in entertaining the plaintiff's request for trial court attorney's fees because no excusable neglect permitted the late filing. We agree with the defendant.

The following additional procedural history is relevant to our resolution of this portion of the defendant's claim. During the April 24, 2023 hearing on the plaintiff's motion, with respect to the excusable neglect question, the plaintiff exclusively relied on the fact that, when the court granted its motion for summary judgment and stated in conclusion that "[j]udgment shall enter in favor of the plaintiff in the amount of $225,803.25," no separate document titled "[j]udgment" was "entered" on the docket. The plaintiff maintains this position on appeal.

As many federal courts do, we focus our attention on the third excusable neglect factor (i.e., the reason for the delay, including whether it was within the reasonable control of the movant). See *Silivanch* v. *Celebrity Cruises, Inc.*, 333 F.3d 355, 366 (2d Cir. 2003), cert.

denied, 540 U.S. 1105, 124 S. Ct. 1047, 157 L. Ed. 2d 890 (2004); see also *Graphic Communications International Union, Local 12–N* v. *Quebecor Printing Providence, Inc.*, 270 F.3d 1, 5 (1st Cir. 2001) ("Although the *Pioneer* standard is more forgiving than the standard in our prior case law, there still must be a satisfactory explanation for the late filing. . . . [T]he four *Pioneer* factors do not carry equal weight; the excuse given for the late filing must have the greatest import. While prejudice, length of delay, and good faith might have more relevance in a [close] case, the reason-for-delay factor will always be critical to the inquiry . . . ." (Internal quotation marks omitted.)). For the reasons that follow, we conclude that the plaintiff's proffered reason fails, as a matter of law, to satisfy the excusable neglect standard.

With respect to trial court attorney's fees, Practice Book § 11-21 provides in relevant part that "[m]otions for attorney's fees shall be filed with the trial court within thirty days following the date on which the final judgment of the trial court was *rendered*. . . ." (Emphasis added.) The fundamental flaw with the plaintiff's contention is that it incorrectly articulates the relevant portion of § 11-21 by substituting the *entry* of judgment for the *rendering* of judgment. Simply put, the plaintiff's substitution of "entered" for "rendered" in this context is legally incorrect.

When the rules of practice do not define a term, "we look to the commonly approved meaning of the word as defined in the dictionary." *State* v. *Tutson*, 278 Conn. 715, 732, 899 A.2d 598 (2006). Black's Law Dictionary defines "[r]ender judgment" as follows: "To pronounce, state, declare, or announce the judgment of the court in a given case or on a given state of facts; not used with reference to judgments by confession, and *not synonymous with 'entering,'* 'docketing,' or 'recording' *the judgment*. Judgment is 'rendered' when decision is

officially announced, either orally in open court or by memorandum filed with clerk." (Emphasis added.) Black's Law Dictionary (6th Ed. 1990) p. 1296. "Rendition of judgment" is defined in relevant part as follows: "Rendition of a judgment is effected when [the] trial court in open court declares the decision of the law upon the matters at issue, and *it is distinguishable from* '*entry of judgment*,' which is a purely ministerial act by which the judgment is made of record and preserved. . . . A judgment is rendered as of [the] date on which [the] trial judge declares in open court his decision on matters submitted to him for adjudication, and oral pronouncement by the court of its decision is sufficient for 'rendition of judgment.' . . . It is the pronouncement of the court of its conclusions and decision upon the matter submitted to it for adjudication; a judgment may be rendered either orally in open court or by memorandum filed with the clerk. . . . '*Rendition*' *of judgment is distinguishable from its 'entry' in the records*. . . ." (Citations omitted; emphasis added.) Id. Finally, "[e]ntering judgments" is defined in relevant part as follows: "*Entry of judgment differs from rendition of judgment. 'Rendition' of a judgment is the judicial act of the court in pronouncing the sentence of the law upon the facts in controversy.* The 'entry' is a ministerial act, which consists in entering upon the record a statement of the final conclusion reached by the court in the matter, thus furnishing external and incontestable evidence of the sentence given, and designed to stand as a perpetual memorial of its action." (Emphasis added.) Id., p. 476.

In the present case, regardless of whether a separate document titled "judgment" was *entered*, there could not reasonably be any ambiguity or confusion regarding the fact that the trial court had rendered a final judgment when it granted the plaintiff's motion for summary judgment. The fact that the defendant took a timely

appeal, in which the plaintiff participated, buttresses the point. See Practice Book § 61-1 ("[a]n aggrieved party may appeal from a *final judgment*, except as otherwise provided by law" (emphasis added)); Practice Book § 61-2 ("[w]hen judgment has been rendered on an entire complaint . . . whether by . . . summary judgment pursuant to [Practice Book §] 17-44, or otherwise, such judgment shall constitute a final judgment"). It necessarily follows that there could be no ambiguity or confusion in the present case as to "the date on which the final judgment of the trial court was *rendered*"; (emphasis added); i.e., the date that triggered the thirty day period for the plaintiff to file a motion for trial court attorney's fees under Practice Book § 11-21. Simply put, we conclude, as a matter of law, that counsel's misapplication of the plain language of Practice Book § 11-21 cannot constitute excusable neglect so as to cure the failure to comply with its timing requirements. See *Silivanch* v. *Celebrity Cruises, Inc.*, supra, 333 F.3d 369–70 (collecting cases).

In sum, the plaintiff's delay of more than one year in requesting its trial court attorney's fees on the sole purported ground that no judgment had "entered" in the trial court fails as a matter of law to satisfy the excusable neglect standard. Thus, the trial court abused its discretion in entertaining the motion.

B

We next address the defendant's claim that the court abused its discretion in awarding the plaintiff its appellate attorney's fees because no excusable neglect permitted the late filing. We agree with the defendant.

The following additional procedural history is relevant to our resolution of this claim. This court rendered its decision disposing of the defendant's prior appeal on February 14, 2023, and no motion for reconsideration or petition for certification to appeal followed. More

than six weeks later, the plaintiff filed its motion containing its request for appellate attorney's fees. Before the trial court, the plaintiff provided no reason for the untimely filing with respect to appellate attorney's fees other than the proffered excuse discussed in part II A of this opinion. During oral argument before this court, the plaintiff's counsel represented for the first time that the reason for the delay in requesting appellate attorney's fees following the release of this court's decision resulted from "[computer] problems with the billing."

We again focus our attention on the third excusable neglect factor (i.e., the reason for the delay, including whether it was within the reasonable control of the movant). With respect to the sole reason presented to the trial court for the delayed filing, we reject it as a matter of law for the same reasons explained in part II A of this opinion. With respect to the reason stated for the first time during oral argument before this court, we do not consider this proffer, as it was not presented to the trial court. See *J.E. Robert Co.* v. *Signature Properties, LLC*, 309 Conn. 307, 328 n.20, 71 A.3d 492 (2013) ("it is well settled that arguments cannot be raised for the first time at oral argument"). Because the plaintiff failed to present the trial court with any viable reason for its delay in moving for appellate attorney's fees, and therefore made a legally insufficient showing to support an excusable neglect finding, we conclude that the court abused its discretion in considering the late filing.

The judgment is reversed and the case is remanded with direction to deny the plaintiff's motion for approval of costs and attorney's fees.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* CHRISTOPHER BOLDEN (AC 46215)

Elgo, Moll and Prescott, Js.

Syllabus

Pursuant to statute (§ 53a-155 (a)), a defendant is guilty of tampering with evidence if, "believing that a criminal investigation conducted by a law enforcement agency . . . is . . . about to be instituted, [the defendant] . . . conceals . . . [a] thing with purpose to impair its . . . availability in such criminal investigation . . . ."

Convicted, following a jury trial, of the crimes of evading responsibility in the operation of a motor vehicle and tampering with physical evidence, the defendant appealed to this court. The defendant's conviction stemmed from an incident during which the defendant struck and killed the victim with the SUV he was driving, fled the scene, and thereafter left the SUV in a driveway. *Held*:

1. The defendant could not prevail on his claim that the evidence was insufficient to support his conviction of tampering with evidence:

   a. The evidence was sufficient to prove beyond a reasonable doubt that the defendant believed that a criminal investigation was about to be instituted when he fled the scene of the accident and abandoned the SUV he was driving in a driveway; the jury was permitted to consider circumstantial evidence presented by the state to make reasonable inferences regarding the defendant's state of mind, including evidence that the defendant saw the victim on the ground when he returned to the intersection before fleeing the scene, or that the defendant must have known from the significant damage to the SUV that the victim had been injured, and the jury was free to credit or discredit the defendant's statements in his recorded statement to the police.

   b. There was sufficient evidence to prove beyond a reasonable doubt that the defendant had concealed the SUV; a rational juror could consider and credit the context for the defendant's act of concealment, including evidence that the defendant likely knew he had seriously injured a pedestrian, fled the scene, and needed to act quickly and temporarily abandon the vehicle, which had become disabled, and, in light of the defendant's exigent circumstances, a juror could conclude that he saw an opportunity to make the SUV less noticeable in a private driveway among several other vehicles.

2. This court did not reach the merits of the defendant's claim that the trial court's refusal to answer two questions submitted by the jury during its deliberations as to whether moving evidence equated to tampering or concealing evidence resulted in an unconstitutional enlargement of the charged crimes, as that claim was deemed waived pursuant to *State*

v. *Kitchens* (299 Conn. 447): although the trial court did not inform the parties of the answer it intended to provide to the jury's questions, it invited counsel, outside the presence of the jury, to raise any issues before the answer was given, both counsel stated that they had nothing further to discuss, and counsel failed to object after the court responded to the jury's questions; accordingly, this court could not say that the defendant was deprived of a fair trial when the record indicated that the defense was provided a meaningful opportunity to propose an answer to the jury's questions and to object to the trial court's response to those questions, and, therefore, the defendant waived the right to challenge that response on appeal.

Argued May 15—officially released August 27, 2024

Procedural History

Substitute information charging the defendant with the crimes of evading responsibility in the operation of a motor vehicle, misconduct with a motor vehicle, and tampering with physical evidence, brought to the Superior Court in the judicial district of Waterbury, geographical area number four, and transferred to the judicial district of Waterbury, where the case was tried to the jury before *Kwak*, *J.*; verdict and judgment of guilty of evading responsibility in the operation of a motor vehicle and tampering with physical evidence, from which the defendant appealed to this court. *Affirmed.*

Alice Osedach Powers, assigned counsel, for the appellant (defendant).

Alexander O. Kosakowski, certified legal intern, with whom were *Scott A. Warden*, certified legal intern, and, on the brief, *Ronald G. Weller*, senior assistant state's attorney, for the appellee (state).

Opinion

ELGO, J. The defendant, Christopher Bolden, appeals from the judgment of conviction, rendered following a jury trial, of evading responsibility in the operation of a motor vehicle in violation of General Statutes § 14-224 (a) and tampering with physical evidence in violation of General Statutes § 53a-155 (a). On appeal, the defendant

claims that (1) with regard to the tampering charge, the evidence was insufficient to prove beyond a reasonable doubt that the defendant believed that a criminal investigation was about to be instituted and that he had concealed a thing with the purpose to impair its availability in such investigation, and (2) the court's refusal to answer the jury's questions during its deliberations resulted in an improper enlargement of the charged crimes. We disagree and, accordingly, affirm the judgment of the trial court.

The following facts, as reasonably could have been found by the jury, are relevant to the resolution of this appeal. At approximately 8:40 p.m. on May 1, 2020, the defendant, an unlicensed driver, was driving his girlfriend's black BMW sport utility vehicle (SUV) on Baldwin Street in Waterbury. The roadway was dry, and the intersection of Baldwin Street and Scovill Street was well lit from the streetlights and exterior lights from Saint Mary's Hospital. A witness driving a vehicle behind the defendant could clearly see the victim, Shaneice Copeland, walking along the sidewalk near the intersection. As the defendant and the witness both approached the intersection, the light was green. At that time, the victim stepped off the sidewalk and into the crosswalk. The defendant did not slow down or brake as he approached the intersection, and he struck the victim with the SUV. The victim rolled over the hood of the SUV before landing on the street.

After striking the victim, the defendant drove several hundred feet before coming to a stop on Baldwin Street. After approximately twenty seconds, the defendant conducted a U-turn and returned to the intersection where he had struck the victim. The defendant paused at the intersection, made eye contact with a witness, and then immediately fled the scene. Witnesses who called 911 immediately after the accident described the victim as a "body" on the ground and noted that she

was "[laying] on the ground . . . like she is dead." The victim died later that evening as a result of blunt impact injuries to the head, neck, torso, and extremities.

After leaving the scene of the accident, the defendant drove the SUV to Meriden Road in Waterbury, approximately six or seven miles from where the accident occurred. The SUV began to overheat and smoke. When the SUV was no longer drivable, the defendant put it in neutral and allowed it to roll backwards down the natural incline of the street and into a driveway on Meriden Road that had at least seven other vehicles parked in it. The defendant knocked on the door of the residence and told the homeowner that he was having car trouble. The homeowner called a cab for the defendant and, when it arrived, at the defendant's request, the homeowner and the cab driver assisted the defendant in pushing the SUV far enough into the driveway so that its front bumper would no longer protrude into the street. The defendant then left in the cab, and the homeowner understood that the defendant would return the next day for the SUV. The cab driver took the defendant to his girlfriend's place of employment, then drove the couple to a hotel, where they stayed for the night.

From the description provided by a witness at the scene of the accident, police investigators knew that they were looking for a black SUV with front end damage consistent with striking a pedestrian. At approximately 10:50 a.m. the next morning, on May 2, 2022, a patrol officer found the SUV parked in the driveway on Meriden Road. The officer noted that the SUV was facing the street, and, as a result, the front end damage was clearly visible to anyone driving in either direction. A crime scene technician was dispatched to photograph and collect evidence from the SUV, while police officers spoke with the homeowner at that address.

On that same morning, the defendant and his girlfriend were picked up from the hotel by a friend. Between approximately 11 a.m. and noon, the defendant, along with his friend and his girlfriend, drove past the driveway on Meriden Road, where the SUV was parked. The girlfriend testified that it was their intention "to go get the car, to look at the car, to go see what happened to the car" but, upon seeing the police activity at the residence on Meriden Road, they drove past it without stopping and eventually returned to the home of the defendant's girlfriend. Once at her home, the girlfriend called the police to report that her vehicle had been stolen but later admitted to making the false report. Soon after, the police arrived and took the defendant and his girlfriend to the police station for questioning. The defendant at that time confessed to striking the victim with the SUV, leaving the scene without speaking to anyone, parking and leaving the SUV in the driveway on Meriden Road, and stated that he was aware that his girlfriend had falsely reported that the SUV had been stolen.

The defendant thereafter was arrested and charged with the following crimes: in count one, evading responsibility in the operation of a motor vehicle in violation of § 14-224 (a),[1] in count two, misconduct with a motor vehicle in violation of General Statutes § 53a-57 (a),[2] and, in count three, tampering with physical evidence in violation of § 53a-155 (a).[3] Specifically, in count three,

[1] General Statutes § 14-224 (a) provides in relevant part: "Each operator of a motor vehicle who is knowingly involved in an accident which results in the death of any other person shall at once stop and render such assistance as may be needed and shall give such operator's name, address and operator's license number and registration number to any officer or witness to the death of any person . . . ."

[2] General Statutes § 53a-57 (a) provides: "A person is guilty of misconduct with a motor vehicle when, with criminal negligence in the operation of a motor vehicle, he causes the death of another person."

[3] General Statutes § 53a-155 (a) provides in relevant part: "A person is guilty of tampering with or fabricating physical evidence if, believing that a criminal investigation conducted by a law enforcement agency or an official

the state charged the defendant with tampering with physical evidence "in that, on or about May 1, 2020, at or about [9 p.m.], at or near 727 Meriden Road, in the [c]ity of Waterbury, Connecticut, the [defendant], believing that a criminal investigation conducted by a law enforcement agency was about to be instituted, concealed a thing with purpose to impair its availability in such criminal investigation."

After the presentation of evidence at trial, the court instructed the jury on the elements of each of the charged crimes, noting that "[t]he state is required to prove each element and each count beyond a reasonable doubt." During deliberations, the jury asked for clarification regarding two of the elements in count three, specifically, whether moving evidence equated with tampering or concealing evidence. The court responded that it was up to the jury as a group to determine that answer.

The jury found the defendant guilty on count one, evading responsibility in the operation of a motor vehicle in violation of § 14-224 (a), and on count three, tampering with physical evidence in violation of § 53a-155 (a). The jury found the defendant not guilty on count two, misconduct with a motor vehicle in violation of § 53a-57 (a). The court rendered judgment in accordance with the jury's verdict and sentenced the defendant to a total effective term of fifteen years of incarceration. This appeal followed. Additional facts will be set forth as necessary.

I

The defendant's first claim is that the evidence was insufficient to support his conviction of tampering with

proceeding is pending, or about to be instituted, such person . . . [a]lters, destroys, conceals or removes any record, document or thing with purpose to impair its verity or availability in such criminal investigation or official proceeding . . . ."

physical evidence because the state failed to prove beyond a reasonable doubt that he (1) believed a criminal investigation was about to be instituted when he fled the scene of the accident and subsequently abandoned the SUV in a driveway, and (2) concealed the SUV.[4] We disagree.

"To determine whether the evidence was sufficient to establish [an] essential element of [a crime], we apply a two part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom, the [jury] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt . . . . In doing so, we are mindful that the trier of fact is not required to accept as dispositive those inferences that are consistent with the defendant's innocence. . . . The trier [of fact] may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical. . . .

[4] In the statement of issues and in the primary heading in his principal appellate brief, the defendant claims, inter alia, that the evidence was insufficient to prove that he "intended to conceal a vehicle with the intent to impair its availability in [a] criminal proceeding." In the subheading and body of his brief, however, the defendant does not argue the "intent to conceal" the SUV or "intent to impair its availability." Rather, the defendant argues that "the evidence was insufficient to prove beyond a reasonable doubt that [he] concealed the vehicle." Because the substance of the defendant's argument involves the alleged concealment of the SUV, that is the claim we address on appeal. See, e.g., *Taylor* v. *Mucci*, 288 Conn. 379, 383 n.4, 952 A.2d 776 (2008) ("We repeatedly have stated that [w]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . Where a claim is asserted in the statement of issues but thereafter receives only cursory attention in the brief without substantive discussion or citation of authorities, it is deemed to be abandoned." (Internal quotation marks omitted.)).

"[W]e do not draw a distinction between direct and circumstantial evidence so far as probative force is concerned . . . . Indeed, [c]ircumstantial evidence . . . may be more certain, satisfying and persuasive than direct evidence. . . . It is not one fact . . . but the cumulative impact of a multitude of facts [that] establishes guilt in a case involving substantial circumstantial evidence." (Citation omitted; internal quotation marks omitted.) *State* v. *Honsch*, Conn. , , A.3d (2024).

Section 53a-155 (a) provides in relevant part that a defendant is guilty of tampering with evidence "if, believing that a criminal investigation conducted by a law enforcement agency . . . is . . . about to be instituted, [the defendant] . . . conceals . . . [a] thing with purpose to impair its . . . availability in such criminal investigation . . . ."[5] Consequently, the court instructed the jury that, in order to find the defendant guilty of tampering with evidence, it must find the following elements beyond a reasonable doubt: "(1) the defendant believed that a criminal investigation conducted by a law enforcement agency was pending or about to be instituted, (2) the defendant tampered with physical evidence, and (3) the defendant concealed any item with the purpose of impairing its availability in such proceeding."

"We . . . note that the jury must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense, [but] each of the basic and inferred facts underlying those conclusions need not be proved beyond a reasonable doubt.

[5] Although § 53a-155 (a) allows a defendant to be convicted if he "conceals *or removes* any . . . thing with purpose to impair its verity or availability"; (emphasis added); here, the state only charged the defendant with concealment, and not removal, of a "thing . . . ." For that reason, concealment was the element used in the jury instructions, as well as the element that is considered on appeal.

. . . If it is reasonable and logical for the jury to conclude that a basic fact or an inferred fact is true, the jury is permitted to consider the fact proven and may consider it in combination with other proven facts in determining whether the cumulative effect of all the evidence proves the defendant guilty of all the elements of the crime charged beyond a reasonable doubt." (Internal quotation marks omitted.) *State* v. *Taupier*, 330 Conn. 149, 187, 193 A.3d 1 (2018), cert. denied, U.S. , 139 S. Ct. 1188, 203 L. Ed. 2d 202 (2019). When a penal statute includes a requirement such as a defendant's belief or intent, the jury is often tasked with considering circumstantial evidence in order to determine the defendant's state of mind at the time of the crime. "[T]he state of mind of one accused of a crime is often the most significant and, at the same time, the most elusive element of the crime charged. . . . Because it is practically impossible to know what someone is thinking or intending at any given moment, absent an outright declaration of intent, a person's state of mind is usually [proven] by circumstantial evidence. . . . For example, intent may be proven by conduct before, during and after [a crime]. Such conduct yields facts and inferences that demonstrate a pattern of behavior and attitude . . . by the defendant that is probative of the defendant's mental state." (Citation omitted; internal quotation marks omitted.) *State* v. *Bonilla*, 317 Conn. 758, 766, 120 A.3d 481 (2015). Here, the jury was permitted to rely on the circumstantial evidence presented by the state, such as the defendant's actions and his pattern of behavior, to make reasonable and logical inferences regarding his state of mind.

A

The defendant argues that the evidence was insufficient to prove beyond a reasonable doubt that he believed that a criminal investigation was about to begin when he fled the scene of the accident and abandoned

the SUV he has driving in a driveway. Specifically, the defendant points to his recorded statement to the police in which he stated that he never observed the victim on the ground after striking her and, instead, believed that the victim was uninjured because he mistakenly thought she was an unidentified person walking along the sidewalk after the accident. The defendant argues that, "as [he] left the scene, he did not believe that an official proceeding or investigation against him was probable because he believed that . . . the person had not been injured." With regard to parking the SUV in the driveway, the defendant similarly argues that he moved the disabled SUV into the driveway because Meriden Road is a busy road with very little shoulder, and not because he believed that a criminal investigation was about to be instituted. We are not persuaded.

The jury was permitted to consider circumstantial evidence presented by the state, together with the defendant's actions and his pattern of behavior, to determine his state of mind. "In evaluating evidence, the [finder] of fact is not required to accept as dispositive those inferences that are consistent with the defendant's innocence. . . . The [finder of fact] may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical." (Internal quotation marks omitted.) *State* v. *Campbell*, 328 Conn. 444, 504, 108 A.3d 882 (2018). The jury was free to credit or disregard the defendant's statements in his recorded statement to the police. Similarly, the jury was permitted to draw reasonable inferences from the evidence in the record, including that the defendant saw the victim on the ground when he returned to—and paused at—the intersection before fleeing the scene, or that the defendant must have known from the significant damage to the SUV that the victim had been injured. The state produced sufficient

evidence upon which the jury could find that the defendant believed that a criminal investigation was about to be instituted when he fled the scene and ultimately abandoned the SUV. Accordingly, the defendant's claim fails.

B

The defendant next claims that the state's evidence was insufficient to prove beyond a reasonable doubt that he concealed the SUV. The defendant provides various definitions of the term "conceal" and argues that this term "cannot be interpreted broadly, but must be construed narrowly . . . ." On the basis of a narrow reading of the definitions he provided, the defendant argues that, "[b]ecause there was no evidence that [he] attempted to or did conceal the vehicle, the [jury's] verdict was based on speculation and not reasonable inferences drawn from the evidence." We disagree.

"When construing a statute . . . [General Statutes] § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . In determining whether the statutory language is plain and unambiguous, words and phrases [must] be construed according to the commonly approved usage of the language . . . . General Statutes § 1-1 (a)." (Citation omitted; internal quotation marks omitted.) *Redding Life Care, LLC* v. *Redding*, 331 Conn. 711, 718, 207 A.3d 493 (2019). The word "conceal" is not defined in § 53a-155 (a) (1) or elsewhere in the Penal Code. Although "[w]e ordinarily look to the dictionary definition of a word to ascertain its commonly approved usage"; (internal quotation marks omitted) *Redding Life Care, LLC* v. *Redding*, supra,

718; in a jury trial, "[i]t is not necessary to define words [for the jury] which are commonly used and which are defined in our standard dictionaries. [T]he definition of words in our standard dictionaries is taken as a matter of common knowledge which the jury is supposed to possess." (Internal quotation marks omitted.) *State* v. *Lewtan*, 5 Conn. App. 79, 85, 497 A.2d 60 (1985). "[J]urors . . . are not required to leave common sense at the courtroom door . . . nor are they expected to lay aside matters of common knowledge or their own observations and experience of the affairs of life . . . ." (Internal quotation marks omitted.) *State* v. *King*, 289 Conn. 496, 522, 958 A.2d 731 (2008). Thus, it is in the purview of a jury to use and apply the ordinary meaning—as the jury understands it—of a word that is commonly used and is not statutorily defined. It is with this understanding that courts often decline to provide a jury with a dictionary definition of commonly understood terms. See, e.g., *State* v. *Lewis*, 303 Conn. 760, 782–83, 36 A.3d 670 (2012) (presuming jury understood and applied common usage of disputed terms); *State* v. *Maresca*, 173 Conn. 450, 460, 377 A.2d 1330 (1977) (court did not err in failing to define terms that may be understood in their ordinary meaning); *State* v. *Lewtan*, supra, 85 (courts may "refuse to define words which are 'used and might be understood in their ordinary meanings' ").

Here, it is presumed that the jury would know the commonly understood meaning of the word "conceal." Merriam-Webster's Collegiate Dictionary includes in its definition of the word "conceal" "to prevent disclosure or recognition of [something] . . . ." Merriam-Webster's Collegiate Dictionary (11th Ed. 2014) p. 257. Using their "common knowledge . . . and experience of the affairs of life"; (internal quotation marks omitted) *State* v. *King*, supra, 289 Conn. 522; the jurors were expected to determine whether the defendant's placement of the

SUV in the driveway was an act of concealment in keeping with a commonly understood definition of the word "conceal."

Although the defendant argues that, if it was his intention, he could have more effectively concealed the SUV by using a tarp, parking it in a garage, or facing it away from the street, that is not the relevant inquiry. Rather, when considering a sufficiency of the evidence claim, we view the cumulative evidence in the light most favorable to sustaining the jury's verdict and then determine whether any rational juror could find that the defendant concealed the SUV.

There is sufficient evidence in the record to sustain the jury's verdict. First, a rational juror could consider and credit the context for the act of concealment, which, here, includes evidence that the defendant likely knew he had seriously injured a pedestrian, fled the scene, and needed to quickly and temporarily abandon the SUV. Next, in light of the exigencies of the defendant's circumstances, a juror could conclude that the defendant saw an opportunity to make the SUV less noticeable in a private driveway with a significant number of other vehicles. Using the commonly understood definition of "concealment," a rational juror reasonably could conclude that parking a disabled vehicle in a private driveway amongst several other vehicles, even if the subject vehicle is in plain sight, could prevent the vehicle from being located. For this reason, the defendant's argument that the evidence was insufficient to prove that he committed an act of concealment fails.

II

The defendant's second claim is that the court's refusal to answer the jury's questions as to whether moving evidence equated to tampering or concealing evidence unconstitutionally enlarged the charged offense. We do not reach the merits of this claim

because it is deemed waived pursuant to *State* v. *Kitchens*, 299 Conn. 447, 10 A.3d 942 (2011), and because the defendant failed to properly raise a claim of plain error.[6]

The following additional facts are relevant to this claim. During deliberations, the court received a note containing two questions from the jury concerning count three, the tampering charge. Specifically, the jury asked: "Related to count three: In element [two], does moving evidence equate to tampering with evidence? In element [three], does moving evidence equate to concealing evidence?" Before calling the jury back into the courtroom, the court advised the parties that it would excuse the jury for the remainder of the day and would respond to its questions the following morning. The court read the questions aloud to the parties and their respective counsel, excused the jury, and then asked counsel if they wanted to read the note for themselves. Both counsel declined. The court then asked: "Is there anything before we adjourn for today?" Both parties' counsel responded, "No, Your Honor."

The next morning, the court again invited the parties to provide feedback by asking: "Is there anything we

[6] "[T]he plain error doctrine is reserved for truly extraordinary situations [in which] the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings. . . . A party cannot prevail under plain error unless it has demonstrated that the failure to grant relief will result in manifest injustice." (Citation omitted; internal quotation marks omitted.) *State* v. *McClain*, 324 Conn. 802, 812, 155 A.3d 209 (2017). In his principal appellate brief, the defendant makes several conclusory assertions that "the trial court's inadequate response to the jurors' questions constituted plain error," but provides no analysis to support his claim. Although the defendant's reply brief contains a citation to case law regarding the plain error doctrine, it similarly is devoid of analysis, and, instead, merely asserts that the plain error doctrine applies to his claim. "We repeatedly have stated that [w]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly." (Internal quotation marks omitted.) *Taylor* v. *Mucci*, supra, 288 Conn. 383 n.4.

need to discuss before bringing [in] the [jurors] and [giving] them an answer to the questions that they asked yesterday?" Both counsel responded: "No, Your Honor." The jurors were brought into the courtroom, and the court read back their questions regarding whether moving evidence equated to concealing or tampering with evidence, and stated: "[The court] cannot give you that answer. That is for you to determine, whether that equates to those things. So, you'll have to make that decision as a group." The court asked the jury to resume its deliberations, then affirmatively asked counsel if there was "[a]nything before we recess," to which both counsel responded: "No, Your Honor." Defense counsel expressed no objection to the court's course of action in responding to the jury's note.

Whether the court's response to the jury's questions resulted in an enlargement of the charged offenses constitutes a legal question over which we exercise plenary review. See, e.g., *State* v. *David N.J.*, 301 Conn. 122, 158, 19 A.3d 646 (2011) ("enlargement claims . . . require us to exercise plenary review").

On appeal, the defendant concedes that his enlargement claim was not preserved before the trial court and thus requests review pursuant to *State* v. *Golding*, 213 Conn. 233, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). Under *Golding*, "a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond

a reasonable doubt." (Emphasis in original; footnote omitted.) *State* v. *Golding*, supra, 239–40.

It is undisputed that the first two prongs of *Golding* are satisfied in the present case. The state argues, however, that the third prong is not met because the defendant waived his claim pursuant to *State* v. *Kitchens*, supra, 299 Conn. 447. We agree with the state.

"A defendant in a criminal prosecution may waive one or more of his or her fundamental rights. . . . [I]n the usual *Golding* situation, the defendant raises a claim on appeal [that], while not preserved at trial, at least was not waived at trial. . . . [A] constitutional claim that has been waived does not satisfy the third prong of the *Golding* test because, in such circumstances, we simply cannot conclude that injustice [has been] done to either party . . . or that the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial. . . .

"The mechanism by which a right may be waived . . . varies according to the right at stake. . . . For certain fundamental rights, the defendant must personally make an informed waiver. . . . For other rights, however, waiver may be effected by action of counsel. . . . [Our Supreme Court] has stated that among the rights that may be waived by the action of counsel in a criminal proceeding is the right of a defendant to proper jury instructions." (Citations omitted; internal quotation marks omitted.) *State* v. *Kitchens*, supra, 299 Conn. 467.

The waiver by the defendant in this case is comparable to the waiver that was effected in *State* v. *Grasso*, 189 Conn. App. 186, 207 A.3d 33, cert. denied, 331 Conn. 928, 207 A.3d 519 (2019). During jury deliberations in *Grasso*, the jury requested to rehear the closing arguments of counsel. Id., 222. Outside of the jury's presence, the court read the request to the parties' counsel,

told them it would deny the request, and indicated that it would, instead, instruct the jury on direct and circumstantial evidence. Id., 223. Counsel for both parties affirmatively stated they did not have an issue with the court's proposed response. Id. The jury returned to the courtroom, the court informed the jury that its request to rehear the closing arguments was denied, and then instructed the jury regarding direct and circumstantial evidence. Id., 223–24. Thereafter, the jury returned to its deliberations, and neither party raised the issue again until the defendant's subsequent appeal from the judgment of conviction. Id., 224. On appeal, this court determined that the defendant had waived the opportunity to challenge the propriety of the court's response to the jury's request because, at trial, defense "counsel affirmatively replied that there were no objections to the court's response and, even after the court addressed the jury in the manner it had proposed, neither the prosecutor nor defense counsel stated any reservations or objections to the court's response." Id., 226.

Here, although the court did not inform the parties of the answer it intended to provide to the jury's questions, it twice invited counsel—outside the presence of the jury—to raise any issues they wanted to discuss prior to the answer being given. Both counsel affirmatively stated that they had nothing to discuss. Then, similar to *Grasso*, neither counsel raised a concern or objection after the court responded to the jury's questions, even though here, they were affirmatively invited to do so. As a result, we conclude that the defendant cannot satisfy the third prong of *Golding*. We cannot say that the defendant was deprived of a fair trial when the record indicates that the defense was provided a meaningful opportunity to either propose an answer to the jury's questions or object to the court's response to those questions. Accordingly, because the defense

acquiesced to the court's response to the jury's questions, the defendant waived, pursuant to *Kitchens*, the right to challenge that response on appeal. The defendant's claim fails because it is waived and, therefore, does not satisfy *Golding*'s third prong. As a result, we do not reach the merits of the defendant's enlargement claim.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* TAHIR L.*
(AC 46111)

Cradle, Clark and Seeley, Js.

Syllabus

Convicted, following a jury trial, under two separate dockets, of five counts of sexual assault in the fourth degree and four counts of risk of injury to a child, the defendant appealed to this court. *Held*:

1. The defendant could not prevail on his unpreserved claim that his right to due process under the federal constitution was violated by the trial court's preliminary instructions to the jury: by providing instructions that contained the language of the statutes that the defendant was charged with violating, the court properly informed the jury of the nature of the charges in accordance with the model jury instructions pertaining to preliminary instructions; moreover, the court included instructions regarding the state's burden to prove each element of the charges beyond a reasonable doubt, an instruction on reasonable doubt that was consistent with the model jury instruction for preliminary instructions, an explanation of the difference between preliminary instructions and final

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

Moreover, in accordance with federal law; see 18 U.S.C. § 2265 (d) (3) (2018), as amended by the Violence Against Women Act Reauthorization Act of 2022, Pub. L. No. 117-103, § 106, 136 Stat. 49, 851; we decline to identify any person protected or sought to be protected under a protection order, protective order, or a restraining order that was issued or applied for, or others through whom that person's identity may be ascertained.

instructions and an instruction to the jurors that their verdict must be based exclusively on evidence presented at trial and on the principles of law in the court's final instructions; furthermore, because the court's final instructions covered all applicable legal principles, the defendant failed to demonstrate that the claimed errors regarding the trial court's preliminary instructions merited the extraordinary relief afforded under the plain error doctrine.

2. The defendant could not prevail on his claims that the trial court violated his constitutional right to due process in its final instructions to the jury:

a. The defendant's claim that the court erred in failing to include in its final instructions a limiting instruction regarding the use of nonpropensity evidence for propensity purposes was unavailing: the defendant consented to the joinder of the two underlying cases, and the court properly advised the jury in its final instructions that the jury must deliberate on each count separately and must make an independent determination as to whether the state satisfied its burden of proof as to each element of the charged offenses; moreover, although the court did not specifically instruct the jury that it could not use the evidence pertaining to one information as propensity evidence when considering the offenses charged in the other information, the defendant waived this claim and was not entitled to review under *State* v. *Golding* (213 Conn. 233) because he did not request such an instruction from the court and defense counsel stated that he had no objection to the court's proposed instructions and did not request any additions or modifications to this section of the instructions; furthermore, the defendant failed to demonstrate that the court committed plain error in the absence of his request for such an instruction.

b. The defendant could not prevail on his claim that the court erred in instructing the jury that it could use the victims' affidavits as substantive evidence rather than solely for impeachment purposes: defense counsel explicitly offered the affidavits as full exhibits and did not indicate at trial that the affidavits were introduced only for a limited purpose; moreover, defense counsel raised no objection during the charge conference regarding the language permitting the jury to consider the affidavits as substantive evidence, nor did defense counsel take exception to the language after the court delivered its final instructions, and, accordingly, the defendant waived this claim and therefore was not entitled to *Golding* review; furthermore, it is well established that an exhibit offered and received as a full exhibit is in the case for all purposes and, accordingly, the court did not commit plain error by instructing the jury in the manner that it did.

c. The defendant could not prevail on his claim that the trial court committed plain error in instructing the jury on the elements of fourth degree sexual assault: although the trial court erroneously omitted the word "intentionally" from its instruction on the elements of fourth degree sexual assault as to four of the five counts, the court's final instructions,

when read as a whole, did not dilute the state's burden of proving beyond a reasonable doubt that the defendant intentionally subjected the victims to sexual contact with respect to each of the five counts of fourth degree sexual assault and, accordingly, the defendant failed to demonstrate that the court's erroneous instruction resulted in manifest injustice.

3. The defendant could not prevail on his unpreserved claims that the trial court erred in admitting certain evidence at trial:

a. This court could not conclude that the trial court erred in admitting photographs of the victims at their ages when the defendant's abuse began: even assuming, arguendo, that the photographs would have been inadmissible if objected to at trial, the defendant cited no authority for the proposition that the trial court had an affirmative obligation to preclude the admission of certain evidence in the absence of an objection; moreover, it is well established that when opposing counsel does not object to evidence, it is inappropriate for the trial court to assume the role of advocate and decide that the evidence should be stricken; furthermore, the defendant's unpreserved evidentiary claim did not present a truly extraordinary situation in which the alleged error was so obvious that it would affect the fairness and integrity of and public confidence in the judicial proceedings and this court therefore declined to afford the defendant relief under the plain error doctrine.

b. This court declined to review the defendant's unpreserved claim that the trial court erred in admitting a photograph of the defendant's gun safe because it was not relevant and was highly prejudicial; because defense counsel objected to the photograph of the gun safe only on the basis of lack of a proper foundation, the defendant could not now challenge its admission on other grounds.

4. The defendant could not prevail on his claims that various statements by the prosecutor were improper: defense counsel did not take exception at trial to any of the prosecutor's uses of the term "sexual assault," nor did the trial court ever instruct the prosecutor to refrain from using the term, and, given the circumstances of this case, the relatively infrequent use of the term, and the context in which the term was used, the prosecutor's six uses of the term "sexual assault" when questioning the witnesses did not constitute prosecutorial impropriety; moreover, although the defendant claimed that the prosecutor improperly suggested that the defendant's abuse caused one of the victim's breast cancer, the prosecutor never claimed a causal relationship between the defendant's abuse and the victim's breast cancer, and the jury could not have reasonably interpreted the prosecutor's remarks as suggestive of such a connection.

Argued May 21—officially released August 27, 2024

Procedural History

Substitute information, in the first case, charging the defendant with four counts of the crime of sexual

assault in the fourth degree and three counts of the crime of risk of injury to a child, brought to the Superior Court in the judicial district of Litchfield, geographical area number eighteen, and substitute information, in the second case, charging the defendant with one count each of the crimes of sexual assault in the fourth degree and risk of injury to a child, brought to the Superior Court in the judicial district of Danbury, geographical area number three; thereafter, the court, *Pelosi*, *J.*, granted the state's motion for joinder and the cases were tried to the jury before *Pelosi*, *J.*; verdicts and judgments of guilty, from which the defendant appealed to this court. *Affirmed.*

Allison M. Near, with whom, on the brief, was *Emily C. Kaas-Mansfield*, for the appellant (defendant).

Laurie N. Feldman, assistant state's attorney, with whom, on the brief, were *David R. Shannon*, state's attorney, and *Terri L. Sonneman*, senior assistant state's attorney, for the appellee (state).

Opinion

CRADLE, J. The defendant, Tahir L., appeals from the judgments of conviction, rendered following a jury trial, of one count of sexual assault in the fourth degree in violation of General Statutes (Rev. to 2003) § 53a-73a (a) (1), four counts of sexual assault in the fourth degree in violation of General Statutes (Rev. to 2009) § 53a-73a (a) (1), and four counts of risk of injury to a child in violation of General Statutes § 53-21 (a) (2).[1] On appeal, the defendant claims that (1) his right to due process was violated by the trial court's preliminary instructions to the jury, (2) his right to due process was

[1] Although § 53-21 has been amended since the events underlying this appeal; see Public Acts 2007, No. 07-143, § 4; Public Acts 2013, No. 13-297, § 1; Public Acts 2015, No. 15-205, § 11; those amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

violated by the court's final instructions to the jury, (3) the court erred in admitting certain evidence, and (4) the state committed prosecutorial impropriety. We affirm the judgments of the trial court.

The jury reasonably could have found the following facts. In 2003, the defendant was living in a house with several brothers, cousins, and other extended family members, including A, the ten year old daughter of one of the defendant's cousins. Around that time, the defendant began asking A to accompany him to a bedroom to help him study for an automotive licensing exam. Inside the bedroom, the defendant would touch A's thighs and breasts and eventually progressed to rubbing his erect penis against her body. This abuse continued until 2005, when the defendant got engaged and moved into a new home.

In 2009, B, the twelve year old daughter of another cousin, visited the defendant's house, and the defendant brought B to his basement to help him write estimates for his masonry company. In the basement, the defendant "dry humped" B with an erect penis. On two occasions, the defendant put his hands inside B's pants and caressed her buttocks and again "humped" her with an erect penis. The abuse of B lasted until 2010, at which point she began avoiding visits to the defendant's house, and, if she did go to the defendant's house, she would sit next to her mother or a female relative.

In 2012, L, the ten year old daughter of another of the defendant's cousins, was staying overnight at the defendant's house. That night, the defendant placed L on his lap and rubbed her vaginal area over her pants while "grinding" his erect penis against L's buttocks. The following night, the defendant laid beside L on a mattress topper and began touching her stomach and buttocks. The defendant then removed his clothes and

had L lay on top of him while he rubbed his erect penis against the outside of L's clothed vagina.

Around the same time in 2012, the defendant began inappropriately touching E, the twelve year old daughter of another cousin. E was also related to the defendant through her maternal aunt, who was married to the defendant at the time. E would come to the defendant's house to visit her aunt and her cousins, and on several occasions when E stayed the night, the defendant touched her breasts and vaginal area, both over and under E's clothes. During one sleepover, the defendant placed E's hand under his boxer shorts and on his erect penis. On occasions when the defendant picked E up from school, he made her sit in the passenger seat of the car and rubbed her thighs and breasts as they drove to the defendant's house. The last instance of abuse occurred in approximately 2013, when E was a high school freshman. While E was visiting the defendant's house with her mother, the defendant called E upstairs to help him fix a television. E went upstairs and found the defendant lying in bed. When she refused to get in bed with him, the defendant touched her breasts. E left the room and texted her cousin, B, that there was an "emergency."

The following day, E and B met at a stop sign near E's house, where E disclosed the abuse to B, who then acknowledged that the defendant had abused her as well. At some point, E and B had each discussed the abuse with A as well. Approximately five years later, in July, 2018, E disclosed the defendant's abuse to her uncle, who was also B's father. Around that time, E and B met with L at a Mexican restaurant, where L acknowledged that she, too, had been abused by the defendant. After these disclosures, A's father sought counsel and hired an attorney. By October, 2018, the

defendant's then wife had become aware of the allegations, and, in January, 2019, she filed for divorce from the defendant.

In March, 2019, each of the victims completed an affidavit at the attorney's office. The affidavits were then forwarded to the police who subsequently met with the victims, and, following an investigation, the defendant was arrested.

The defendant thereafter was charged with one count of sexual assault in the fourth degree in violation of General Statutes (Rev. to 2003) § 53a-73a (a) (1), four counts of sexual assault in the fourth degree in violation of General Statutes (Rev. to 2009) § 53a-73a (a) (1) and four counts of risk of injury to a child in violation of § 53-21 (a) (2).[2] Following trial, the jury found him guilty on all counts, and the trial court, *Pelosi*, *J.*, imposed a total effective sentence of thirty years of incarceration, execution suspended after fifteen years, and twenty-five years of probation. This appeal followed. Additional facts and procedural history will be set forth as necessary.

[2] The defendant was charged in a separate information as to the abuse of A, which occurred in a different town than the abuse of the other three victims. Pursuant to Practice Book § 41-19 and General Statutes § 54-57, the state filed a motion for joinder. The defendant consented to the motion, and the trial court joined the two cases.

As to the abuse of A, the defendant was charged with sexual assault in the fourth degree in violation of General Statutes (Rev. to 2003) § 53a-73a (a) (1) (A) for sexual contact with a victim "under fifteen years of age." As to each of B, L, and E, the defendant was charged with sexual assault in the fourth degree for sexual contact with a victim "under thirteen years of age" when the actor is more than two years older than the victim under General Statutes (Rev. to 2009) § 53a-73a (a) (1) (A). Additionally, because the abuse of E extended past the victim's thirteenth birthday, the defendant was charged with a second count of sexual assault in the fourth degree as to E in violation of General Statutes (Rev. to 2009) § 53a-73a (a) (1) (B) for sexual contact with a person "thirteen years of age or older but under fifteen years of age and the actor is more than three years older than such other person . . . ." The defendant was charged with one count of risk of injury to a child in violation of § 53-21 (a) (2) as to each of the four victims.

I

The defendant first claims that his right to due process under the federal constitution was violated because the trial court's preliminary instructions to the jury were "overly detailed as to the elements of each charge" such that they were "not tailored to the issues in the case," and the preliminary instructions did not define the term "reasonable doubt." We disagree.

The following additional procedural history is relevant to our consideration of the defendant's claim. Prior to the commencement of trial, the court gave preliminary instructions to the jury. In its preliminary instructions addressing the elements of sexual assault in the fourth degree, the court instructed the jury that "sexual contact" means "any contact by the defendant with the intimate parts of the complainant or contact of the intimate parts of the defendant with the complainant." The court further instructed the jury that "sexual contact" as an element of sexual assault in the fourth degree requires the jury to find that "the defendant had the specific intent to obtain sexual gratification or to degrade or humiliate the complainant." See General Statutes § 53a-65 (3). Following the presentation of evidence, the court narrowed its final instructions on sexual assault in the fourth degree to the elements for which there was evidence to support the charge by omitting the phrases "or contact of the intimate parts of the defendant with the complainant" and "or to degrade or humiliate the complainant."

In its preliminary instructions regarding the elements of risk of injury to a child in violation of § 53-21 (a) (2), the court, quoting the statutory language, instructed the jury that the offense covers contact "likely to impair the health or morals of such child." Following the presentation of evidence, the trial court narrowed its final instructions on the elements of the offense by omitting

the language regarding the impairment of morals, which was not at issue in the case.

Additionally, the court in its preliminary remarks repeatedly[3] instructed the jury that the state must prove each element of each offense beyond a reasonable doubt, although the court did not provide a definition of "reasonable doubt." The defendant did not take exception to the court's preliminary instructions.

The defendant concedes[4] that his claims as to the court's preliminary instructions were not preserved and, therefore, requests review pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015).[5] Under *Golding*, "a defendant can prevail on a claim of constitutional error not preserved at trial only if all of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject

[3] The court used the term "reasonable doubt" a total of twenty-four times during its preliminary remarks.

[4] The defendant claims that the trial court prevented him from challenging the preliminary instructions. We disagree. On the first day of voir dire, the court invited the parties to submit proposed instructions without specification as to preliminary or final instructions. Defense counsel asked the court whether there was a deadline for instructional requests, and the court responded, "No. Let's see how the evidence comes in, and as it's coming in, okay?" The following day, the court stated: "And again, not to be a broken record, any charges—charging documents that you want the court to have, please submit ASAP."

The defendant did not submit proposed preliminary instructions, nor was there an explicit request to do so by the defendant.

[5] "The state does not claim that the defendant waived the challenge to the [court's preliminary instructions] pursuant to *State* v. *Kitchens*, 299 Conn. 447, 10 A.3d 942 (2011)." *State* v. *Thompson*, 305 Conn. 806, 814 n.11, 48 A.3d 640 (2012); see id., 814 and n.11 (reviewing unpreserved challenge to jury charge pursuant to *Golding* where state did not claim that defendant waived challenge under *Kitchens*).

to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Emphasis omitted; footnote omitted.) *State* v. *Golding*, supra, 239–40. "The first two *Golding* requirements involve whether the claim is reviewable, and the second two involve whether there was constitutional error requiring a new trial." (Internal quotation marks omitted.) *In re Na-Ki J.*, 222 Conn. App. 1, 7, 303 A.3d 1206, cert. denied, 348 Conn. 929, 304 A.3d 860 (2023).

Here, the record is adequate to review the defendant's claims relating to the court's preliminary instructions. The defendant contends that his claim is constitutional in that the court's instructions violated his due process right to a fair trial. Even assuming, arguendo, that the defendant's claim is constitutional in nature, we conclude that the defendant failed to prove the existence of a constitutional violation and that he was deprived of a fair trial. Resultantly, his claim fails under the third prong of *Golding*.

We are mindful that "[w]hen reviewing [a] challenged jury instruction . . . we must adhere to the well settled rule that a charge to the jury is to be considered in its entirety, read as a whole, and judged by its total effect rather than by its individual component parts." (Internal quotation marks omitted.) *State* v. *Bruny*, 342 Conn. 169, 202, 269 A.3d 38 (2022).

"Preliminary instructions to prospective jurors in a criminal case are not mandatory. . . . When preliminary instructions are given, they do not supersede those given after evidence and arguments under our practice." *State* v. *Webb*, 238 Conn. 389, 457, 680 A.2d 147 (1996). "Preliminary instructions serve the important function of orienting the jurors to the nature of the trial to come. It is helpful to explain at the very start the nature and scope of the jury's duty, some of the basic ground rules

and the issues to be decided." J. Pellegrino, A Collection of Connecticut Selected Jury Instructions: Criminal (3d Ed. 2001) p. 3. Our model jury instructions provide guidance as to what the court's preliminary instructions to the jury should entail, including apprising the jury of the general legal principles in the case and apprising the jury of the nature of the charges against the defendant. When a trial court provides preliminary instructions, as it did here, it must do so without the benefit of seeing the evidence subsequently presented at trial. By providing instructions that contain the language of the statutes that the defendant was charged with violating, the court properly informed the jury of the nature of the charges, not necessarily the specific manner in which he was alleged to have violated them, in accordance with the model jury instructions pertaining to preliminary instructions.[6]

Here, the court's preliminary instructions on the elements of each offense included instructions regarding the state's burden to prove each element beyond a reasonable doubt, and the court's preliminary instruction on reasonable doubt was consistent with the model jury instruction for preliminary instructions.[7] The court

[6] Instruction 1.2-2 of the Connecticut Criminal Jury Instructions provides:

"This is a criminal case. The state has brought charges against <*insert name of defendant*> as follows: <*read information*>.

"The information which I just read is not evidence. It is merely the formal means of accusing a person of a crime and bringing (him/her) to trial. You must not consider it as any evidence of the guilt of the defendant or draw any inference of guilt because the defendant has been arrested and formally charged. Each charge against the defendant is set forth in the information as a separate count, and you must consider each count separately in deciding this case.

"<*Identify each offense charged and summarize the elements.*>" Connecticut Criminal Jury Instructions 1.2-2, available at http://www.jud.ct.gov/JI/Criminal/Criminal.pdf (last visited August 21, 2024).

[7] Instruction 1.2-3 of the Connecticut Criminal Jury Instructions provides in relevant part:

"Every defendant in a criminal case is presumed to be innocent and this presumption of innocence remains with the defendant throughout the trial unless and until (he/she) is proved guilty beyond a reasonable doubt.

also properly explained the difference between preliminary instructions and final instructions. In its preliminary instructions, the court instructed the jurors that once closing arguments were complete, the court would "instruct you as to the law that you must apply in this case" and that "your verdict must be based exclusively on evidence presented at trial and again on the principles of law given to you in my final instructions."

Moreover, "[i]n determining whether preliminary jury instructions require reversal, we must ask whether the jury was fully and properly instructed at the critical time, after all the evidence and after the arguments of counsel." (Internal quotation marks omitted.) *State* v. *Marra*, 222 Conn. 506, 537, 610 A.2d 1113 (1992). Following the presentation of evidence, the court omitted from its final instructions the three elements that were not at issue in this case[8] and properly defined "reasonable doubt." Accordingly, the defendant has failed to prove that a constitutional violation exists and that it deprived him of a fair trial.

"The burden is on the state to prove the defendant guilty beyond a reasonable doubt, and that burden of proof never shifts throughout the trial. Unless you find at the conclusion of all the evidence that the state has proved beyond a reasonable doubt that the defendant has committed every element of an offense, you must find (him/her) not guilty of that offense. On the other hand, if you are satisfied that the evidence establishes the guilt of the defendant beyond a reasonable doubt, you should not hesitate to find (him/her) guilty. . . ." Connecticut Criminal Jury Instructions 1.2-3, available at http://www.jud.ct.gov/JI/Criminal/Criminal.pdf (last visited August 21, 2024).

[8] We note that, even if the trial court had included these elements in its final instructions, it would not follow that a clear constitutional violation exists and deprived the defendant of his right to a fair trial. See *State* v. *Clark*, 264 Conn. 723, 736, 826 A.2d 128 (2003) (no constitutional error where final instructions "merely added an additional element that the state was not required to prove"); *State* v. *Vlahos*, 138 Conn. App. 379, 393, 51 A.3d 1173 (2012) (no harm from jury instruction that included extraneous statutory element), cert. denied, 308 Conn. 913, 61 A.3d 1101 (2013); *State* v. *Rosado*, 107 Conn. App. 517, 537, 945 A.2d 1028 (alleged constitutional violation does not clearly exist where trial court's instruction improperly included additional element of intent), cert. denied, 287 Conn. 919, 951 A.2d 571 (2008).

Alternatively, the defendant claims that the court's allegedly erroneous preliminary instructions constituted plain error. In evaluating plain error claims, "we must determine whether the trial court in fact committed an error and, if it did, whether that error was indeed plain in the sense that it is patent [or] readily discernable on the face of a factually adequate record, [and] also . . . obvious in the sense of not debatable." (Internal quotation marks omitted.) *State* v. *Darryl W.*, 303 Conn. 353, 373, 33 A.3d 239 (2012). "[T]he plain error doctrine is reserved for truly extraordinary situations [in which] the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings." (Internal quotation marks omitted.) *State* v. *McClain*, 324 Conn. 802, 812, 155 A.3d 209 (2017). A party cannot prevail under the plain error doctrine "unless he demonstrates that the claimed error is *both* so clear *and* so harmful that a failure to reverse the judgment would result in manifest injustice." (Emphasis in original; internal quotation marks omitted.) Id.

Here, the defendant has failed to demonstrate that the court committed any error in its preliminary instructions, never mind one that was so harmful that a failure to reverse the judgments would result in manifest injustice. Moreover, because the court's final instructions covered all applicable legal principles, as we discuss in part II of this opinion, the defendant has failed to show that the claimed errors regarding the trial court's preliminary instructions merit the extraordinary relief under the plain error doctrine. See *State* v. *Alston*, 272 Conn. 432, 450, 862 A.2d 817 (2005) ("[e]ven in cases wherein the preliminary instructions were held to be incomplete and improvidently timed, we have not found reversible error where the final jury instructions were complete and appropriate"). We therefore conclude

that the defendant's challenge to the trial court's preliminary instructions is unavailing.

II

Next, the defendant claims that, in its final instructions to the jury, the court violated his constitutional right to due process in (1) failing to give the jury a propensity instruction, (2) instructing the jury that it could consider the victims' affidavits substantively rather than solely for impeachment purposes, and (3) improperly instructing the jury on the elements of sexual assault in the fourth degree.

The defendant acknowledges that he failed to preserve these claims before the trial court and, therefore, seeks review under *State* v. *Golding*, supra, 213 Conn. 239–40. The state claims that the defendant waived these claims. We agree with the state.

"[W]hen the trial court provides counsel with a copy of the proposed jury instructions, allows a meaningful opportunity for their review, solicits comments from counsel regarding changes or modifications and counsel affirmatively accepts the instructions proposed or given, the defendant may be deemed to have knowledge of any potential flaws therein and to have waived implicitly the constitutional right to challenge the instructions on direct appeal. Such a determination by the reviewing court must be based on a close examination of the record and the particular facts and circumstances of each case." *State* v. *Kitchens*, 299 Conn. 447, 482–83, 10 A.3d 942 (2011).

"[J]ury instructions [are] implicitly waived under *Golding* . . . [when] the defense expressly acknowledged and agreed by words or conduct to the instruction challenged on appeal." (Footnote omitted.) Id., 475; see also *State* v. *Hampton*, 293 Conn. 435, 447–50, 988 A.2d 167 (2009) (claim of instructional error was waived

because defense assented to challenged instruction by expressing satisfaction with instruction, suggesting no changes, and failing to object after court asked counsel for changes); *State* v. *Elias V.*, 168 Conn. App. 321, 337, 147 A.3d 1102 (claim of instructional error was waived because defense counsel participated in charging conference, failed to submit written request to change challenged instruction, and expressed satisfaction with challenged instruction), cert. denied, 323 Conn. 938, 151 A.3d 386 (2016); *State* v. *Collazo*, 115 Conn. App. 752, 758–60, 974 A.2d 729 (2009) (claim of instructional error was waived because defense counsel expressly agreed with challenged instruction at charge conference and failed to object after instruction was given), cert. denied, 294 Conn. 929, 986 A.2d 1057 (2010). The defendant does not contest that the trial court provided him with a copy of proposed jury instructions or that he had a meaningful opportunity to review and to offer comments.[9]

Alternatively, the defendant argues that, even if these claims were waived, each alleged error requires reversal of the judgments under the plain error doctrine. As stated herein, a party may prevail under the plain error doctrine only if "he demonstrates that the claimed error is *both* so clear *and* so harmful that a failure to reverse the judgment would result in manifest injustice." (Emphasis in original; internal quotation marks omitted.) *State* v. *McClain*, supra, 324 Conn. 812. With these principles in mind, we address the defendant's three claims in turn. Additional facts and procedural history will be set forth as necessary.

[9] On Friday, September 30, 2022, the court provided proposed jury instructions to the parties for review ahead of a charging conference scheduled for Monday, October 3, 2022. At the October 3, 2022 charging conference, both parties indicated to the court that they had received the proposed instructions and that they had had enough time to review them. The court proceeded to review the instructions seriatim with the parties.

A

We first address the defendant's claim that the court erred in failing to include in its final instructions a limiting instruction regarding the use of nonpropensity evidence for propensity purposes. As noted herein, the defendant consented to the joinder of the information charging the defendant with the abuse of A and the information charging the defendant with the abuse of the other three victims. In the court's final instructions to the jury, it properly advised the jury that it must deliberate on each count separately and must make an independent determination as to whether the state satisfied its burden of proof as to each element of the charged offenses. The court did not, however, specifically instruct the jury that it could not use the evidence pertaining to one information as propensity evidence when considering the offenses charged in the other information. We further note that the defendant did not request such an instruction from the court. In fact, at the charge conference, defense counsel stated that he had no objection to the court's proposed instructions on evidence for a limited purpose and did not request any additions or modifications to this section of the instructions.

"Connecticut courts have found implicit waiver when defense counsel did not object to the challenged instruction for what clearly appeared, on the basis of counsel's trial conduct, to have been tactical reasons." *State* v. *Kitchens*, supra, 299 Conn. 479–80. Here, the defense theory at trial was that the victims' allegations were part of a "corroborated attack" on the defendant orchestrated by his now former wife, who had filed for divorce two months prior to the four victims signing affidavits at the attorney's office. For example, when one victim testified at trial about what another victim had told her in a prior conversation, defense counsel stated that it had no objection to the testimony and that, "[a]s far as

I'm concerned, this is them getting together and getting their stories straight before they go to the attorney's office, so." During closing arguments, defense counsel highlighted the similarities in the timing of the disclosure of each victim's allegations, noting that all four victims signed affidavits within days of the others, and at times appeared to encourage the jury to consider the affidavits of each victim in comparison to the affidavits of the other victims.[10] Accordingly, we conclude that the defendant waived this claim and, therefore, is not entitled to *Golding* review.

We next turn to the defendant's alternative claim that the court's failure to give a limiting instruction on propensity evidence amounts to plain error. He cursorily asserts that the court's alleged instructional error was obvious and "denying relief would result in manifest injustice." We disagree. "It is well established in Connecticut . . . that the trial court generally is not obliged . . . to give a limiting instruction [sua sponte]." (Internal quotation marks omitted.) *State* v. *Crenshaw*, 313 Conn. 69, 90 n.16, 95 A.3d 1113 (2014). Accordingly, we cannot conclude that the court committed error, much less plain error, by not, sua sponte, providing a limiting instruction on the use of evidence for propensity purposes in the absence of the defendant's request for such an instruction.

B

We next turn to the defendant's claim that the court erred in instructing the jury that it could use the victims' affidavits as substantive evidence rather than solely for impeachment purposes. During trial, defense counsel introduced the affidavits of three of the victims, which were admitted into evidence as full exhibits, wherein the victims each recounted the incidents that occurred

[10] For example, defense counsel told the jury: "Take a look at [L's] affidavit. Take a look at [E's]. So [E] created an incident with [L] that [L] doesn't recall."

between them and the defendant. At trial, defense counsel did not indicate that the affidavits were introduced only for a limited purpose but, in fact, explicitly offered them as full exhibits.[11] The defendant nevertheless claims on appeal that it was evident from defense counsel's questions that they were introduced only for impeachment purposes and not as substantive evidence.

In the court's final instructions to the jury, it provided the following instruction on impeachment: "Evidence has been presented that . . . witnesses may have made statements outside of court that are inconsistent with their trial testimony. You should consider this evidence only as it relates to the credibility of the witness' testimony, not as substantive evidence. In other words, consider such evidence as you would any other evidence of inconsistent conduct in determining the weight to be given to the testimony of the witness in court. . . .

"In evidence as defense exhibits are prior statements of [A], [L] and [E]. To the extent, if at all, you find such

[11] During cross-examination of A, the following exchange occurred when defense counsel offered her affidavit into evidence:

"[Defense Counsel]: I'm showing what's defendant's exhibit A for identification, could you tell me what that is?

"[The Witness]: My affidavit.

"[Defense Counsel]: Is that the one that you signed in the Law Offices of Mark Sherman?

"[The Witness]: Correct.

"[Defense Counsel]: Is that the one that was presented to the police?

"[The Witness]: Correct.

"[Defense Counsel]: Could you go to the second page, is that your signature at the bottom?

"[The Witness]: Yes, it is.

"[Defense Counsel]: Your Honor, [at] this time I'd offer the entire affidavit, it is an affidavit sworn under oath as a full exhibit. I believe, a full affidavit sworn under oath, can come in as a full exhibit. . . .

"[The Court]: All right. We're gonna have it marked full . . . . You want this entered as a full exhibit; correct?

"[Defense Counsel]: I do."

During the subsequent testimony of L and E, defense counsel similarly offered their affidavits into evidence as full exhibits.

statements inconsistent with the witness' trial testimony, you may give such inconsistency the weight to which you feel it is entitled in determining the witness' credibility here in court. You may also use these written statements for the truth of its content and find facts from it."

At the charge conference prior to giving its final instructions, the court reviewed this section on impeachment with the parties. When the court asked the parties, "are we good with that [section]," defense counsel responded affirmatively. The prosecutor, however, noted at that time that the court's instruction may cause confusion in that it instructs the jury that it may not use the witnesses' out of court statements as substantive evidence and immediately thereafter instructs the jury that it may consider the witnesses' affidavits as substantive evidence.

The court, in reference to the affidavits, responded: "I mean, [they] did come in for both purposes, that's the whole thing." To clarify the instruction, the court suggested inserting the word "written" before "statements" when referencing which out-of-court statements that the jury may consider as substantive evidence. Both parties affirmatively agreed with the modified language, and defense counsel stated that the change "seems appropriate." The court subsequently incorporated the modification into its final instructions. Defense counsel raised no objection during the charge conference regarding the language permitting the jury to consider the affidavits as substantive evidence, nor did defense counsel take exception to the language after the court delivered its final instructions. Accordingly, the defendant assented to the instruction by expressing satisfaction with the charge and failing to take exception to the challenged language at the charging conference or after the instruction was given. The defendant waived

this claim, and, therefore, he is not entitled to *Golding* review.

Alternatively, the defendant claims that it was plain error for the court to instruct the jury that it may use the victims' affidavits as substantive evidence rather than solely for impeachment purposes. It is well established that "[a]n exhibit offered and received as a full exhibit is in the case for all purposes." (Internal quotation marks omitted.) *State* v. *Camacho*, 282 Conn. 328, 377, 924 A.2d 99, cert. denied, 552 U.S. 956, 128 S. Ct. 388, 169 L. Ed. 2d 273 (2007). Accordingly, the court did not commit error, much less plain error, by instructing the jury that it may consider full exhibits, admitted for all purposes, as substantive evidence.

C

We now turn to the defendant's third claim that the court erred in instructing the jury on the elements of sexual assault in the fourth degree. With respect to four of the five counts of sexual assault in the fourth degree, the court instructed that "[t]he first element is that the defendant subjected the complainant . . . to sexual contact." In instructing on these four counts, however, the trial court erroneously quoted the language of a more recent revision of the statute rather than the operative revisions at issue in this case, which each require that the defendant "*intentionally* subject[ed] another person to sexual contact . . . ." (Emphasis added.) General Statutes (Rev. to 2003) § 53a-73a (a) (1); General Statutes (Rev. to 2009) § 53a-73a (a) (1).[12]

[12] General Statutes (Rev. to 2003) § 53a-73a provides in relevant part: "(a) A person is guilty of sexual assault in the fourth degree when: (1) Such person intentionally subjects another person to sexual contact who is (A) under fifteen years of age . . . ."

General Statutes (Rev. to 2009) § 53a-73a provides in relevant part: "(a) A person is guilty of sexual assault in the fourth degree when: (1) Such person intentionally subjects another person to sexual contact who is (A) under thirteen years of age and the actor is more than two years older than such other person . . . ."

In the defendant's reply brief,[13] he concedes that he waived his claim regarding the instruction on the elements of sexual assault in the fourth degree[14] but argues that the court's omission of the word "intentionally" requires reversal of the judgments under the plain error doctrine. The state concedes, and we agree, that the court erred when it omitted the word "intentionally" from its instruction on the elements of sexual assault in the fourth degree. Because we conclude that error exists, whether the defendant can prevail under the plain error doctrine turns on whether the court's error was of "such monumental proportion that [it] threaten[s] to erode our system of justice and work a serious and manifest injustice on the aggrieved party." (Internal quotation marks omitted.) *State* v. *Blaine*, 334 Conn. 298, 305, 221 A.3d 798 (2019). As an initial matter, we note that our Supreme Court recently emphasized "that it has been especially rare for a jury instruction to be so clearly improper that our courts have deemed plain error review necessary to correct it." *State* v. *Kyle A.*, 348 Conn. 437, 448, 307 A.3d 249 (2024). Moreover, "[a]n omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law." (Internal quotation marks omitted.) Id., 451.

As noted herein, "[w]hen reviewing the challenged jury instruction . . . we must adhere to the well settled rule that a charge to the jury is to be considered in its

[13] Specifically, the defendant concedes that defense counsel's affirmative agreement with the court as to the language of all but two of the charges of sexual assault in the fourth degree fairly waived the objection as to the rest.

[14] At oral argument before this court, when asked about the concession in the reply brief, the defendant's appellate counsel equivocated as to whether she stood by that concession. When asked whether she was withdrawing her concession, she did not give a conclusive response. Even if the defendant had not conceded that he had waived his claim to the court's instruction in this regard, we conclude, for the reasons stated herein, that he has failed to demonstrate that the error deprived him of a fair trial and, therefore, his claim fails under the third prong of *Golding*.

entirety, read as a whole, and judged by its total effect rather than by its individual component parts." (Internal quotation marks omitted.) *State* v. *Bruny*, supra, 342 Conn. 202. After a thorough review of the record, we cannot conclude that this error resulted in manifest injustice.

In its final instructions, the trial court instructed the jury that the concept of specific intent applies to each of the five counts of sexual assault in the fourth degree. The court then defined specific intent, stating: "Specific intent is the intent to achieve a specific result. A person acts 'intentionally' with respect to a result when his conscious objective is to cause such result." After providing this definition, the court again instructed the jury that the concept of specific intent applies to each of the five counts of sexual assault in the fourth degree. When the court instructed the jury on the elements for each count of sexual assault in the fourth degree, it stated that, for the second element, it must find that the defendant "had the specific intent to obtain sexual gratification" and reiterated that "[a] person acts 'intentionally' with respect to a result when his conscious objective is to cause such result." Additionally, although the court's instructions on four of the five counts of sexual assault omitted the word "intentionally" when defining the first element of the offense, subjecting another person to sexual contact, the court, prior to reciting the elements for each count, stated: "The statute defining this offense reads in pertinent part as follows: A person is guilty of sexual assault in the fourth degree when such person *intentionally subjects* another person to sexual contact . . . ." (Emphasis added.) Thus, considering the court's charge in its entirety, we conclude that, despite the court's erroneous omission of the word "intentionally," the jury was properly instructed that the state must prove that the

defendant's conduct was intentional for each count of sexual assault in the fourth degree.

We therefore conclude that, when read as a whole, the court's final instructions did not dilute the state's burden of proving beyond a reasonable doubt that the defendant intentionally subjected the victims to sexual contact with respect to each of the five counts of sexual assault in the fourth degree. Accordingly, the defendant cannot prevail under the plain error doctrine because he has not demonstrated that the court's erroneous instruction as to the elements of sexual assault in the fourth degree resulted in manifest injustice.[15]

III

Third, the defendant claims that the trial court erred in admitting into evidence (1) photographs of the victims at their ages when the abuse began and (2) a photograph of the defendant's gun safe. We disagree.

A

The following additional facts are relevant to our consideration of the defendant's claim that the court erred in admitting into evidence photographs of the victims at their ages at the time the abuse began because "they were irrelevant, highly prejudicial and . . . harmful . . . ." The victims were twenty years of age

[15] In support of this claim, the defendant cites our Supreme Court's decision in *State* v. *Anderson*, 227 Conn. 518, 631 A.2d 1149 (1993), which addressed the trial court's erroneous omission of the word "complete" from the phrase "with complete safety" when instructing on the duty to retreat element of the self-defense statute. (Internal quotation marks omitted.) Id., 531–32. In holding that the court's erroneous instruction required reversal of the judgment, the court concluded that the trial court's omission substantively altered the statute's duty to retreat element, which was central to the only contested issue in the case—the defendant's self-defense claim. Id. *Anderson* is inapposite because the court's erroneous instruction did not go to a contested central issue of the present case in that the issue at trial was not whether the defendant acted with intent, but whether the alleged conduct even occurred.

or older when they testified at trial. For each of the nine counts, the state had to prove the victim's age at the time of the abuse.[16] At trial, the state introduced photographs of A and of L when they were ten years old and photographs of B and of E when they were twelve years old. On each occasion, defense counsel stated that he had no objection to the victim's photograph being admitted as a full exhibit.[17] The defendant concedes that his evidentiary claim regarding the photographs of the victims is not preserved but argues that reversal is appropriate under the plain error doctrine. We disagree.

We cannot conclude that the defendant has demonstrated that the claimed error is both so clear and so harmful that reversal is required under the plain error doctrine. Even assuming, arguendo, that the photographs would have been inadmissible if objected to at trial, the defendant cites no authority for the proposition that the trial court has an affirmative obligation to preclude the admission of certain evidence in the absence of an objection. Moreover, this court consistently has rejected unpreserved evidentiary claims asserting plain error.[18] Indeed, it is well established that,

[16] For each of the four counts of risk of injury to a child, the state had to prove that the victim was under sixteen years of age. See General Statutes § 53-21 (a) (2). For four of the counts of sexual assault in the fourth degree under § 53a-73a (a) (1) (A), the state had to either prove that the victim was under fifteen years of age (A); see General Statutes (Rev. to 2003) § 53a-73a (a) (1) (A); or under thirteen years of age (B, L, and E). See General Statutes (Rev. to 2009) § 53a-73a (a) (1) (A). For the second count of sexual assault in the fourth degree as to the abuse of E, the state had to prove that the victim was thirteen years of age or older and less than fifteen years of age. See General Statutes (Rev. to 2009) § 53a-73a (a) (1) (B).

[17] Additionally, at defense counsel's request, once admitted, the photographs of A and B were taken down for the remainder of the witness' testimony after being shown to the jury.

[18] See *In re Miyuki M.*, 202 Conn. App. 851, 857–58, 246 A.3d 1113 (2021) (unpreserved claim that court erred by accepting exhibit into evidence without canvassing opposing party did not warrant relief under plain error doctrine); *State* v. *Rodriguez*, 192 Conn. App. 115, 118–22, 217 A.3d 21 (2019) (unpreserved claim that court erred in admitting uncharged misconduct

"[w]hen opposing counsel does not object to evidence, it is inappropriate for the trial court to assume the role of advocate and decide that the evidence should be stricken. . . . The court cannot determine if counsel has elected not to object to the evidence for strategy reasons." (Internal quotation marks omitted.) *State* v. *Burgos-Torres*, 114 Conn. App. 112, 118, 968 A.2d 476, cert. denied, 293 Conn. 908, 978 A.2d 1111 (2009). Thus, the defendant's unpreserved evidentiary claim does not present a truly extraordinary situation in which the alleged error is so obvious that it would affect the fairness and integrity of and public confidence in the judicial proceedings. We therefore decline to afford the defendant relief under the plain error doctrine.

B

The defendant next claims that the court erred in admitting a photograph of the defendant's gun safe because it was not relevant and was highly prejudicial. The defendant claims that this evidentiary claim is preserved. We disagree and conclude that this claim is not preserved and thus decline to review it.

The following additional facts are relevant to our consideration of the defendant's claim. On the state's

evidence did not warrant relief under plain error doctrine because alleged error was not so obvious that it affected fairness and integrity of and public confidence in judicial proceedings); *State* v. *Patterson*, 170 Conn. App. 768, 784–86, 156 A.3d 66 (unpreserved claim that state improperly questioned expert witness on cross-examination did not involve alleged error sufficient to warrant relief under plain error doctrine), cert. denied, 325 Conn. 910, 158 A.3d 320 (2017); *State* v. *Natal*, 113 Conn. App. 278, 283–86, 966 A.2d 331 (2009) (unpreserved claim that court erroneously admitted testimony regarding results of defendant's urine tests did not present "the type of extraordinary situation implicating [the plain error] doctrine"); see also *State* v. *Bowman*, 289 Conn. 809, 819–22, 960 A.2d 1027 (2008) (unpreserved claim that court in murder trial erred in admitting eight irrelevant and " 'exceptionally gruesome' " photographs of deceased victim did not result in manifest injustice to defendant and thus precluded relief under plain error doctrine), overruled on other grounds by *State* v. *Elson*, 311 Conn. 726, 91 A.3d 862 (2014).

redirect examination of E, she stated that the defendant owned guns and a gun safe in response to a question about her fear of the defendant. The state then asked another question specifically about the gun safe. Defense counsel did not object. The state then offered a photograph of the gun safe as a full exhibit, to which defense counsel raised a foundational objection, stating that "[t]he person who took that photograph isn't here." The court overruled the objection but instructed the state to lay a better foundation. After doing so, the state again offered the photograph as a full exhibit, and when the court asked if there was an objection, defense counsel responded, "[i]t's already been overruled, no," and the court admitted the photograph as a full exhibit.

On appeal, the defendant claims that the court erred in admitting the photograph of the gun safe because it was not relevant and was highly prejudicial. "Appellate review of evidentiary rulings is ordinarily limited to the specific legal [ground] raised by the objection of trial counsel. . . . To permit a party to raise a different ground on appeal than [that] raised during trial would amount to trial by ambuscade, unfair both to the trial court and to the opposing party." (Internal quotation marks omitted.) *State* v. *Stenner*, 281 Conn. 742, 755, 917 A.2d 28, cert. denied, 552 U.S. 883, 128 S. Ct. 290, 169 L. Ed. 2d 139 (2007). Accordingly, because defense counsel objected to the photograph of the gun safe only on the basis of lack of a proper foundation, the defendant cannot now challenge its admission on the ground that it was not relevant and, therefore, we decline to review this claim.

IV

The defendant finally claims that the state committed prosecutorial impropriety in that it (1) used the term "sexual assault" when examining the victims and (2)

suggested that the defendant's abuse of A caused her breast cancer. We disagree.

"In analyzing claims of prosecutorial impropriety, we engage in a two step analytical process. . . . We first examine whether prosecutorial impropriety occurred. . . . Second, if an impropriety exists, we then examine whether it deprived the defendant of his due process right to a fair trial." (Internal quotation marks omitted.) *State* v. *Albino*, 312 Conn. 763, 771, 97 A.3d 478 (2014). We look at the circumstances of the case and at the context of the prosecutor's challenged conduct, and "[t]here is . . . no mathematical formula that can be applied ritualistically to [such] claims . . . ." *State* v. *Rodriguez*, 107 Conn. App. 685, 701–702, 946 A.2d 294, cert. denied, 288 Conn. 904, 953 A.2d 650 (2008).

A

We first address the defendant's challenge to the state's use of the term "sexual assault." On direct examination, A testified that she was "sexually assaulted" by the defendant. The prosecutor then asked A to tell the jury about what she had "described [as] being a sexual assault,"[19] and, in response, A described the specific occasions on which the defendant had sexually assaulted her. Thereafter, the prosecutor asked five questions of A in which she used the term "sexual assault" or a derivative of the term.[20] During the prosecutor's direct examination of E, the court took a brief recess after E became emotional while recounting a

[19] On appeal, the defendant does not claim that the prosecutor's use of the term "sexual assault" in this particular question was improper.

[20] Specifically, the prosecutor asked A: (1) "So you told your mother, not that the defendant was sexually assaulting you, but that he was a bad person?" (2) "When was the first time you told someone in your family that the defendant sexually assaulted you?" (3) "[H]ow does Albanian culture treat sexual assault?" (4) "When did your parents find out that the defendant had sexually assaulted you?" And (5) "[b]ut there was no sexual assault when [the defendant] was in New Milford?"

particular instance in which the defendant had sexually assaulted her. When E retook the stand, the prosecutor stated, "I'm trying to remember where we were. When the defendant—I'm sorry. I had asked you about what you heard and talked about heavy breathing," before asking E, "Did you hear anything else when the defendant was sexually assaulting you?"

The defendant claims that the prosecutor's six uses of the term "sexual assault" when questioning witnesses was improper because the commission of a sexual assault was an issue for the jury to decide. Even assuming arguendo that a prosecutor's reference to a charged offense may constitute prosecutorial impropriety in some circumstances,[21] we are not convinced that the prosecutor's use of the term "sexual assault" in six questions during trial was improper.[22] Here, it was A

[21] The defendant argues that the prosecutor's use of the term "sexual assault" is tantamount to a prosecutor referring to complainants as "victims" when the commission of a crime is at issue. Our Supreme Court has stated that when the commission of a crime is at issue in a case, a court's repeated use of the word "victim" with reference to a complaining witness is inappropriate. See, e.g., *State* v. *Warholic*, 278 Conn. 354, 369, 897 A.2d 569 (2006). This is because the "jury could . . . [draw] only one inference from its repeated use, namely, that the defendant had committed a crime against the complainant." Id. However, "[a] different set of circumstances exists when the person making reference to the complaining witness is the prosecutor." *State* v. *Rodriguez*, 107 Conn. App. 685, 701, 946 A.2d 294, cert. denied, 288 Conn. 904, 953 A.2d 650 (2008). Although our Supreme Court has cautioned the state against making excessive use of terms like "victim" when the commission of a crime is at issue, our courts "repeatedly have concluded that a prosecutor's infrequent use of the term 'victim' does not constitute prosecutorial impropriety." *State* v. *Johnson*, 345 Conn. 174, 217, 283 A.3d 477 (2022).

[22] For example, in *State* v. *Olivero*, 219 Conn. App. 553, 295 A.3d 946, cert. denied, 348 Conn. 910, 303 A.3d 10 (2023), this court found no impropriety in a prosecutor's nine uses of the term "victim" while questioning witnesses; id., 585–86; because the prosecutor's use of the term occurred over three days of evidence, generally occurred after the witnesses first used the term, and the court never instructed the prosecutor not to use the term. Id., 591–94. On the other hand, in *State* v. *Albino*, supra, 312 Conn. 765, our Supreme Court affirmed the judgment of this court, and concluded, inter alia, that, although there were various statements made by the prosecutor

who first used the term "sexual assault." The prosecutor then used the term in five subsequent questions of A, three of which related to A's disclosure regarding her allegation of sexual assault against the defendant, and one of which was how Albanian culture views sexual assault. The prosecutor also used the term when questioning E, but only to help E recall where her testimony had left off prior to the court taking a brief recess. Defense counsel did not take exception at trial to any of the state's uses of the term "sexual assault," nor did the trial court ever instruct the prosecutor to refrain from using the term. Accordingly, given the circumstances of this case, the relatively infrequent use of the term, and the context in which the term was used, we conclude that the prosecutor's six uses of the term "sexual assault" when questioning the witnesses did not constitute prosecutorial impropriety.

B

The defendant next claims that the prosecutor improperly suggested that the defendant's abuse caused A's breast cancer. The following additional facts are relevant to our consideration of the defendant's claim. On direct examination, A, in response to a question about when her parents became aware of the abuse, used her breast cancer diagnosis to recall which year that disclosure occurred. The following colloquy then occurred:

"Q. So let me ask about the breast cancer. You're a young woman of twenty-nine.

that were improper, the defendant was not deprived of a fair trial. This court concluded that prosecutorial impropriety was committed where the commission of a crime was at issue and the prosecutor referred to the complainant as "the victim" approximately twenty-seven times, to the killing as a "murder" approximately twelve times, and to the firearm as the "murder weapon" approximately six times during the evidentiary phase of the trial. *State* v. *Albino*, 130 Conn. App. 745, 766, 24 A.3d 602 (2011), aff'd, 312 Conn. 763, 97 A.3d 478 (2014).

"A. Yes.

"Q. Did you talk with your doctors about your breast cancer?

"A. I did."

Defense counsel then objected on relevance grounds, and the state responded that the questions go to an element of risk of injury to a child. The court sustained the objection, and the state did not ask any further questions of A regarding her breast cancer diagnosis, although defense counsel brought the issue up on cross-examination.[23]

Additionally, after the court sustained defense counsel's objection, A gave, without objection from defense counsel, the following testimony in response to a question about therapy during the state's direct examination: "I was seeing [a] therapist because of [the defendant's abuse] in particular; it was causing a lot of issues in my life. I started drinking a lot more than I normally was drinking. I was depressed, I was angry, I was doing things that just like, I wasn't myself. And then on top of that, I got breast cancer a year later, so that just kind of really brought my whole life down. My insecurities, I was super insecure. I felt like I lost my whole womanhood on top of what had already occurred, so it was just a lot to deal with at once and I just needed someone to talk to and she's been great, ever since I started talking to her . . . ."

During closing arguments, the prosecutor told the jury that in order to convict the defendant of risk of injury to a child, it had to find that the defendant's conduct was likely to impair the health of the victim, and then argued: "You heard [A] very candidly tell you as a result of this, things were not going well for her.

[23] Defense counsel asked A: "The therapy, was that after you had breast cancer or before, did you start it?"

She was drinking too much, she was depressed, she was angry and then she got breast cancer. There is ample evidence before you, ladies and gentlemen, that in fact the defendant did impair the health of [A]."

The defendant claims that the prosecutor's remarks during direct examination of A and in closing arguments improperly insinuated that the defendant's abuse caused the victim's breast cancer. The state disagrees with this interpretation and contends that the prosecutor's argument was that the defendant's abuse caused heightened trauma for the victim when she was diagnosed with breast cancer, not that it caused the breast cancer itself. We agree with the state. The prosecutor never claimed a causal relationship between the defendant's abuse and the victim's breast cancer, and we conclude that the jury could not have reasonably interpreted the prosecutor's remarks as suggestive of such a connection. See *State* v. *Felix R.*, 319 Conn. 1, 13, 124 A.3d 871 (2015) ("for the purpose of determining whether a challenged remark is improper, when selecting among multiple, plausible interpretations of the language, this court will assign the remark the less damaging, plausible meaning"). Accordingly, we reject the defendant's argument that the prosecutor improperly suggested to the jury that the defendant's abuse caused A's breast cancer.

The judgments are affirmed.

In this opinion the other judges concurred.

LLOYD CARTY *v.* MERCHANT 99-111 FOUNDERS, LLC
(AC 46511)

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

Syllabus

The plaintiff sought to recover damages from the defendant for personal injuries he sustained in connection with an alleged slip and fall as a

result of untreated ice on premises owned, controlled, and maintained by the defendant. The trial court granted the defendant's motion for summary judgment on the basis of the ongoing storm doctrine, and the plaintiff appealed to this court. *Held* that the trial court properly granted the defendant's motion for summary judgment as it was undisputed that there was an ongoing storm at the time the plaintiff fell, the defendant satisfied its initial burden of establishing, prima facie, that it neither created the snow and ice condition nor did it have actual or constructive notice of the condition, and the plaintiff failed to satisfy his burden of raising a genuine issue of material fact with respect to whether the icy condition existed prior to the storm that was ongoing at the time of his fall.

Argued April 25—officially released August 27, 2024

Procedural History

Action to recover damages for personal injuries sustained as a result of the defendant's alleged negligence, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Rosen*, *J.*, granted the defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

William B. Wynne, for the appellant (plaintiff).

Sarah B. Christie, with whom, on the brief, were *Colleen M. Garlick* and *Nicholas G. Dimopoulos*, for the appellee (defendant).

Opinion

CLARK, J. The plaintiff, Lloyd Carty, appeals from the summary judgment rendered by the trial court in favor of the defendant, Merchant 99-111 Founders, LLC,[1] on the plaintiff's one count complaint sounding

[1] On November 12, 2021, the defendant filed a motion to serve a third-party complaint on Pinewood Landscaping, LLC (Pinewood). The defendant alleged that BrightView Landscapes, LLC, was retained by the defendant for snow removal services which, in turn, subcontracted with Pinewood, that the defendant was a third-party beneficiary to the subcontract agreement, and that the agreement provided that Pinewood shall hold harmless and indemnify the defendant and to include the defendant as an additional insured on its liability policy to protect the defendant from claims such as the present claim. On December 20, 2021, the court granted the defendant's motion to implead Pinewood. Pinewood was not a party to the motion for summary judgment and is not participating in this appeal.

in premises liability arising out of his slip and fall. On appeal, the plaintiff claims that the court improperly rendered summary judgment in favor of the defendant on the basis of the ongoing storm doctrine because (1) the defendant never produced evidence to refute the claim that the plaintiff fell on preexisting ice, and (2) the plaintiff raised genuine issues of material fact as to whether he fell on preexisting ice.[2] We affirm the judgment of the trial court.

We begin with the relevant procedural history of the case. On January 7, 2021, the plaintiff commenced the present action against the defendant in which he asserted a claim sounding in premises liability arising out of his alleged slip and fall. In support of his claim, he alleged that, on March 10, 2019, he was walking on the exterior of the premises known as 111 Founders Plaza in East Hartford (plaza), which is owned by the defendant. He was caused to slip and fall by reason of a dangerous and defective condition, namely, an accumulation of snow and ice that had been present for some time, which was not visible to pedestrians. As a result of such fall, he suffered various injuries and losses, and incurred (and may continue to incur) expenses for medical care and attention, hospital care, X-rays, physical therapy, and prescriptions, among other things.

On March 25, 2021, the defendant answered the complaint and asserted a special defense alleging that the

[2] The plaintiff also claims that "the trial court improperly substituted its judgment for that of the trier of fact and deprived the plaintiff-appellant of his right to a jury trial." At oral argument before this court, the plaintiff conceded that this claim is better characterized as an argument that summary judgment was improperly rendered. Therefore, although the plaintiff attempted to brief this argument as a separate claim, we read the substance of this claim as part of his more general argument that the court improperly granted the defendant's motion for summary judgment, which we address in our analysis of the plaintiff's other two claims.

plaintiff's alleged injuries and damages were caused, in whole or in part, by his own negligence.

On October 6, 2022, the defendant filed a motion for summary judgment, accompanied by a supporting memorandum of law. The defendant argued that it was entitled to summary judgment because there was no genuine issue of material fact that the plaintiff's injuries occurred during an ongoing snowstorm and that, consequently, pursuant to the ongoing storm doctrine, the defendant did not owe any legal duty to the plaintiff at the time of the incident and could not, as a matter of law, be found negligent. As evidentiary support for its motion, the defendant submitted transcript excerpts from the August 26, 2022 deposition of the plaintiff and a police report produced by the East Hartford Police Department.

The plaintiff testified during his deposition that, on March 10, 2019, at approximately 8 a.m., he had just finished working his shift as a security guard at the plaza and was on his way home after being relieved by his coworker, Christian Burton. Before the plaintiff left, Burton told him that Pitkin Street was slippery, and that he had slipped on his way in to work. As the plaintiff was leaving work, he observed that it was actively snowing and that the roads, parking lot, and sidewalks were covered with snow. He also observed plow trucks and a snow removal crew working, which he saw arrive at the property at some point during his shift.

The plaintiff testified that he walked on the sidewalk in front of the plaza and headed across the parking lot of the Hampton Inn & Suites toward the sidewalk along Pitkin Street, which was the route he typically took to access the Founders Bridge into downtown Hartford on his route home. As the plaintiff was walking down the sidewalk near the Hampton Inn & Suites, he slipped on a patch of ice that was underneath the snow and

fell onto his knees and then onto his stomach. Once he was able to get up, he tried to continue walking but was only able to reach East River Drive before his pain was too much to bear. He then sat down on a staircase in a commuter parking lot and called 911. An ambulance arrived first, followed by an East Hartford police officer, who spoke to the plaintiff about his fall. The plaintiff told the officer the general area where he fell, and the officer located the area and took photographs, which were included in the police report.

As to the weather conditions on the day of his fall, the plaintiff testified that, when he arrived at work, he did not recall it snowing and that the parking lot and sidewalks were clear. According to the plaintiff, it started snowing in the morning on the day of his fall while he was working indoors. Although he could not recall exactly when he first noticed that it had begun to snow, it was snowing when he fell, and the roads, parking lot, and sidewalks were covered with snow at that time. With respect to the condition of the sidewalk where he fell, the plaintiff could not recall whether there had been any snow or ice on the sidewalk the day before his fall. He also testified that he did not know how or when the ice that caused him to slip and fall had formed, how long that ice was there before he fell, how thick the ice was, or whether it was formed during the ongoing storm. To the best of the plaintiff's recollection, it had last snowed early during the week leading up to his fall. The plaintiff also testified that, at some point during the week leading up to his fall, he noticed water on the sidewalk in the general area where he fell.

On January 18, 2023, the plaintiff filed a memorandum of law in opposition to the defendant's motion for summary judgment with appended exhibits, including additional transcript excerpts from his deposition and a

"certified copy of the United States Department of Commerce meteorological records from the National Centers for Environmental Information in Asheville, North Carolina" (weather records). In his memorandum of law, the plaintiff argued that there existed a genuine issue of material fact with respect to whether the ice that caused him to fall had formed prior to the storm that was ongoing when he fell. In support of that contention, he pointed to his deposition testimony that he had seen water on the sidewalk in the area where he fell during the week leading up to his fall and to the weather records, which, according to him, proved that there had been precipitation during the week leading up to his fall and that the temperature had ranged above and below freezing throughout that period.

The plaintiff also filed an affidavit in opposition to the defendant's motion for summary judgment on January 23, 2023. In his affidavit, the plaintiff stated, inter alia, that he "was caused to fall by reason of ice that was present underneath snow that had fallen overnight," that "[i]n the week before [he] fell, [he saw] ice on the sidewalk in the area where [he] fell, and that, "[d]uring [the week that he fell], [he saw] water on the sidewalks and the temperatures had fallen below freezing [at night]."

At an April 17, 2023 hearing, the court, *Rosen*, *J.*, heard oral argument on the defendant's motion for summary judgment. On April 28, 2023, the court issued a memorandum of decision in which it granted the defendant's motion for summary judgment. In its memorandum of decision, the court stated: "In the present case, it is undisputed that there was an ongoing storm when the plaintiff fell. The plaintiff testified at his deposition that it was snowing when the incident occurred, a fact corroborated by the [weather] records submitted by the plaintiff. . . . As such, the defendant has met its burden under the ongoing storm doctrine. The plaintiff

must therefore show that the condition that caused the plaintiff to fall preexisted the ongoing storm and that the defendant had notice of the condition. . . .

"The plaintiff avers that a few days prior to the incident, he saw ice on the sidewalk in the area where he fell. . . . At his deposition, the plaintiff could not recall whether there had been any snow or ice on the sidewalk the day before the incident. . . . The plaintiff also could not conclusively state that the ice had not formed during the ongoing storm. . . . The plaintiff did not know when the ice first appeared, how it formed, or how long it had been on the ground. . . . Nor did he know its thickness. . . .

"The plaintiff's averment that he saw ice in the general vicinity of where he fell a few days before he fell is insufficient to satisfy his burden. The plaintiff submitted [weather] records to support his argument that ice was present in the days preceding his fall. . . . However, those records, while supporting the notion that ice could have formed before his fall, do not raise a genuine issue of material fact that ice had in fact formed, was present in the area on the day he fell, establish its thickness, or when it formed. . . . How and when the ice formed is therefore speculation and conjecture, and is insufficient to raise a genuine issue of material fact. The plaintiff also has not shown that the defendant had notice of the allegedly preexisting condition. Evidence that there was ice in the general vicinity of the accident is insufficient to raise a genuine issue of material fact as to whether the defendant had actual or constructive notice. *Belevich* v. *Renaissance I, LLC*, [207 Conn. App. 119, 131, 261 A.3d 1 (2021)]. . . . For all of the foregoing reasons, the defendant's motion for summary judgment is granted." (Citations omitted.) This appeal followed. Additional facts and procedural history will be set forth as necessary.

On appeal, the plaintiff claims that the court improperly granted summary judgment in favor of the defendant on the basis of the ongoing storm doctrine because (1) the defendant never produced evidence to refute the claim that the plaintiff fell on preexisting ice and (2) the plaintiff raised genuine issues of material fact as to whether he fell on preexisting ice. We disagree.

We begin by setting forth the standard of review and legal principles necessary to our resolution of this appeal. "Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A party moving for summary judgment is held to a strict standard. . . . To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. . . . As the burden of proof is on the movant, the evidence must be viewed in the light most favorable to the opponent. . . . When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue. . . . Once the moving party has met its burden, however, the opposing party must present evidence that demonstrates the existence of some disputed factual issue. . . . It is not enough, however, for the opposing party merely to assert the existence of such a disputed issue. Mere assertions of fact . . . are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court under Practice Book § [17-45]. . . . Our review of the trial court's decision to grant [a] motion for summary judgment is plenary." (Internal

quotation marks omitted.) *Belevich* v. *Renaissance I, LLC*, supra, 207 Conn. App. 124.

In *Kraus* v. *Newton*, 211 Conn. 191, 558 A.2d 240 (1989), our Supreme Court held that, "[i]n the absence of unusual circumstances, a property owner, in fulfilling the duty owed to invitees upon his property to exercise reasonable diligence in removing dangerous accumulations of snow and ice, may await the end of a storm and a reasonable time thereafter before removing ice and snow from outside walks and steps." Id., 197–98. The court reasoned that "[t]o require a landlord or other inviter to keep walks and steps clear of dangerous accumulations of ice, sleet or snow or to spread sand or ashes while a storm continues is inexpedient and impractical." Id., 198. The court also held, however, that its decision did "not foreclose submission to the jury, on a proper evidentiary foundation, of the factual determinations of whether a storm has ended or whether a plaintiff's injury has resulted from new ice or old ice when the effects of separate storms begin to converge." Id.

More recently, this court, in *Belevich*, clarified "(1) precisely what a movant for summary judgment must demonstrate to satisfy its initial burden when relying on the [ongoing storm] doctrine and (2) any burden-shifting that may follow." *Belevich* v. *Renaissance I, LLC*, supra, 207 Conn. App. 126. "Noting the scant authority from other jurisdictions on the issue of the ongoing storm doctrine in the context of summary judgment, this court [in *Belevich*] adopted, as a matter of Connecticut common law, the approach taken by the New York Appellate Division in *Meyers* v. *Big Six Towers, Inc.*, 85 App. Div. 3d 877, 877–78, 925 N.Y.S.2d 607 (2011), which held that, '[a]s the proponent of the motion for summary judgment, the defendant ha[s] to establish, prima facie, that it neither created the snow and ice condition nor had actual or constructive notice

of the condition . . . . [T]he defendant [may sustain] this burden by presenting evidence that there was a storm in progress when the plaintiff fell . . . . [Upon the defendant meeting its burden], the burden shift[s] to the plaintiff to raise a triable issue of fact as to whether the precipitation from the storm in progress was not the cause of his accident . . . . To do so, the plaintiff [is] required to raise a triable issue of fact as to whether the accident was caused by a slippery condition at the location where the plaintiff fell that existed prior to the storm, as opposed to precipitation from the storm in progress, and that the defendant had actual or constructive notice of the preexisting condition . . . .' " *Herrera* v. *Meadow Hill, Inc.*, 217 Conn. App. 671, 681, 290 A.3d 377 (2023).

The plaintiff first claims that the court erred in rendering summary judgment for the defendant because the defendant failed to produce any evidence refuting the plaintiff's claim that he fell on preexisting ice. Specifically, the plaintiff argues that "[i]n its motion for summary judgment, the only evidence offered by the [defendant] is excerpts of the plaintiff's deposition and a police report" including the plaintiff's testimony "that it was snowing when he fell." In making this argument, the plaintiff misstates the nature of the defendant's burden on summary judgment under the ongoing storm doctrine. "As the proponent of the motion for summary judgment, the defendant ha[s] to establish, prima facie, that it neither created the snow and ice condition nor had actual or constructive notice of the condition . . . . [T]he defendant [may sustain] this burden by presenting evidence that there was a storm in progress when the plaintiff fell . . . ." (Internal quotation marks omitted.) *Belevich* v. *Renaissance I, LLC*, supra, 207 Conn. App. 127. Once the defendant sustains his burden, the burden shifts to the plaintiff, at which time the plaintiff must raise a triable issue of fact as to whether his fall was

caused by a slippery condition that existed prior to the ongoing storm and whether the defendant had actual or constructive notice of the allegedly preexisting condition. Id., 129.

We first consider, therefore, whether the trial court correctly determined that the defendant satisfied its initial burden in establishing "prima facie, that it neither created the snow and ice condition nor had actual or constructive notice of the condition . . . ." (Internal quotation marks omitted.) Id., 127. In support of its motion for summary judgment, the defendant submitted the plaintiff's deposition testimony that there was a storm in progress at the time of his fall. Specifically, the defendant presented excerpts from the plaintiff's deposition in which he testified that: (1) it was snowing when he left the building after his shift ended; (2) it had started snowing earlier that morning; and (3) when he left work, it was still snowing and the sidewalk where he fell was covered with snow. In addition, at oral argument before this court, the plaintiff conceded that it was undisputed that there was an ongoing storm at the time of his fall. Thus, we conclude that the trial court correctly concluded that the defendant satisfied its initial burden of establishing, prima facie, that it neither created the snow and ice condition nor had actual or constructive notice of the condition. See id. ("[t]he defendant [may sustain] this burden by presenting evidence that there was a storm in progress when the plaintiff fell" (internal quotation marks omitted)).

Accordingly, the burden shifted to the plaintiff to demonstrate the existence of a genuine issue of material fact as to whether the plaintiff's fall was caused by a preexisting condition and whether the defendant had actual or constructive notice of the allegedly preexisting condition. The plaintiff claims that he satisfied that burden through his affidavit, deposition transcripts, and

the weather records that he introduced into evidence. We are not persuaded.

We begin by setting forth the standard adopted by this court in *Belevich* regarding the plaintiff's burden on summary judgment under the ongoing storm doctrine. The court in *Belevich*, relying on various New York state court cases, made clear that evidence presented by a plaintiff to demonstrate the existence of a genuine issue of material fact cannot require a jury to resort to conjecture and speculation in order to find that there was a preexisting slippery condition that caused the plaintiff to fall. See *Campanella* v. *St. John's University*, 176 App. Div. 3d 913, 913, 112 N.Y.S.3d 153 (2019) (plaintiff failed to raise triable issue of fact where "the opinions contained in an affidavit of the plaintiff's meteorologist as to when and how the alleged ice patch was formed were based on speculation and conjecture"), appeal denied, 35 N.Y.3d 914, 153 N.E.3d 447, 130 N.Y.S.3d 2 (2020); *Battaglia* v. *MDC Concourse Center, LLC*, 175 App. Div. 3d 1026, 1027–28, 108 N.Y.S.3d 607 (2019) (court found that nothing in plaintiff's deposition testimony or any evidence she submitted raised triable issue of fact and, therefore, "[t]o say that old ice caused the subject ice patch as opposed to the storm in progress would require a jury to resort to conjecture and speculation in order to determine the cause of the incident" (internal quotation marks omitted)), aff'd, 34 N.Y.3d 1164, 144 N.E.3d 367, 121 N.Y.S.3d 757 (2020); *Powell* v. *Cedar Manor Mutual Housing Corp.*, 45 App. Div. 3d 749, 750, 844 N.Y.S.2d 890 (2007) ("plaintiff's contention that she fell on 'old ice' from a prior storm which was hidden under the new snowfall is mere speculation and insufficient to defeat the defendants' motion for summary judgment"); *DeVito* v. *Harrison House Associates*, 41 App. Div. 3d 420, 421, 837 N.Y.S.2d 726 (2007) ("plaintiff's allegations that the ice which allegedly caused her accident had been present

for 'a day or two,' or that it was 'from another time,' were insufficient to raise a triable issue of fact as to whether she fell on 'old' ice"). Furthermore, the court stated that, "under the New York burden-shifting approach that we expressly adopt today, even [e]vidence that there was ice in the general vicinity of the accident prior to the storm is insufficient to raise a triable issue of fact as to whether the defendant had actual or constructive notice of the condition of the specific area within the parking lot where the plaintiff fell . . . ." (Internal quotation marks omitted.) *Belevich* v. *Renaissance I, LLC*, supra, 207 Conn. App. 131.

The plaintiff contends that his deposition testimony and affidavit, in conjunction with the weather records he submitted in opposition to the defendant's motion for summary judgment, created a genuine issue of material fact with respect to whether he fell on preexisting ice and whether the defendant had actual or constructive notice of that condition. First, the plaintiff argues that his deposition testimony and his affidavit demonstrate that "the ice upon which he fell was preexisting." At his deposition, the plaintiff testified that he "slipped on a patch of ice that was underneath the snow." Additionally, he testified that it had been snowing throughout the morning while he was working and that, when he left work, it was actively snowing and there was an accumulation of snow on the ground from the storm. The plaintiff further testified that he did not know how thick the ice he slipped on was, but that his best guess was that it was less than one inch thick, and that it was clear in color. The plaintiff also testified that he did not know when the ice first appeared, how long it had been on the ground before his fall, or how it formed. In response to a question as to how the ice formed, the plaintiff responded: "I don't think I can say [that] it was not due to the weather conditions that [occurred] on that day." Although the plaintiff attempted to walk back

that testimony, stating that the ice "did not look like it was caused" by the current storm, he nevertheless admitted that he was "not sure how it got there." Last, the plaintiff testified at his deposition that during the week leading up to his fall he had observed water, not ice, on the sidewalk in the general area where he fell. In his subsequent affidavit in opposition to the defendant's motion for summary judgment, however, the plaintiff contradicted that deposition testimony and swore that a few days prior to his fall, he saw ice and water on the sidewalk in the area where he fell.

In addition to his deposition testimony and affidavit, the plaintiff also points to the weather records he submitted in opposition to the defendant's motion for summary judgment. He contends that those records support his assertion that, "in the week prior to the fall, there was precipitation that coincided with temperatures above and below . . . freezing levels." The plaintiff offered no expert testimony interpreting or analyzing those weather records, however, and the records themselves constitute no more than raw weather data, including temperature ranges, precipitation levels, pressure levels, and wind levels during the period leading up to the storm and the plaintiff's fall.

On the basis of our plenary review of the entire record that was before the court, we conclude that the trial court correctly determined that the plaintiff failed to satisfy his burden of presenting evidence sufficient to create a genuine issue of material fact with respect to whether the ice that caused him to fall was present prior to the advent of the storm that was ongoing when he fell. The evidence put forth by the plaintiff would, at best, require a jury to speculate on that point. Neither the plaintiff nor any other witness testified that the ice that caused him to fall was present prior to the ongoing storm. On the contrary, the plaintiff admitted during his deposition that he was "not sure how [the ice] got

there" and that he could not say that it was not due to the weather conditions that had occurred on that day. The weather records that the plaintiff submitted also failed to create a genuine issue of material fact with respect to whether the ice that caused him to fall was present prior to the storm. At best, those records show that it is possible that surface water may have been present in the geographic region to which the records pertained and that such water conceivably could have frozen at one point or another somewhere within that region. Asking a jury to conclude on the basis of those records that the specific ice patch that caused the plaintiff to fall was formed from precipitation that had fallen prior to the day of the storm, however, would require a jury to engage in the kind of speculation and conjecture that this court has held is impermissible under the ongoing storm doctrine. See *Belevich* v. *Renaissance I, LLC*, supra, 207 Conn. App. 130–31.

Last, we note that, although the plaintiff testified at his deposition that, in the week before he fell, he saw water in the area where he fell and further swore in his affidavit that, in the week before he fell, he saw ice on the sidewalk in the area where he fell, the plaintiff did not claim that he had observed ice in the precise area where he fell on the sidewalk before the storm began or that he saw ice at that location at a time when it likely would have remained in that condition during the time leading up to his fall. This court has held that, "even [e]vidence that there was ice in the general vicinity of the accident prior to the storm is insufficient to raise a triable issue of fact as to whether the defendant had actual or constructive notice of the condition of the specific area . . . where the plaintiff fell . . . ." (Internal quotation marks omitted.) Id., 131.

As a result, we conclude that the trial court properly granted the defendant's motion for summary judgment

because the plaintiff failed to satisfy his burden of raising a genuine issue of material fact with respect to whether the condition that caused him to sustain his alleged injuries existed prior to the storm that was ongoing at the time of his fall, or whether the defendant had actual or constructive notice of the condition of the sidewalk where the plaintiff fell.

The judgment is affirmed.

In this opinion the other judges concurred.