VIVIAN PEREZ, ADMINISTRATRIX (ESTATE OF ANDRES BURGOS) *v.* METROPOLITAN DISTRICT COMMISSION (AC 40610)

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

Syllabus

The plaintiff administratrix of the estate of the decedent sought to recover damages from the defendant, a political subdivision of the state, for the wrongful death of the decedent, who had drowned while swimming with a group of friends in an undesignated swimming area of a lake that is located in a recreational area owned and operated by the defendant. The plaintiff alleged that the defendant had certain ministerial duties that it failed to perform and that this nonfeasance was a direct and proximate cause of the decedent's death. The defendant filed a motion for summary judgment on the ground that the plaintiff's claim was barred by the doctrine of governmental immunity pursuant to the statute (§ 52-557n) that provides immunity for discretionary acts, but

not ministerial acts, of employees of political subdivisions. In her objection to the motion, the plaintiff claimed, inter alia, that the decedent was an identifiable person subject to imminent harm and, thus, that an exception to governmental immunity applied. The trial court granted the motion for summary judgment on the ground of governmental immunity and rendered judgment in favor of the defendant, from which the plaintiff appealed to this court. *Held*:

1. The trial court properly concluded that the plaintiff failed to establish that a genuine issue of material fact existed as to whether the decedent's death was caused by the defendant's breach of a ministerial duty: although the plaintiff claimed that certain deposition testimony of M, who was responsible for safety at the subject lake at the time of the incident, that she had made a lot of changes to the safety policies at the lake prior to the incident but that she could not recall the changes specifically without referencing a state manual from which the changes had been derived and which the defendant could not produce, raised a question of fact as to whether M's policy changes created ministerial duties or whether they were communicated effectively to the persons responsible for their implementation, the exhibits submitted by the defendant in support of its motion for summary judgment clearly established that the policies existing at the time of the incident did not create ministerial duties with respect to preventing or rescuing an individual from drowning in an undesignated swimming area, and M's inability to recall changes she made to the safety policies was not a sufficient basis alone to conclude that there was a material dispute of fact as to that issue; moreover, the plaintiff's claim that, on the basis of the defendant's failure to preserve the state manual, she was entitled to an adverse inference that the defendant violated a ministerial duty, which in turn established a dispute of material fact, was unavailing, as a plaintiff, in the context of summary judgment, cannot displace the evidentiary foundation necessary to raise a genuine issue of material fact with the mere supposition that an adverse inference will be instructed at trial, and the plaintiff here failed to adduce any evidence to support the existence of a ministerial duty in conjunction with her claim for an adverse inference.

2. The plaintiff could not prevail on her claim that because the decedent was an identifiable person subject to an imminent risk of harm, there was a genuine issue of material fact as to whether the defense of governmental immunity was applicable, which was based on her claim that the decedent was an identifiable victim because he was among a group of specific individuals swimming in an area of the subject lake where the defendant, through its employees, arguably knew unpermitted swimming frequently occurred: there was no evidence that any of the defendant's employees saw the decedent, or any member of his group, in the undesignated swimming area prior to the incident, and in the absence of some evidence that a person either was individually identifiable to

a public official or among a class of identifiable victims, which our precedent limits to school children attending public school during school hours, the first prong of the exception to governmental immunity could not be satisfied; accordingly, this court concluded that a group of individuals in an undesignated swimming area, whose presence is unknown to the defendant, could not be deemed identifiable for the purposes of the identifiable person, imminent harm exception, and, therefore, there was no genuine issue of material fact as to whether the plaintiff's claim was barred by the doctrine of governmental immunity.

Argued October 9—officially released December 11, 2018

Procedural History

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

Daniel P. Scholfield, with whom, on the brief, were *Steven J. Errante* and *Marisa A. Bellair*, for the appellant (plaintiff).

Jack G. Steigelfest, with whom was *Christopher M. Harrington*, for the appellee (defendant).

Opinion

DiPENTIMA, C. J. This case arises from the untimely death of Andres Burgos, who drowned while swimming in Lake McDonough, a recreational area that is owned and operated by the defendant, the Metropolitan District Commission.[1] The plaintiff, Vivian Perez, administratrix of the estate of Andres Burgos, appeals from the summary judgment rendered by the trial court in favor of the defendant on the basis of governmental

[1] The defendant "is a political subdivision of the state, specially chartered by the Connecticut General Assembly for the purpose of water supply, waste management and regional planning." *Martel* v. *Metropolitan District Commission*, 275 Conn. 38, 41, 881 A.2d 194 (2005).

immunity. On appeal, the plaintiff claims that the trial court erred in rendering summary judgment because there is a genuine issue of material fact with respect to (1) whether Burgos' death was caused by the defendant's breach of one or more of its ministerial duties, and (2) whether Burgos was an identifiable person subject to imminent harm. We are not persuaded and, accordingly, affirm the judgment of the trial court.

Viewed in the light most favorable to the plaintiff as the nonmoving party, the record reveals the following facts and procedural history. On July 9, 2011, Burgos and a group of friends went to Lake McDonough to swim. The lake is located principally in Barkhamsted, and its perimeter encompasses approximately 10.5 miles. At approximately 4 p.m., the group arrived at West Beach, which was one of three beaches on the lake that the defendant permitted the public to use during the late spring and summer months. Each of these beaches was adjacent to a designated swimming area, the boundaries of which were indicated by a string of red and white buoys. At each beach, the defendant also posted signs, in both English and Spanish, displaying the pertinent rules and regulations, including where swimming was permitted. Additionally, the defendant's employees conducted random boat patrols throughout the lake in order to locate individuals swimming outside of the designated areas.

After arriving at West Beach, Burgos and his friends followed a trail through the woods to an area of the lake colloquially known as "the Point." The group, including Burgos, entered the water from the Point and swam to a small island, referred to as First Island, approximately 250 feet from shore.[2] After reaching the island, the group

[2] Although swimming was not permitted in this area, it was not uncommon for the defendant's boat patrol to find people swimming to and from the island.

started back to the shore. During the return journey, Burgos began to struggle before slipping underwater.

Upon realizing that Burgos had disappeared, members of the group swam to shore and ran back along the trail to West Beach to alert the defendant's lifeguards. Once informed of the incident, several lifeguards ran to the Point, entered the water and began to search for Burgos. Lifeguards from the other nearby beaches, notified over the radio of a possible drowning incident, soon arrived by boat to assist with the ongoing rescue. Despite the relatively close proximity of the island to the shore, the location where the group had been swimming was estimated to be deeper than twenty feet in some places. The depth of the water impaired visibility and forced the defendant's lifeguards to confine their line search to the shallower areas. After searching and not finding Burgos in the shallow sections, some of the lifeguards dove down into the deeper parts of the channel. Approximately fifty-five minutes after Burgos was last seen, one of the lifeguards, performing a deep water dive, located him lying faceup on the lakebed. He was retrieved and transported to Hartford Hospital. Burgos was pronounced dead later that day at 5:50 p.m. The cause of death was determined to be asphyxia and drowning.

On May 2, 2013, the plaintiff commenced the present wrongful death action against the defendant. The operative complaint alleged a single count against the defendant predicated on General Statutes § 52-557n (a) (1) (A).[3] Specifically, the plaintiff alleged, inter alia, that

[3] The operative complaint included a second count, which was brought pursuant to § 52-557n (a) (1) (B), alleging that the defendant was negligent "in the performance of functions from which the political subdivision derive[d] a special corporate profit or pecuniary benefit." The plaintiff conceded at oral argument before this court that this claim was withdrawn prior to the trial court's ruling on the motion for summary judgment. Accordingly, this appeal addresses only the first count of the plaintiff's operative complaint.

the defendant had a ministerial duty (1) to prevent visitors from accessing and swimming in undesignated areas, (2) to conduct timely boat patrols, (3) to initiate a timely search for Burgos, (4) to contact the police, or call 911, in a timely fashion, and (5) to possess and maintain appropriate rescue equipment, but had failed to perform one or more of these responsibilities, and this nonfeasance was a direct and proximate cause of Burgos' death. On December 29, 2016, the defendant filed a motion for summary judgment on the ground that the plaintiff's claim was barred by the doctrine of governmental immunity pursuant to § 52-557n. In her objection to the motion, the plaintiff argued that the defendant had failed to meet its initial burden of negating the allegations of negligence as framed in the complaint, and, alternatively, that Burgos was an identifiable person subject to imminent harm, thus, creating an exception to governmental immunity.

In its memorandum of decision, dated June 16, 2017, the trial court concluded that the defendant had carried its burden of establishing that no genuine issue of material fact existed and granted the motion for summary judgment on the ground of governmental immunity. The court concluded that the plaintiff had failed to adduce evidence to raise a genuine issue of material fact as to the existence of a ministerial duty or that Burgos was an identifiable person subject to an imminent risk of harm. This appeal followed. Additional facts will be set forth as necessary.

We begin by setting forth the standard of review with respect to an appeal from a trial court's decision to grant a motion for summary judgment. "Practice Book § [17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In deciding a

motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which,under applicable principles of substantive law, entitle him to a judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . . [I]ssue-finding, rather than issue-determination, is the key to the procedure. . . . [T]he trial court does not sit as the trier of fact when ruling on a motion for summary judgment. . . . [Its] function is not to decide issues of material fact, but rather to determine whether any such issues exist. . . . Our review of the decision to grant a motion for summary judgment is plenary. . . . We therefore must decide whether the court's conclusions were legally and logically correct and find support in the record." (Internal quotation marks omitted.) *DiMiceli* v. *Cheshire*, 162 Conn. App. 216, 221–22, 131 A.3d 771 (2016).

I

The plaintiff's first claim is that the court erred in concluding that she had not established a genuine issue of material fact with regard to whether Burgos' death was caused by the defendant's breach of a ministerial duty.[4] In support of her argument, the plaintiff primarily relies on the deposition of Marcia Munoz, the individual responsible for safety at Lake McDonough at the time

[4] The plaintiff also argued to the trial court and to this court that the defendant had failed to satisfy its initial burden of showing the absence of any genuine issue of material fact. At oral argument before this court, however, the plaintiff's counsel stated that he understood the trial court's conclusion to the contrary and, therefore, was not going "to waste this court's time arguing otherwise." Having reviewed the record and the affidavits appended to the defendant's motion for summary judgment, we agree with the trial court that the defendant's showing was sufficient to satisfy its initial burden.

of the incident. Munoz testified that she made "a lot of changes" to the defendant's lifeguard policies prior to 2011, but that she could not recall these changes specifically without first referencing a state manual from which the changes were derived. The defendant, however, was unable to produce the state manual, as it was apparently lost at some point after Munoz' retirement. The plaintiff contends on appeal that, without knowing precisely what changes Munoz adopted, a reasonable jury could conclude that her changes created ministerial duties or that her changes were not communicated effectively to those responsible for their implementation.[5] Additionally, the plaintiff argues that the defendant's failure to preserve the state manual referenced in Munoz' testimony created a permissible adverse inference that the defendant violated a ministerial duty.

As a threshold matter, we acknowledge that the parties do not dispute that the defendant is a political subdivision and, therefore, entitled to the defense of governmental immunity. "With respect to governmental immunity, under . . . § 52-557n, a [political subdivision] may be liable for the negligent act or omission of [its] officer[s] acting within the scope of [their] employment or official duties. . . . The determining factor is whether the act or omission was ministerial or discretionary. . . . [Section] 52-557n (a) (2) (B) . . . explicitly shields a [political subdivision] from liability for damages to person or property caused by the negligent

[5] We note that this argument was not addressed in the trial court's memorandum of decision and, in reviewing the plaintiff's objection to the defendant's motion for summary judgment, we cannot say that it was clearly asserted. Nevertheless, given that the defendant has not objected to this argument being presented on appeal and that this position is, in effect, an expansion of a claim referenced in the plaintiff's opposition memorandum of law, we will address the merits in this particular circumstance. We caution, however, that it remains our practice not to review claims made for the first time on appeal. *DiMiceli* v. *Cheshire*, supra, 162 Conn. App. 229

acts or omissions which require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law. . . . In contrast . . . officers [of a political subdivision] are not immune from liability for negligence arising out of their ministerial acts, defined as acts to be performed in a prescribed manner without the exercise of judgment or discretion." (Citations omitted; internal quotation marks omitted.) *Hull* v. *Newtown*, 327 Conn. 402, 407–408, 174 A.3d 174 (2017).

"[O]fficials [of a political subdivision] are immune from liability for negligence arising out of their discretionary acts in part because of the danger that a more expansive exposure to liability would cramp the exercise of official discretion beyond the limits desirable in our society. . . . Discretionary act immunity reflects a value judgment that—despite injury to a member of the public—the broader interest in having government officers and employees free to exercise judgment and discretion in their official functions, unhampered by fear of second-guessing and retaliatory lawsuits, outweighs the benefits to be had from imposing liability for that injury. . . . In contrast, [public officials] are not immune from liability for negligence arising out of their ministerial acts. . . . This is because society has no analogous interest in permitting [them] to exercise judgment in the performance of ministerial acts." (Internal quotation marks omitted.) *Ugrin* v. *Cheshire*, 307 Conn. 364, 390–91, 54 A.3d 532 (2012).

"There is a difference between laws that impose general duties on officials and those that mandate a particular response to specific conditions." *Bonington* v. *Westport*, 297 Conn. 297, 308, 999 A.2d 700 (2010). "The hallmark of a discretionary act is that it requires the exercise of judgment. . . . If by statute or other rule of law the official's duty is *clearly* ministerial rather

than discretionary, a cause of action lies for an individual injured from allegedly negligent performance. . . . [M]inisterial refers to a duty which is to be performed in a prescribed manner without the exercise of judgment or discretion. . . . [E]vidence of a ministerial duty is provided by an explicit statutory provision, town charter, rule, ordinance or some other written directive." (Citation omitted; emphasis in original; internal quotation marks omitted.) *Ventura* v. *East Haven*, 170 Conn. App. 388, 401–402, 154 A.3d 1020, cert. granted, 325 Conn. 905, 156 A.3d 537 (2017).

The plaintiff first argues that Munoz' deposition testimony creates a question of material fact similar to that which was presented in *Strycharz* v. *Cady*, 323 Conn. 548, 148 A.3d 1011 (2016). In *Strycharz*, the plaintiff, a high school student, was injured when he was struck by a car while leaving school grounds to smoke a cigarette across the street. Id., 556–57. The incident occurred prior to the start of the school day, when school buses were arriving to drop off students. Id., 556. In an action against school officials, the plaintiff alleged, inter alia, that the defendant vice principals were liable in failing to execute their ministerial duty to assign school staff members to bus duty the morning of the incident. Id. 565–66. On appeal, our Supreme Court reversed in part the judgment of the trial court granting the defendants' motion for summary judgment. Id. 572–73. Our Supreme Court determined that the record did not support the trial court's decision to grant the motion for summary judgment with regard to the vice principals' ministerial duty to assign school staff to bus duty because an issue of fact remained as to whether they had distributed to staff members the roster that identified morning bus duty assignments. Id., 572. "After all, a bus duty roster by itself would be useless if it is not distributed to those charged with student supervision, informing them about their respective posts and schedule." Id. 566.

The present case is distinguishable from *Strycharz*. In *Strycharz*, it was undisputed that a ministerial duty existed; the issue was whether it had been followed. See id., 554–55, 569–573. Here, the plaintiff asks this court to speculate that the changes Munoz enacted created ministerial duties and that these changes were not communicated or implemented. "Although the court must view the inferences to be drawn from the facts in the light most favorable to the party opposing the motion . . . a party may not rely on mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment. . . . A party opposing a motion for summary judgment must substantiate its adverse claim by showing that there is a genuine issue of material fact together with the evidence disclosing the existence of such an issue." (Internal quotation marks omitted.) *Tuccio Development, Inc.* v. *Neumann*, 111 Conn. App. 588, 594, 960 A.2d 1071 (2008). The exhibits submitted in support of the defendant's motion for summary judgment clearly established that the policies existing at the time of the incident did not create ministerial duties with respect to preventing or rescuing an individual from drowning in an undesignated swimming area.[6] We are not convinced that Munoz' inability to recall changes she made to the safety policies at Lake McDonough is a sufficient basis alone to conclude that there is a material dispute of fact as to this issue.

Alternatively, the plaintiff claims that, on the basis of the defendant's failure to preserve the state manual that Munoz used to amend the policies at Lake McDonough, she is entitled to an adverse inference that the

[6] The materials included affidavits from the defendant's manager of Lake McDonough in 2011, the chief of the defendant's police department, and several lifeguards involved in the attempted rescue of Burgos. Also attached were photographs of the signs posted informing visitors of the rules and regulations at the lake and excerpts of deposition testimony from lifeguards concerning the events of July 9, 2011.

defendant violated a ministerial duty, which in turn establishes a dispute of material fact as to this issue. Although the plaintiff does not cite any authority, nor are we aware of any, for the claim that a permissive adverse inference predicated on a party's intentional spoliation of evidence can serve to raise a genuine issue of material fact for the purposes of defeating summary judgment, we will nevertheless address the merits of this contention.

As first recognized in *Beers* v. *Bayliner Marine Corp.*, 236 Conn. 769, 777–79, 675 A.2d 829 (1996), "[a]n adverse inference may be drawn against a party who has destroyed evidence only if the trier of fact is satisfied that the party who seeks the adverse inference has proven the following. First, the spoliation must have been intentional. . . . [There need not have been] an intent to perpetrate a fraud by the party or his agent who destroyed the evidence but, rather . . . the evidence [must have] been disposed of intentionally and not merely destroyed inadvertently. . . .

"Second, the destroyed evidence must be relevant to the issue or matter for which the party seeks the inference. . . . Third, the party who seeks the inference must have acted with due diligence with respect to the spoliated evidence. . . . Finally . . . the trier of fact . . . is not required to draw the inference that the destroyed evidence would be unfavorable but . . . it may do so upon being satisfied that the above conditions have been met." (Internal quotation marks omitted.) *Surrells* v. *Belinkie*, 95 Conn. App. 764, 770–71, 898 A.2d 232, 236 (2006). "Pursuant to *Beers*, a party suffering from spoliation cannot build an underlying case on the spoliation inference alone; for an underlying claim to be actionable, the [party] must also possess some concrete evidence that will support the underlying claim." (Internal quotation marks omitted.) *Rizzuto* v. *Davidson Ladders, Inc.*, 280 Conn. 225, 238, 905 A.2d

1165 (2006).[7] Accordingly, in the context of summary judgment, a plaintiff cannot displace the evidentiary foundation necessary to raise a genuine issue of material fact with the mere supposition that an adverse inference will be instructed at trial. Cf. id. ("a plaintiff in a product liability action cannot rely solely on the spoliation inference to withstand a motion for summary judgment or a motion for a directed verdict; he must also have some independent concrete evidence of a product defect"). As the plaintiff here has failed to adduce any evidence to support the existence of a ministerial duty in conjunction with her claim for an adverse inference, the trial court properly concluded that there was no dispute of material fact as to this issue.

II

The plaintiff's second claim is that Burgos was an identifiable person subject to an imminent risk of harm and that, therefore, there is a genuine issue of material fact as to whether the defense of governmental immunity applies. Specifically, the plaintiff argues that Burgos was an identifiable victim because he was among a

[7] Conversely, in *Rizzuto*, our Supreme Court recognized, as an independent cause of action, the tort of intentional spoliation of evidence. *Rizzuto* v. *Davidson Ladders, Inc.*, supra., 280 Conn. 251. "[T]he tort . . . consists of the following essential elements: (1) the defendant's knowledge of a pending or impending civil action involving the plaintiff; (2) the defendant's destruction of evidence; (3) in bad faith, that is, with intent to deprive the plaintiff of his cause of action; (4) the plaintiff's inability to establish a prima facie case without the spoliated evidence; and (5) damages." Id. 244–45. Unlike the adverse inference acknowledged in *Beers*, the plaintiff alleging a claim of intentional spoliation of evidence need not produce evidence sufficient to establish a prima facie case, provided there is evidence that the defendant's intentional spoliation "rendered the plaintiff unable to establish a prima facie case in the underlying litigation." Id., 246.

Here, the plaintiff did not plead, as a separate cause of action, intentional spoliation of evidence. Therefore, even if the defendant's failure to preserve the state manual were to satisfy the requirements provided in *Beers*, the permitted adverse inference does not relieve the plaintiff of her burden to establish a prima facie case.

group of specific individuals in an area of Lake McDonough where the defendant, through its employees, arguably knew unpermitted swimming frequently occurred. We disagree.

As we noted previously in this opinion, "governmental immunity precludes liability regardless of whether the duty is public or private as long as the act complained of is discretionary in nature and none of the three recognized exceptions[8] to discretionary act immunity applies." (Footnote added.) *Violano* v. *Fernandez*, 280 Conn. 310, 332, 907 A.2d 1188 (2006). One of these exceptions, which our Supreme Court describes as "very limited," arises "when the circumstances make it apparent to [a public official] that his or her failure to act would be likely to subject an identifiable person to imminent harm. . . . By its own terms, this test requires three things: (1) an imminent harm; (2) an identifiable victim; and (3) a public official to whom it is apparent that his or her conduct is likely to subject that victim to that harm. . . . If the [plaintiff] fail[s] to establish any one of the three prongs, this failure will be fatal to [her] claim that [she] come[s] within the imminent harm exception."[9] (Internal quotation marks omitted.) *Brooks* v. *Powers*, 328 Conn. 256, 265–66, 178 A.3d 366 (2018). Because we conclude that Burgos was not an identifiable victim and/or within a class of identifiable victims, we further conclude that the exception does not apply.

"With respect to the identifiable victim element, we note that this exception applies not only to identifiable

[8] The other two exceptions are provided in subdivision (2) of § 52-557n (a) and are not relevant for the purposes of this appeal.

[9] Although the plaintiff's complaint does not name an individual to whom the imminent harm should have been apparent, our Supreme Court, in *Grady* v. *Somers*, 294 Conn. 324, 348, 984 A.2d 684 (2009), concluded that the "identifiable person, imminent harm common-law exception to . . . qualified immunity also applies in an action brought directly against municipalities pursuant to § 52-557n (a) (1) (A), regardless of whether an employee or officer of the municipality also is a named defendant."

individuals but also to narrowly defined identified classes of foreseeable victims. . . . [W]hether a particular plaintiff comes within a cognizable class of foreseeable victims for purposes of this narrowly drawn exception to qualified immunity ultimately is a question of law for the courts, in that it is in effect a question of whether to impose a duty of care. . . . In delineating the scope of a foreseeable class of victims exception to governmental immunity, our courts have considered numerous criteria, including the imminency of any potential harm, the likelihood that harm will result from a failure to act with reasonable care, and the identifiability of the particular victim. . . . Other courts, in carving out similar exceptions to their respective doctrines of governmental immunity, have also considered whether the legislature specifically designated an identifiable subclass as the intended beneficiaries of certain acts . . . whether the relationship was of a voluntary nature . . . the seriousness of the injury threatened . . . the duration of the threat of injury . . . and whether the persons at risk had the opportunity to protect themselves from harm." (Internal quotation marks omitted.) *Grady* v. *Somers*, 294 Conn. 324, 350–51, 984 A.2d 684 (2009). "The only identifiable class of foreseeable victims that we have recognized for these purposes is that of school children attending public schools during school hours." *Durrant* v. *Board of Education*, 284 Conn. 91, 107, 931 A.2d 859, 869 (2007); see also *Jahn* v. *Board of Education*, 152 Conn. App. 652, 668–69, 99 A.3d 1230 (2014) (declining to expand class of identifiable victims to include students participating in after school athletic competition).

In support of her argument, the plaintiff relies on *Sestito* v. *Groton*, 178 Conn. 520, 528, 423 A.2d 165 (1979), "the case that created the identifiable person, imminent harm exception as we know it." *Haynes* v. *Middletown*, 314 Conn. 303, 333, 101 A.3d 249 (2014)

(*Eveleigh*, *J.*, concurring). In *Sestito*, the plaintiff brought an action against the defendant municipality on behalf of the estate of an individual who had been shot and killed outside a bar. *Sestito* v. *Groton*, supra, 521–23. Prior to the shooting, a police officer employed by the defendant had been patrolling the area in his car and observed a group of men gathered in a parking lot near the bar. Id., 522. While observing the men, he witnessed an altercation begin between two of them that eventually devolved into a physical fight. Id., 523. Instead of intervening, the officer waited until one of the men was shot before he "drove over and arrested the assailant." Id. On appeal, our Supreme Court concluded, without describing the decedent as an identifiable victim,[10] that there was a question of fact as to whether the defendant's police officer owed a legal duty to the decedent to prevent the shooting from occurring. Id., 527–28.

The plaintiff submits that, just as the decedent in *Sestito* was identifiable despite the police officer not knowing who among the group of men would be shot, Burgos was identifiable because he was among a group of people swimming in Lake McDonough, any of whom could have fatigued suddenly and slipped underwater. The salient difference between the present case and *Sestito*, however, is that there is no evidence that any of the defendant's employees saw Burgos, or any member of his group, in the undesignated swimming area prior to the incident.[11] In the absence of some evidence

[10] The term "identifiable victim" was not used until *Shore* v. *Stonington*, 187 Conn. 147, 156, 444 A.2d 1379 (1982); nevertheless, our courts have relied on *Sestito* in applying the exception. See, e.g., *Doe* v. *Board of Education*, 76 Conn. App. 296, 301, 819 A.2d 289 (2003).

[11] The affidavits and deposition testimony attached to the parties' summary judgment filings established that the area in which Burgos and his group were swimming was not visible from any of the three beaches where lifeguards were stationed and that although it may have been visible from the defendant's boathouse, there was no evidence that anyone saw Burgos or his group.

that a person either was individually identifiable to a public official or among a class of identifiable victims, which our precedent limits to school children attending public school during school hours; see *Durrant* v. *Board of Education*, supra, 284 Conn. 107; the first prong of the exception to governmental immunity cannot be satisfied.

Indeed, the present case is analogous to *Evon* v. *Andrews*, 211 Conn. 501, 559 A.2d 1131 (1989), in which our Supreme Court "concluded that the imminent harm exception did not apply to the plaintiffs' decedents who were killed in an apartment house fire. Specifically, [the] court determined that [t]he class of possible victims of an unspecified fire that may occur at some unspecified time in the future is by no means a group of identifiable persons . . . ." (Internal quotation marks omitted.) *Violano* v. *Fernandez*, supra, 280 Conn. 330. Similarly, we conclude that a group of individuals in an undesignated swimming area, whose presence is unknown to the defendant, cannot be deemed identifiable for the purposes of the identifiable person, imminent harm exception. Accordingly, there is no genuine issue of material fact as to whether the plaintiff's claim is barred by the doctrine of governmental immunity.

The judgment is affirmed.

In this opinion the other judges concurred.

MARGARET E. DAY, COCONSERVATOR (ESTATE OF SUSAN D. ELIA) *v.* RENEE F. SEBLATNIGG ET AL. (AC 38734)

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

Syllabus

The plaintiff, the coconservator of the estate of E, brought this action seeking a declaratory judgment that a certain irrevocable trust was void ab initio and unenforceable, and that any and all assets transferred from E's estate into the trust be returned to the estate. The Probate Court previously had granted E's request for the voluntary appointment of a conservator of her person and estate. The defendant S, the former conservator of

E's estate, had entered into an asset protection services agreement on E's behalf with an affiliate of the defendant F Co. Thereafter, the trust was formed to hold E's assets, which were transferred from E's conservatorship estate to the trust. After S resigned, the plaintiff was appointed coconservator of E's estate for the limited purpose of matters relating to E's interest in the trust, and this action followed. The trial court granted the plaintiff's motion for summary judgment, declaring that the trust was void ab initio and unenforceable, and ordering that the assets that were transferred be returned to E's estate. From the judgment rendered thereon, F Co. appealed to this court. F Co. claimed, inter alia, that the plaintiff had no standing pursuant to the conservatorship statute (§ 45a-655) to initiate the present matter on behalf of E's estate. *Held:*

1. The plaintiff had statutory standing to bring the declaratory judgment action on behalf of E's conservatorship estate; a conservator of the estate has such power as is expressly or impliedly given to her pursuant to § 45a-655, which provides that the conservator of the estate may bring an action for and collect all debts due to the conserved person, a conservator is not required to obtain Probate Court approval prior to commencing an action on behalf of the ward if that power is a necessary implication of § 45a-655 (a), which grants to conservators the necessary power to commence litigation where such a course is necessarily implied by a conservator's duty to manage the ward's affairs, the legislature has not included language requiring Probate Court approval in § 45a-655 (a) when discussing a conservator's ability to initiate an action on behalf of a conserved person, the power of conservators of the estate to initiate an action on behalf of a conserved person has been broadly interpreted, and, thus, although § 45a-655 (a) does not expressly provide that a conservator may initiate a declaratory judgment action questioning the validity of a trust created without the former conservator having obtained Probate Court approval, such power is reasonably implied from the statute and from case law.
2. F Co. could not prevail on its claim that the trial court erred in rendering summary judgment in the absence of a necessary party, B Co., which was based on its claim that B Co., as the sole trustee of the trust, held legal title to the assets in the trust and, thus, had to be joined as a necessary party to this action: no statute mandates the naming and serving of a putative trustee, F Co. failed to show that the failure of the plaintiff or the court to join B Co. as a party infringed on the due process rights of B Co., which had knowledge of this action and chose not to intervene, and in light of the prayer for relief, the issue before the trial court concerned the validity of the trust and did not involve the trustee protecting any wrongful interference with the trust's assets, and, therefore, the presence of B Co., which did not have possession of the assets of the trust, in this action involving the validity of the trust due to the conservator's failure to obtain Probate Court approval was not absolutely required in order to assure a fair and equitable trial; moreover, B Co.'s interests were aligned sufficiently with that of F Co., which as the protector of the trust, had the duty to manage and the power to remove the trustee under the terms of the trust, and the trial court

having determined that there was no genuine issue of material fact that the trust was void ab initio, B Co. did not have an interest in a trust that never lawfully existed and, thus, did not have power to transfer the assets.

3. F Co.'s claim that the trial court erred when it concluded that E lacked the ability to execute the trust while under a voluntary conservatorship was unavailing: a voluntary conserved person does not retain control over her estate, as the clear language of § 45a-655 gives control over the estate to the conservator, and contrary to F Co.'s claim that the 2007 revision of the conservatorship statutes suggests that a voluntary conserved person retains control over her estate, the amendment does not alter the power and duties of the conservator but, rather, establishes the method through which a conservator must carry out her statutory duties, and to interpret the statutory revision to eliminate the responsibilities a conservator has with respect to a conserved person's estate could effectively negate the powers and duties given to conservators in § 45a-655, which would run afoul of the principle of statutory construction that the legislature does not intend to enact meaningless provisions; moreover, it would make meaningless the Probate Court's granting of an application for a voluntary conservator to permit a duality of control over assets due to the confusion that can be sown when a conservator and a voluntary conserved person take conflicting action with respect to the same asset, especially given that a voluntarily conserved person may seek to be released from the voluntary conservatorship; accordingly, no genuine issue of material fact existed that E lacked the legal capacity to form the trust, and the trial court, therefore, properly determined that no genuine issue of material fact existed that the trust was void ab initio.

Argued September 6—officially released December 11, 2018

Procedural History

Action for a judgment declaring, inter alia, a certain trust void ab initio and unenforceable, and for other relief, brought to the Superior Court in the judicial district of Stamford, where the court, *Heller*, *J.*, granted the plaintiff's motion for summary judgment and rendered judgment thereon, from which the defendant First State Fiduciaries, LLC, appealed to this court. *Affirmed.*

James G. Green, *Jr.*, with whom were *Jeffrey A. Dorman* and, on the brief, *Robert J. Mauceri*, for the appellant (defendant First State Fiduciaries, LLC).

Bridgitte E. Mott, with whom was *Richard E. Castiglioni*, for the appellee (plaintiff).

Opinion

FLYNN, J. The principal issue in this case is whether a settlor of a revocable trust who is later under a voluntary conservatorship may, while under conservatorship, acting on her own behalf, convert the trust to an irrevocable trust without action by her conservator and without her conservator obtaining Probate Court approval. The defendant, First State Fiduciaries, LLC,[1] appeals from the judgment of the Superior Court granting the motion of the plaintiff, Margaret E. Day, coconservator of the estate of Susan D. Elia, for summary judgment and declaring that the Susan D. Elia Irrevocable Trust dated September 15, 2011 (Delaware irrevocable trust) was void ab initio and unenforceable, and that all transfers of assets from Elia's conservatorship estate to the Delaware irrevocable trust or its wholly owned limited liability company, Peace at Last, LLC, were unauthorized and improper and ordering that the assets from Elia's conservatorship estate that were transferred to the Delaware irrevocable trust to Peace at Last, LLC,[2] shall be immediately returned to Elia's conservatorship estate.

On appeal, the defendant claims that the court erred in granting the plaintiff's motion for summary judgment

[1] The complaint also named as defendants Renee F. Seblatnigg, sole independent trustee and former conservator of the Susan D. Elia Irrevocable Trust dated September 15, 2011; Edward E. Pratesi; Harry D. Lewis; Susan D. Elia; Marc W. Elia, as guardian of minor children Alden H. Elia, Ryder C. Elia, and Schuyler H. Elia; Christine E. Elia, as guardian of minor child Ennio Barry Simon; Attorney General George Jepsen; Sarah Wilbur Day; Matthew Lewis Striplin; Samuel Bowden Striplin; and Suzanne Palazzi Day. The claims against Seblatnigg, Lewis and Pratesi were withdrawn. The court granted the motions for default as to Marc Elia, Matthew Striplin, Samuel Striplin, Sarah Day, and Suzanne Day. First State Fiduciaries, LLC, alone filed the present appeal. Accordingly, we will refer to First State Fiduciaries, LLC, as the defendant.

[2] By agreement of the parties and with the approval of the Delaware Court of Chancery, these assets were transferred to an account at the Wilmington Trust Company.

in the absence of an indispensable party, Bryn Mawr Trust Company of Delaware (Bryn Mawr).[3] We conclude that the court properly determined that Elia could not lawfully replace the Connecticut revocable trust with the Delaware irrevocable trust while under a conservatorship. We also conclude that the court properly determined that the former conservator of Elia's estate, Renee F. Seblatnigg, could not transfer the assets of the conservatorship estate to the Delaware irrevocable trust and that this transfer was void ab initio. Finally, we conclude that Bryn Mawr was not an indispensable party. We affirm the judgment of the trial court.

On January 18, 2014, the plaintiff initiated the present action in which she sought a declaratory judgment that (1) the Delaware irrevocable trust was void ab initio and unenforceable; and (2) any and all assets transferred from Elia's estate to the Delaware Irrevocable Trust or to an entity owned by the Delaware Irrevocable Trust be returned to the estate.[4] The following procedural history relates to the issues now on appeal. On February 26, 2015, the plaintiff moved for summary judgment.

In its memorandum of decision, the Superior Court set forth the following undisputed material facts. "Elia is seventy-one years old. She suffers from advanced Parkinson's disease and lung cancer. In June, 2011, Elia applied to the Greenwich Probate Court for the voluntary appointment of a conservator of her person and

[3] The defendant, in its "Memorandum in Opposition to Plaintiff's Motion for Summary Judgment," raised for the first time the issue that Bryn Mawr was not joined in the action and is a necessary party. On September 3, 2015, the defendant filed a motion to strike arguing that Bryn Mawr was a necessary party, which motion was not ruled on by the court. In its memorandum of decision on the plaintiff's motion for summary judgment, the court addressed the issue of joinder.

[4] The court ordered that the assets that were transferred to the Delaware irrevocable trust be returned to Elia's conservatorship estate. No claim was made on appeal that the assets should be returned to the Connecticut revocable trust rather than to Elia's conservatorship estate.

her estate. Following a June 28, 2011 hearing in the Greenwich Probate Court, at which the court, *Hopper*, *J.*, saw Elia in person, heard her reason for seeking voluntary representation, and explained to her that appointing a conservator as requested would subject her and her property to the authority of the conservator, the court found that Elia resided or had domicile in the Greenwich Probate District, that the court had jurisdiction, that Elia had requested the appointment of a conservator of the person and the estate, and that the proposed conservators had accepted the position of trust. The Greenwich Probate Court accordingly granted Elia's application for voluntary representation. By decree issued on June 28, 2011 . . . the court appointed Seblatnigg the conservator of Elia's estate and Richard DiPaola . . . the conservator of Elia's person.

"The June 28, 2011 decree provided that Seblatnigg, as the conservator of Elia's estate, had the power to manage the estate, to apply estate funds to support Elia, to pay her debts, and to collect debts due to her. At the time of Seblatnigg's appointment as conservator of Elia's estate, Elia owned or held an equitable interest in cash and securities valued in excess of $6,000,000, including those held in the Susan D. Elia Revocable Trust, a 2007 revocable trust governed by Connecticut law (the Connecticut revocable trust).

"In September, 2011, Seblatnigg consulted with the managers of First State Fiduciaries, [Attorney] Robert Mauceri . . . and [Attorney] James Holder . . . regarding the creation of an asset protection plan for Elia. They recommended to Seblatnigg that Elia establish and fund a self-settled irrevocable Delaware asset protection trust and a limited liability company, to be owned by the trust, to hold her assets.

"Seblatnigg, as conservator of Elia's estate, entered into an asset protection services agreement on Elia's

behalf with First State Facilitators, LLC (First State Facilitators), an affiliate of First State Fiduciaries, on September 15, 2011. Seblatnigg, as conservator, also signed a legal representation agreement on behalf of Elia with Mauceri. On the same day, Seblatnigg met with Elia and supervised her execution of the instrument that created the Delaware irrevocable trust. The trust instrument named Seblatnigg and Salvatore Mulia . . . as the independent trustees of the Delaware irrevocable trust and named First State Fiduciaries as the protector of the Delaware irrevocable trust. Seblatnigg did not seek or obtain the approval of the Greenwich Probate Court to establish the Delaware irrevocable trust or to advise Elia to execute the trust instrument.

"A Delaware limited liability company, Peace at Last . . . wholly owned by the Delaware irrevocable trust, was formed on September 15, 2011, to hold Elia's assets. Beginning on September 20, 2011, Seblatnigg directed the transfer of more than $6,000,000 in cash and securities from Elia's conservatorship estate and the Connecticut revocable trust to the Delaware irrevocable trust or to Peace at Last. Seblatnigg did not seek or obtain the approval of the Greenwich Probate Court before she transferred the assets to the [Susan D. Elia Irrevocable Trust dated September 15, 2011 (Delaware irrevocable trust)] . . . or to Peace at Last.

"Seblatnigg resigned as the conservator of Elia's estate on April 5, 2013. The Greenwich Probate Court accepted Seblatnigg's resignation on May 21, 2013, subject to the allowance of her final account, and appointed Mulia the successor conservator of Elia's estate.

"The Greenwich Probate Court appointed the plaintiff the coconservator of Elia's person on May 23, 2013. On January 9, 2014, at Elia's request, the Greenwich Probate Court issued a decree . . . naming the plaintiff the coconservator of Elia's estate for the limited

purpose of any matters relating to Elia's interest in the Delaware irrevocable trust, because Mulia had a possible conflict of interest.

"In March 2014, shortly after the plaintiff commenced this declaratory judgment action, First State Fiduciaries filed a petition in the Delaware Court of Chancery (Delaware action) in which it sought an order compelling Morgan Stanley Smith Barney, LLC (Morgan Stanley), which held the assets of the Delaware irrevocable trust, to transfer the trust assets to the purported new sole trustee, the Bryn Mawr Trust Company of Delaware . . . . Morgan Stanley filed an answer and counterpetition in the nature of an interpleader, in which it maintained that it had no interest in the trust assets, on May 19, 2014.

"On May 16, 2014, the plaintiff moved to intervene in the Delaware action. The motion to intervene was granted on June 10, 2014. The plaintiff filed a response, counterclaim, and third-party complaint in the Delaware action that day. On January 29, 2015, the plaintiff moved for a protective order and to stay discovery in the Delaware action. Morgan Stanley joined in the plaintiff's motion to stay the Delaware action.

"On February 13, 2015, a special master in the Delaware action recommended that the court deny First State Fiduciaries' motion to compel and grant the plaintiff's motion for a protective order and a stay of any discovery. In a letter to counsel dated August 4, 2015, the special master indicated that she was recommending that the court stay the Delaware action in its entirety." (Footnotes omitted.)

The court granted the plaintiff's motion for summary judgment. The court determined that "[n]o genuine issue of material fact exists as to whether Elia was under a voluntary conservatorship at the time she executed the instrument creating the Delaware irrevocable

trust. While Seblatnigg, as conservator, could have created and funded the Delaware irrevocable trust with the Greenwich Probate Court's approval, she chose instead to do so without the court's authorization" in violation of General Statutes § 45a-655 (e).[5] The court ruled that "[u]ntil such time [as Elia sought and obtained release from the conservatorship pursuant to General Statutes § 45a-647] . . . the conservator, as the agent of the Probate Court [had] the exclusive authority to manage the affairs of the conserved person." The court concluded that the Delaware irrevocable trust was void ab initio. In addressing an issue of joinder raised by the defendant in its memorandum in opposition to the plaintiff's motion for summary judgment, the court concluded that Bryn Mawr was not a necessary party to the action. This appeal followed.

[5] General Statutes § 45a-655 (e) provides in relevant part: "Upon application of a conservator of the estate, after hearing with notice to the Commissioner of Administrative Services, the Commissioner of Social Services and to all parties who may have an interest as determined by the court, the court may authorize the conservator to make gifts or other transfers of income and principal from the estate of the conserved person in such amounts and in such form, outright or in trust, whether to an existing trust or a court-approved trust created by the conservator, as the court orders to or for the benefit of individuals, including the conserved person, and to or for the benefit of charities, trusts or other institutions . . . . Such gifts or transfers shall be authorized only if the court finds that . . . (3) the estate of the conserved person and any proposed trust of which the conserved person is a beneficiary is more than sufficient to carry out the duties of the conservator as set forth in subsections (a) and (b) of this section, both for the present and foreseeable future, including due provision for the continuing proper care, comfort and maintenance of such conserved person in accordance with such conserved person's established standard of living and for the support of persons the conserved person is legally obligated to support . . . . The court shall give consideration to the following: (A) The medical condition of the conserved person, including the prospect of restoration to capacity; (B) the size of the conserved person's estate; (C) the provisions which, in the judgment of the court, such conserved person would have made if such conserved person had been capable, for minimization of income and estate taxes consistent with proper estate planning; and (D) in the case of a trust, whether the trust should be revocable or irrevocable, existing or created by the conservator and court approved."

We first set forth the relevant standards that generally govern our review of a court's decision to grant a motion for summary judgment. "The standards governing our review of a trial court's decision to grant a motion for summary judgment are well established. Practice Book [§ 17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . . A material fact . . . [is] a fact which will make a difference in the result of the case. . . . Finally, the scope of our review of the trial court's decision to grant the plaintiff's motion for summary judgment is plenary." (Internal quotation marks omitted.) *Romprey* v. *Safeco Ins. Co. of America*, 310 Conn. 304, 312–13, 77 A.3d 726, 731 (2013). Having set forth the relevant standard of review, we now turn to the defendant's claims on appeal.

I

We begin by addressing the defendant's jurisdictional claim that the court improperly concluded that the plaintiff had standing to commence this declaratory judgment action on behalf of Elia's conservatorship estate.[6] "The issue of standing implicates the trial

[6] The defendant raised the issue of standing in its motion in opposition to the plaintiff's motion for summary judgment, and the court addressed that issue in its memorandum of decision. The defendant raised the issue of standing before this court for the first time in its reply brief. Although

court's subject matter jurisdiction and therefore presents a threshold issue for our determination." *New Hartford* v. *Connecticut Resources Recovery Authority*, 291 Conn. 511, 518, 970 A.2d 583 (2009). The defendant argues that the plaintiff lacks standing to bring the action because she failed to obtain Probate Court approval to initiate the action pursuant to General Statutes § 45a-655 (a). We disagree.

"[I]t is the burden of the party who seeks the exercise of jurisdiction in his favor . . . clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute. . . . It is well established that, in determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged. . . . Because a determination regarding the trial court's subject matter jurisdiction raises a question of law, our review is plenary. . . .

"Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he [or she] has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy. . . . When standing is put in issue, the question is whether the person whose standing is challenged is a proper party to request an adjudication of the issue . . . . Standing requires no more than a colorable claim of injury; a [party] ordinarily establishes . . . standing by allegations of injury [that he or she has suffered or is likely to suffer]. Similarly, standing exists to attempt to vindicate arguably protected interests. . . .

"Standing is established by showing that the party claiming it is authorized by statute to bring suit or is

arguments raised for the first time in reply briefs are disfavored, we will review the issue because it implicates subject matter jurisdiction. See *Peters* v. *Dept. of Social Services*, 273 Conn. 434, 441, 870 A.2d 448 (2005) (issues of subject matter jurisdiction may be raised at any time).

classically aggrieved. . . . The fundamental test for determining [classical] aggrievement encompasses a well-settled twofold determination: first, the party claiming aggrievement must successfully demonstrate a specific, personal and legal interest in [the subject matter of the challenged action], as distinguished from a general interest, such as is the concern of all members of the community as a whole. Second, the party claiming aggrievement must successfully establish that this specific personal and legal interest has been specially and injuriously affected by the [challenged action]. . . . Aggrievement is established if there is a possibility, as distinguished from a certainty, that some legally protected interest . . . has been adversely affected." (Citations omitted; internal quotation marks omitted.) *Wilcox* v. *Webster Ins., Inc.*, 294 Conn. 206, 213–15, 982 A.2d 1053 (2009).

At issue is the plaintiff's standing to initiate the underlying action. The plaintiff was not the initial conservator of Elia's estate, but rather was appointed by the Probate Court in January, 2014, as coconservator of Elia's estate "for the limited purpose" of matters relating to Elia's interest in the Delaware irrevocable trust. The defendant contends that the plaintiff lacks standing because she failed to obtain Probate Court approval to initiate the declaratory judgment action and that § 45a-655 (a) authorizes only debt collection actions, which the declaratory judgment action is not. We disagree.

The defendant misinterprets the language of § 45a-655 (a). That section permits a conservator of the estate to sue on behalf of the conserved person. General Statutes § 45a-655 (a) lists the duties of the conservator of the estate, whether voluntarily or involuntarily appointed, and provides that a conservator of the estate "shall manage all the estate . . . and may sue for and

collect all debts due to the conserved person." "Property management" is defined in General Statutes § 45a-644 (j) as "actions to (1) obtain, administer, manage, protect and dispose of real and personal property, intangible property, business property, benefits and income, and (2) deal with financial affairs." The plaintiff was specifically appointed to deal with matters relating to Elia's interest in the Delaware irrevocable trust.

A conservator is not required to obtain Probate Court approval prior to commencing suit on behalf of the ward if that power is a necessary implication of § 45a-655 (a). See *Doyle* v. *Reardon*, 11 Conn. App. 297, 527 A.2d 260 (1987). In *Doyle*, this court held that Probate Court permission was not necessary to engage the services of an attorney to investigate a conveyance of real estate from the ward to the plaintiff prior to the appointment of an involuntary conservator. Id., 302–303. The court interpreted General Statutes § 45-75, now § 45a-655, and prior case law, to mean that Probate Court approval is not required in order for the conservator to bring suit, but rather, if "prior permission to bring suit is not sought, the conservator proceeds at his peril in terms of recouping the expenses of such a suit, in the event he engages the services of an attorney to prosecute the action." Id., 301. Accordingly, we read *Doyle* to mean that failure to obtain Probate Court approval may affect a conservator's ability to recoup litigation expenses, but does not impact her ability to initiate suit in that or analogous matters unless prior approval is specifically required by statute.

Consistent with our decision in *Doyle*, we construe the statutory scheme adopted by our legislature in enacting § 45a-655 (a) to grant to conservators the necessary power to commence litigation where such a course is necessarily implied by a conservator's duty to manage the ward's affairs. That statutory scheme sets forth certain actions where prior Probate Court

approval is required before certain actions are permitted by a conservator. For example, in § 45a-655 (e), the legislature clearly provides that conservators must obtain Probate Court approval prior to taking certain actions. That section provides: "*[u]pon application of a conservator of the estate*, after hearing with notice . . . *the court may authorize* the conservator to make gifts or other transfers of income and principal from the estate of the conserved person" provided certain factors are satisfied. (Emphasis added.) General Statutes § 45a-655 (e). The legislature clearly knew how to require the conservator to obtain prior Probate Court approval when it wanted to do so. Significantly, the legislature did not include language requiring Probate Court approval in § 45a-655 (a) when discussing a conservator's ability to initiate suit on behalf of a conserved person. "Where a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject . . . is significant to show that a different intention existed. . . . That tenet of statutory construction is well grounded because [t]he General Assembly is always presumed to know all the existing statutes and the effect that its action or non-action will have upon any one of them." (Internal quotation marks omitted.) *Hatt* v. *Burlington Coat Factory*, 263 Conn. 279, 310, 819 A.2d 260 (2003).

We conclude that the plaintiff has statutory standing to bring the declaratory judgment action because a conservator of the estate has such power as is "expressly or impliedly given to [her] by [§ 45a-655]." (Internal quotation marks omitted.) *Luster* v. *Luster*, 128 Conn. App. 259, 270, 17 A.3d 1068, cert. granted, 302 Conn. 904, 23 A.3d 1243 (2011) (appeal dismissed April 12, 2012). The power of conservators of the estate to initiate suit on behalf of a conserved person has been broadly interpreted. "In Connecticut, there are many examples

in our case law of conservators bringing suit on behalf of their wards to protect their interests." Id., 272–73. Although § 45a-655 (a) does not expressly provide that a conservator may initiate a declaratory judgment action questioning the validity of a trust created by a voluntarily conserved person and created without the former conservator having obtained Probate Court approval, such power is reasonably implied from § 45-655 (a) and from case law. See *Doyle* v. *Reardon*, supra, 11 Conn. App. 297.

II

We next turn to the defendant's claim that the court erred in rendering summary judgment in the absence of a necessary party, Bryn Mawr, the putative trustee of the Delaware irrevocable trust.[7] We disagree.

In its opposition to the plaintiff's motion for summary judgment, the defendant argued that Bryn Mawr, as trustee of the Delaware irrevocable trust, was a necessary party. In its memorandum of decision, the court rejected this argument and reasoned that Bryn Mawr is not a necessary party to the court's determination of whether the Delaware irrevocable trust was void ab initio.

[7] The defendant raised for the first time at oral argument before this court the issue that Peace at Last, LLC, is a necessary party. The defendant has not directed us to any statute, nor are we aware of any, that mandates that a company that had title to a trust asset in a trust declared to be void ab initio, is a necessary party to a declaratory judgment action such as this one. Because Peace at Last, LLC, does not have a statutory right to intervene, subject matter jurisdiction is not implicated, and the claim may not be raised at any time. See *General Linen Service Co.* v. *Cedar Park Inn & Whirlpool Suites*, 179 Conn. App. 527, 532–33, 180 A.3d 966 (2018) (failure to join indispensable party results in jurisdictional defect only if statute mandates naming and serving of particular party). Because the issue was raised for the first time during oral argument and does not implicate subject matter jurisdiction, we conclude that the issue has not been properly briefed and decline to consider it. It is well established that arguments raised for the first time at oral argument are not reviewable. See *Alexandre* v. *Commissioner of Revenue Services*, 300 Conn. 566, 586 n.17, 22 A.3d 518 (2011).

"Necessary parties . . . are those [p]ersons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. . . . [B]ut if their interests are separable from those of the parties before the court, so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court, the latter are not indispensable parties. . . . A party is deemed necessary if its presence is absolutely required in order to assure a fair and equitable trial. . . . The decision whether to grant a motion for the addition of a party to pending legal proceedings rests generally in the sound discretion of the trial court." (Citations omitted; internal quotation marks omitted.) *In re Devon B.*, 264 Conn. 572, 579–81, 825 A.2d 127 (2003).

"It is well settled that the failure to join an indispensable party does not deprive a trial court of subject matter jurisdiction. See General Statutes § 52-108 and Practice Book §§ 9-18 . . . . [T]he failure to join an indispensable party results in a jurisdictional defect *only if* a statute mandates the naming and serving of [a particular] party. . . . Conversely, when a party is indispensable but is not required by statute to be made a party, the [trial] court's subject matter jurisdiction is not implicated and dismissal is not required. . . . Although a court may refuse to proceed with litigation if a claim cannot properly be adjudicated without the presence of those indispensable persons whose substantive rights and interests will be necessarily and materially affected by its outcome, the absence of such a party does not destroy jurisdiction."[8] (Citations omitted; emphasis in original; internal quotation marks omitted.) *General Linen Service Co.* v. *Cedar Park Inn &*

[8] "In the past, there had been a distinction between 'necessary' and 'indispensable' parties. See *Shields* v. *Barrow*, 58 U.S. (17 How.) 130, 139, 15 L.

Whirlpool Suites, 179 Conn. App. 527, 532–33, 180 A.3d 966 (2018).

The defendant argues that subject matter jurisdiction is implicated and that the joinder of Bryn Mawr as a necessary party is mandated because Bryn Mawr is the current sole trustee of the Delaware irrevocable trust and, as such, holds legal title to the assets in the trust. The defendant contends that Bryn Mawr alone has the power to transfer those assets out of the trust in the event that this court affirms the trial court's decision that the Delaware irrevocable trust is void ab initio.

We first conclude that no statute mandates the naming and serving of a putative trustee and, accordingly, joinder of Bryn Mawr is not so mandated by statute in this case. Furthermore, the defendant has not shown that the plaintiff's or the court's failure to join Bryn Mawr as a party infringes on Bryn Mawr's due process rights. See *Wells Fargo Bank, N.A.* v. *Treglia*, 156 Conn. App. 1, 16 n.6, 111 A.3d 524 (2015) ("[j]oinder of a necessary party is mandatory when that party's due process rights are implicated in the action"). Bryn Mawr is a party to the Delaware action during which the Connecticut litigation was discussed, and the Delaware proceedings were stayed pending a final judgment in this Connecticut action. Bryn Mawr, therefore, had knowledge of the Connecticut litigation and chose not to intervene. A substitute trustee of an irrevocable trust that was void at its creation has not been deprived of due process rights by failure to be joined as a party. Furthermore, the defendant, First State Fiduciaries,

Ed. 158 (1855) (defining both terms). Over time, however, this distinction has become less pronounced; see *Sturman* v. *Socha*, 191 Conn. 1, 6, 463 A.2d 527 (1983) (recognizing that misleading nature of terms 'has resulted in a blurring of the distinction typically drawn between them'); and provisions of our Practice Book and General Statutes currently refer only to necessary parties. See, e.g., Practice Book §§ 9-6 and 9-24; General Statutes §§ 8-8 (f) and 12-638n." *In re Devon B.*, supra, 264 Conn. 580 n.12.

which is a party because of its common interest, can adequately represent Bryn Mawr's interest in this action.

We next determine, in the absence of a statute mandating joinder, whether the trial court can "proceed to a decree, and do complete and final justice" without Bryn Mawr joined in the declaratory judgment action. *In re Devon B.*, supra, 264 Conn. 579-81. The following law on trustees is informative. "[A]s a general rule, the trustee is a proper person to sue or be sued on behalf of a trust. . . . The trustee is the legal owner of trust property, and as such the trustee is the proper party to actions affecting title to trust property. Thus, a trustee is a necessary party to any suit or proceeding involving a disposition of trust property or funds." (Citations omitted; internal quotation marks omitted.) *Bank of New York* v. *Bell*, 142 Conn. App. 125, 133 n.5, 63 A.3d 1026, cert. denied, 310 Conn. 901, 75 A.3d 30 (2013), and cert. denied, 310 Conn. 901, 75 A.3d 31 (2013). "The trustee has a title (generally legal title) to the trust property, usually has its possession and a right to continue in possession, and almost always has all the powers of management and control which are necessary to make the trust property productive and safe." (Internal quotation marks omitted.) *Naier* v. *Beckenstein*, 131 Conn. App. 638, 646, 27 A.3d 104, cert. denied, 303 Conn. 910, 32 A.3d 963 (2011).

The undisputed evidence in this case demonstrates that a question existed in the Delaware action as to whether Bryn Mawr properly was appointed trustee of the Delaware irrevocable trust. The defendant filed a petition in the Delaware action seeking an order compelling Morgan Stanley to transfer the trust assets to Bryn Mawr. Morgan Stanley filed an interpleader in the Delaware action, in which Morgan Stanley stated that it had not transferred the assets to Bryn Mawr because the defendant had not produced evidence sufficient to

establish that Bryn Mawr was the duly appointed trustee of the trust. The Delaware Court of Chancery appointed a special master to oversee the assets of the Delaware trust, and the special master was given authority to execute the documents necessary to transfer the trust assets to the Wilmington Trust Company, the new custodian. The defendant's counsel conceded at oral argument before this court that the possession of the assets at issue is currently with the Delaware Chancery Court, which has stayed the action before it, pending a final judgment in this action.

In her prayer for relief, the plaintiff sought a declaratory judgment that the Delaware irrevocable trust be declared void ab initio and sought the relief that "any and all assets transferred to the trust or any entity owned by the trust be returned to the conservatorship estate from whence it came." The issue before the trial court did not involve the trustee protecting any wrongful interference with the trust assets, rather the issue before the court was the validity of the trust. The presence of Bryn Mawr, which entity does not now have possession of the trust assets, in an action involving the validity of the trust due to the conservator's failure to obtain Probate Court approval, is not absolutely required in order to assure a fair and equitable trial. Furthermore, Bryn Mawr's interests are aligned sufficiently with that of the defendant, which, as the protector of the Delaware irrevocable trust, had the duty to manage and the power to remove the trustee under the terms of the trust.

The trial court concluded, and we agree, that there is no genuine issue of material fact that the Delaware irrevocable trust was void ab initio. Bryn Mawr does not have an interest in a trust that never lawfully existed, and, accordingly, does not have the power to transfer the assets, which are not currently in its possession. Accordingly, the court properly determined that there

was no genuine issue of material fact that Bryn Mawr was not a necessary party in this action.

III

The defendant next claims that the court erred when it concluded that Elia lacked the ability to execute the Delaware irrevocable trust while under a voluntary conservatorship. We disagree.

The court determined that there was no genuine issue of material fact that Elia was under a voluntary conservatorship at the time she executed the instrument, which identified her as the grantor, creating the Delaware irrevocable trust.[9] The court determined, as a matter of law, that Elia did not have the capacity to form the Delaware irrevocable trust because she was voluntarily conserved at the time.

[9] The defendant argues that a genuine issue of material fact exists as to whether Seblatnigg created the Delaware irrevocable trust. The defendant contends that the trust indenture establishes that Elia signed the trust as grantor, thereby creating the Delaware irrevocable trust. The defendant directed our attention to the affidavits of Seblatnigg and Robert Mauceri, both of whom were with Elia when she executed the Delaware irrevocable trust. Seblatnigg stated in her affidavit that Elia created the Delaware irrevocable trust, and Mauceri explained that Elia "exhibited complete comprehension and subtle wit."

The court concluded that there was "no genuine issue of material fact as to whether Elia was under a voluntary conservatorship at the time she executed the instrument creating the Delaware irrevocable trust." Although not a model of clarity, the court determined that "Seblatnigg, as conservator, could have created and funded the Delaware irrevocable trust with the Greenwich Probate Court's approval, she chose instead to do so without the court's authorization." The court clarified that the use of the term "created," with respect to Seblatnigg was referencing an asset protection services agreement with First State Facilitators and a legal representation agreement with Mauceri, on Elia's behalf. It is important to note that the court's principal conclusion that unless Elia sought and obtained release from the conservatorship pursuant to § 45a-647, the conservator, as the agent of the Probate Court, had exclusive authority to manage Elia's affairs.

The court determined that there was no genuine issue of material fact that Elia executed the instrument creating the Delaware irrevocable trust, and the defendant has not directed us to any evidence in the record, nor are we aware of any that creates an issue of material fact as to this issue.

The issue before us concerns a voluntary conservatorship of the estate. Unlike an involuntary conservatorship wherein the Probate Court must find that the respondent is "incapable of managing his or her affairs or is incapable of caring for him or herself"; General Statutes § 45a-644 (e); the Probate Court, when granting an application for a voluntary conservatorship, does not make a finding that the voluntarily conserved person is incapable of managing her affairs. See General Statutes § 45a-644 (g).

A "conservator of the estate" is defined in § 45a-644 (a) as "a person . . . appointed by the Court of Probate . . . to supervise the financial affairs of a person found to be incapable of managing his or her own affairs or of a person who voluntarily asks the Court of Probate for the appointment of a conservator of the estate." The statutory duties of a conservator of the estate, whether voluntarily or involuntarily appointed, "are clearly defined in General Statutes § 45a-655 . . . A conservator of the estate shall manage all the estate and apply so much of the net income thereof, and, if necessary, any part of the principal of the property, which is required to support the ward and those members of the ward's family whom he or she has the legal duty to support and to pay the ward's debts . . . ." (Emphasis omitted; footnote omitted; internal quotation marks omitted.) *Jewish Home for the Elderly of Fairfield County, Inc.* v. *Cantore*, 257 Conn. 531, 539–40, 778 A.2d 93 (2001). "In general terms, a conservator of the estate is required to manage the conservatee's estate for the benefit of the conservatee . . . ." *Gross* v. *Rell*, 304 Conn. 234, 250–51, 40 A.3d 240 (2012). "A conservator has an implied power to enter into contracts on behalf of [her] ward's estate where such contracts involve the exercise of the express or implied powers which are granted to the conservator by statute." *Elmendorf* v. *Poprocki*, 155 Conn. 115, 118, 230 A.2d 1 (1967).

The conservatorship statutes have been revised in 2007 to reflect that a conservator is to manage an estate in the least restrictive means possible. Section 45a-655 (a), which lists the duties of voluntary and involuntary conservators of the estate, provides that: "The conservator shall use the least restrictive means of intervention in the exercise of the conservator's duties and authority." Section § 45a-644 (k) defines "least restrictive means of intervention" as a "means of intervention for a conserved person that is sufficient to provide, within the resources available to the conserved person either from the conserved person's own estate or from private or public assistance, for a conserved person's personal needs or property management while affording the conserved person the greatest amount of independence and self-determination." Our Supreme Court stated in *Kortner* v. *Martise*, 312 Conn. 1, 57, 91 A.3d 412 (2014), that "[t]he current statutory scheme governing conservatorships and its historical development make it abundantly clear that the legislature intends for conserved persons to retain as much decision-making authority and independence as possible, and that a conservator's role should be limited so as to accomplish that objective. Indeed, the fact that a conservator is appointed does not mean that the conserved person loses all of his or her civil rights. Rather, the conservator is to manage the conserved person's affairs through the least restrictive means possible."

However, the 2007 revision does not mean, as the defendant suggests, that a voluntarily conserved person retains control over her estate. The statutory amendment, which requires that a conservator carry out her duties using the least restrictive means possible, does not alter the power and duties of a conservator. Rather, it establishes the method through which a conservator must carry out her statutory duties. To interpret this

statutory revision to eliminate the responsibilities a conservator has with respect to a conserved person's estate could effectively negate the powers and duties given to conservators in § 45a-655. This would run afoul of the principle of statutory construction that the legislature does not intend to enact meaningless provisions. See *Lopa* v. *Brinker International, Inc.*, 296 Conn. 426, 433–34, 994 A.2d 1265 (2010).

The clear language of § 45a-655 gives control over the estate to the conservator, and provides that the "conservator shall manage all the estate." General Statutes § 45a-655. It is inconsistent with the language of § 45a-655 and the filing of an application for a voluntary conservatorship pursuant to General Statutes § 45a-646, for an involuntarily conserved person to retain control over the estate. Such a result would make meaningless the words of the statutes. "It is a basic tenet of statutory construction that the legislature [does] not intend to enact meaningless provisions. . . . [I]n construing statutes, we presume that there is a purpose behind every sentence, clause, or phrase used in an act and that no part of a statute is superfluous. . . . Because [e]very word and phrase [of a statute] is presumed to have meaning . . . [a statute] must be construed, if possible, such that no clause, sentence or word shall be superfluous, void or insignificant." (Internal quotation marks omitted.) Id., 433. "Because no finding of incapacity is reached when applications for voluntary conservatorships are granted, and because the enabling statute is silent, it is not clear to what extent persons so represented remain legally capable to contract, convey title, or have charge of their persons. Retention of legal capacities of this kind would appear inconsistent with the purposes of voluntary representation." R. Folsom & G. Wilhelm, Connecticut Estates Practice Series: Incapacity, Powers of Attorney & Adoption in Connecticut (3d Ed. 2018) § 2:8, p. 129. Consistent with this notion,

§ 45a-646 provides, in relevant part, that the court, upon hearing a respondent's application for a voluntary conservatorship, is to explain "to the respondent that granting the petition will subject the respondent or respondent's property, as the case may be, to the authority of the conservator . . . ."

In contrast to an involuntary conservatorship, a voluntarily conserved person may seek to be released from the voluntarily conservatorship, thereby regaining control of her estate. General Statutes § 45a-647 provides: "Any person who is under voluntary representation as provided by section 45a-646 shall be released from voluntary representation upon giving thirty days' written notice to the Court of Probate." Accordingly, a person voluntarily may file an application to have a conservator control her estate; see General Statutes § 45a-646; and a voluntarily conserved person may also seek to regain control of her estate. See General Statutes § 45a-647. It would make meaningless the Probate Court's granting of an application for a voluntary conservator to permit a duality of control over assets due to the confusion that can be sown when a conservator and a voluntarily conserved person take conflicting action with respect to the same asset. Section 45a-647 makes such conflict unnecessary by permitting a voluntarily conserved person to be released from voluntary representation by giving thirty days written notice; it contemplates a legal procedure that would remove a conservator at the option of the person conserved, thereby avoiding potential conflicts between an action taken by a conservator and an opposing action taken by a voluntarily conserved person.

Because a voluntarily conserved person does not retain control over her estate, no genuine issue of material fact existed that Elia lacked the legal capacity to form the Delaware irrevocable trust. Accordingly, we conclude that the court properly determined that no

genuine issue of material fact existed that the Delaware irrevocable trust was void ab initio.[10]

The judgment is affirmed.

In this opinion the other judges concurred.

LUIS ARIEL RIVERA *v.* COMMISSIONER OF CORRECTION (AC 38837)

Alvord, Moll and Eveleigh, Js.

Syllabus

The petitioner, who had been convicted, on a guilty plea, in 2009 of the crime of manslaughter in the first degree in violation of statute (§ 53a-55), sought a writ of habeas corpus, alleging that the application to him of a 2015 amendment to the earned risk reduction credit statute (§ 18-98e) violated the constitutional prohibition against ex post facto laws and resulted in discrimination. In 2011, the legislature enacted legislation, later codified in § 18-98e, that permitted certain classes of inmates,

[10] The defendant also argues that a genuine issue of material fact exists as to whether Seblatnigg was acting in her role as conservator of the estate, or as cotrustee of the Connecticut revocable trust, when she transferred assets from the Connecticut revocable trust to the Delaware irrevocable trust, and whether conservatorship assets were transferred into the new Delaware trust. This is not a material fact. The defendant acknowledges that Elia signed the trust as grantor and, thereby, created the Delaware irrevocable trust. However, a voluntarily conserved person does not retain the power to manage his or her own property unless the conserved person terminates the voluntary conservatorship pursuant to § 45a-647.

The defendant also claims that the court erred when it held that assets legally titled to the Connecticut revocable trust form part of the conservatorship estate. The defendant's claim regarding the role Seblatnigg acted under implicates the issue before the trial court of whether, pursuant to § 45a-655, Seblatnigg was required to obtain Probate Court approval for the creation and transferring of assets to the Delaware irrevocable trust. Whether Seblatnigg was required to obtain Probate Court approval is not a question we need to resolve. In the absence of Probate Court approval, whether required or not, what remains is a voluntarily conserved individual executing the Delaware irrevocable trust instrument. As a result, the trust that the conserved person created is void ab initio, and the remaining issues need not be resolved on appeal.

who were not expressly disqualified, to earn credits toward a reduction of their sentences at the discretion of the Commissioner of Correction, who also was conferred with the discretion to revoke the credits for good cause. Pursuant to the 2011 legislation, the petitioner became eligible to earn risk reduction credit. The 2015 amendment expanded the list of persons ineligible to earn risk reduction credit, including persons who had been sentenced for violating § 53a-55, and, as a result, the petitioner was no longer eligible to earn risk reduction credit toward the reduction of his sentence. The habeas court, sua sponte, dismissed the habeas petition on the ground that it lacked subject matter jurisdiction. Thereafter, the habeas court granted the petition for certification to appeal, and the petitioner appealed to this court. Subsequently, in accordance with this court's order, the habeas court issued an articulation of its decision. *Held*:

1. The habeas court properly dismissed the habeas petition on the ground that it lacked subject matter jurisdiction over the petitioner's ex post facto claim; the petitioner did not have a constitutionally protected liberty interest in earning future risk reduction credit and there was no colorable basis for his ex post facto claim, as the 2015 amendment simply returned the petitioner to the position that he was in at the time he committed the subject offense, the petitioner's interest in earned risk reduction credit, as alleged, was not assured by § 18-98e, which confers broad discretion on the commissioner to award such credits, and, therefore, the petitioner failed to allege a cognizable liberty interest sufficient to implicate the subject matter jurisdiction of the habeas court over his ex post facto claim.

2. This court having concluded that the habeas court lacked subject matter jurisdiction over the petitioner's claims, it was not necessary to address his remaining claim that the habeas court's articulation constituted an improper and untimely modification of its judgment.

Argued September 13—officially released December 11, 2018

Procedural History

Petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Oliver*, *J.*; judgment dismissing the petition, from which the petitioner, on the granting of certification, appealed to this court; thereafter, the court, *Oliver*, *J.*, issued an articulation of its decision. *Affirmed.*

Temmy Ann Miller, assigned counsel, for the appellant (petitioner).

Steven R. Strom, assistant attorney general, with whom, on the brief, was *George Jepsen*, attorney general, for the appellee (respondent).

Opinion

MOLL, J. The petitioner, Luis Ariel Rivera, appeals, following the granting of his petition for certification to appeal, from the judgment of the habeas court dismissing his petition for a writ of habeas corpus for lack of jurisdiction pursuant to Practice Book § 23-29 (1).[1] On appeal, the petitioner claims that (1) the habeas court's articulation constitutes an improper modification of its original judgment and must be stricken from the record, and (2) the habeas court improperly dismissed his petition for lack of jurisdiction. We conclude that the habeas court lacked jurisdiction over the petition and, accordingly, affirm the judgment.

The following procedural and statutory background is relevant to this appeal. In 2007, the petitioner was arrested and charged with manslaughter in the first degree in violation of General Statutes § 53a-55.[2] In

[1] Practice Book § 23-29 provides in relevant part: "The judicial authority may, at any time, upon its own motion or upon motion of the respondent, dismiss the petition, or any count thereof, if it determines that: (1) the court lacks jurisdiction . . . ."

[2] General Statutes § 53a-55 provides: "(a) A person is guilty of manslaughter in the first degree when: (1) With intent to cause serious physical injury to another person, he causes the death of such person or of a third person; or (2) with intent to cause the death of another person, he causes the death of such person or of a third person under circumstances which do not constitute murder because he committed the proscribed act or acts under influence of extreme emotional disturbance, as provided in subsection (a) of section 53a-54a, except that the fact that homicide was committed under the influence of extreme emotional disturbance constitutes a mitigating circumstance reducing murder to manslaughter in the first degree and need not be proved in any prosecution initiated under this subsection; or (3) under circumstances evincing an extreme indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person.

"(b) Manslaughter in the first degree is a class B felony."

2009, the petitioner pleaded guilty to that charge and was sentenced to twenty years of incarceration, execution suspended after fifteen years, followed by five years of probation. As a result of his conviction, the petitioner remains in the custody of the respondent, the Commissioner of Correction.

In 2011, while the petitioner was incarcerated, the General Assembly enacted No. 11-51, § 22, of the 2011 Public Acts (P.A. 11-51), later codified in General Statutes § 18-98e (original legislation).[3] The original legislation provided that certain classes of prisoners, which included the petitioner, convicted of crimes committed on or after October 1, 1994, "may be eligible to earn risk reduction credit toward a reduction of such person's sentence, in an amount not to exceed five days per month, at the discretion of the Commissioner of Correction" for certain positive, statutorily described conduct.

[3] Number 11-51 of the 2011 Public Acts, § 22, provides in relevant part: "(a) Notwithstanding any provision of the general statutes, any person sentenced to a term of imprisonment for a crime committed on or after October 1, 1994, and committed to the custody of the Commissioner of Correction on or after said date, except a person sentenced for a violation of section 53a-54a, 53a-54b, 53a-54c, 53a-54d, 53a-70a or 53a-100aa, may be eligible to earn risk reduction credit toward a reduction of such person's sentence, in an amount not to exceed five days per month, at the discretion of the Commissioner of Correction for conduct as provided in subsection (b) of this section occurring on or after April 1, 2006.

"(b) An inmate may earn risk reduction credit for adherence to the inmate's offender accountability plan, for participation in eligible programs and activities, and for good conduct and obedience to institutional rules as designated by the commissioner, provided (1) good conduct and obedience to institutional rules alone shall not entitle an inmate to such credit, and (2) the commissioner or the commissioner's designee may, in his or her discretion, cause the loss of all or any portion of such earned risk reduction credit for any act of misconduct or insubordination or refusal to conform to recommended programs or activities or institutional rules occurring at any time during the service of the sentence or for other good cause. If an inmate has not earned sufficient risk reduction credit at the time the commissioner or the commissioner's designee orders the loss of all or a portion of earned credit, such loss shall be deducted from any credit earned by such inmate in the future."

P.A. 11-51, § 22. The original legislation also conferred on the respondent the discretion to revoke earned (and even unearned) risk reduction credits for good cause. P.A. 11-51, § 22.[4] Because a sentence for a violation of § 53a-55 was not disqualifying at the time, the original legislation rendered the petitioner eligible to earn risk reduction credit toward the advancement of his end of sentence date. In 2015, the General Assembly passed No. 15-216, § 9, of the 2015 Public Acts (P.A. 15-216), which amended § 18-98e to expand the list of persons ineligible to earn risk reduction credit toward the reduction of their sentences, including persons who have been sentenced for violating § 53a-55,[5] the offense of which the petitioner had been convicted. Consequently, once the amendment became effective on October 1, 2015, the petitioner was no longer eligible to earn risk reduction credit toward the reduction of his sentence. See P.A. 15-216, § 9.

On December 11, 2015, the petitioner, representing himself, filed his petition alleging that the application of P.A. 15-216 resulted in "[d]iscrimination" and "the violation of ex post facto."[6] He alleged that, as of October 1, 2015, he became ineligible to earn risk reduction

[4] At the time of the original legislation, and again in 2013, the General Assembly amended the parole eligibility provisions set forth in General Statutes § 54-125a. Public Acts 2011, No. 11-51, § 25; Public Acts 2013, No. 13-3, § 59. The 2011 and 2013 amendments to § 54-125a are not at issue in this appeal.

[5] After the passage of P.A. 15-216, § 9, General Statutes § 18-98e provided in relevant part that "any person sentenced to a term of imprisonment for a crime committed on or after October 1, 1994, and committed to the custody of the Commissioner of Correction on or after said date, except a person sentenced for a violation of section 53a-54a, 53a-54b, 53a-54c, 53a-54d, *53a-55*, *53a-55a*, 53a-70a, *53a-70c* or 53a-100aa, *or is a persistent dangerous felony offender or persistent dangerous sexual offender pursuant to section 53a-40*, may be eligible to earn risk reduction credit toward a reduction of such person's sentence, in an amount not to exceed five days per month, at the discretion of the Commissioner of Correction . . . ." (Emphasis added.)

[6] See U.S. Const., art. I, § 10.

credit toward the reduction of his sentence, even though he had been earning such credit since the original legislation went into effect.[7] The petitioner does not claim that he has been deprived of risk reduction credit already earned. On December 21, 2015, the habeas court dismissed the petition, sua sponte, pursuant to Practice Book § 23-29 (1), for lack of jurisdiction "over the claims set forth in the petition concerning the change in the [p]etitioner's eligibility date for parole consideration." The court did not hold a hearing prior to dismissing the petition.

On December 31, 2015, the petitioner filed a petition for certification to appeal, contending that his petition was dismissed based on a ground not raised therein. On January 4, 2016, the habeas court granted the petition for certification to appeal. On January 11, 2016, the petitioner filed a request for the appointment of counsel and an application for waiver of fees, costs, and expenses. On January 13, 2016, the habeas court granted his request for appointment of counsel and application for waiver. This appeal followed.

On May 31, 2016, the petitioner filed a motion for articulation, stating that "[t]he need for an articulation

[7] The petitioner filed his petition using a state supplied form. In his petition, the petitioner stated in relevant part: "6. This petition claims that my incarceration/sentence is illegal because . . .

"6d. Other (be specific): *Due to Public Act 15-216, as of Oct*[*ober*] *1, 2015, I am ineligible to earn* [*risk reduction earned credit*] *toward the reduction of my sentence, which I have been getting since pass*[*ed*] *into law. Going back to 5/1/09.*

"6e. State all facts and details regarding your claim: *Discrimination. The effect of a law or established practice that confers privileges on a certain class. And the violation of ex post facto. Done or made after the fact having retroactive force of effect.* . . .

"I am asking the court to . . .

"5. Other (specify) *Judge order correction the restart on my* [*risk reduction earned credit*] *from Oct*[*ober*] *1, 2015, and retroactively until the present day of the order. That correction see that they are in violation of ex post facto. And discrimination.*" (Emphasis added.)

motion arises from the fact that the dismissal refers to a parole eligibility claim, and the claim raised is not such a claim. Articulation is needed because it is not clear how the perceived lack of jurisdiction over a 'change in the petitioner's eligibility date for parole consideration' pertains to the dismissal of a claim unrelated to parole eligibility." On July 12, 2016, the habeas court denied the motion for articulation. On July 19, 2016, the petitioner filed with this court a motion for review of the denial of his motion for articulation. On September 21, 2016, this court granted in part the petitioner's motion for review and ordered the habeas court "to articulate the legal basis for the court's determination that it lacks jurisdiction over the claims set forth in the petition concerning the change in the petitioner's eligibility for parole consideration."

On January 17, 2017, in accordance with this court's order, the habeas court issued an articulation. The habeas court concluded that the application of P.A. 15-216 to the petitioner does not violate the ex post facto clause because it does not increase his term of confinement. The habeas court also concluded that the prospective opportunity to earn risk reduction credit pursuant to § 18-98e, as amended by P.A. 15-216, does not implicate a liberty interest upon which the petitioner may predicate habeas relief because the legislative amendment has at its foundation discretionary language authorizing, but not requiring, the respondent to grant such credit to qualifying inmates.

I

We first address the petitioner's claim that the habeas court improperly dismissed his petition for lack of jurisdiction.[8] The petitioner argues that, pursuant to the

[8] Because our resolution of this claim is dispositive of the petitioner's appeal, we address this claim first.

proper jurisdictional analysis, the allegations in his petition are sufficient to invoke the jurisdiction of the habeas court. Additionally, the petitioner argues that a liberty interest in future unearned risk reduction credit is not required to establish jurisdiction over his discrimination[9] and ex post facto claims. The respondent argues, to the contrary, that the habeas court properly dismissed the petition for lack of subject matter jurisdiction because the petitioner lacks a cognizable liberty interest in earning future risk reduction credit, and there is no colorable basis for an ex post facto claim. We agree with the respondent.

To begin, we set forth the relevant standard of review and legal principles that govern the petitioner's claim on appeal. "[A] determination regarding a trial court's subject matter jurisdiction is a question of law and, therefore, we employ the plenary standard of review and decide whether the court's conclusions are legally and logically correct and supported by the facts in the record." (Internal quotation marks omitted.) *Petaway* v. *Commissioner of Correction*, 160 Conn. App. 727, 731, 125 A.3d 1053 (2015), cert. dismissed, 324 Conn. 912, 153 A.3d 1288 (2017). "[T]o invoke the trial court's subject matter jurisdiction in a habeas action, a petitioner must allege that he is illegally confined or has been deprived of his liberty." (Internal quotation marks omitted.) *Joyce* v. *Commissioner of Correction*, 129 Conn. App. 37, 41, 19 A.3d 204 (2011); see also *Perez* v. *Commissioner of Correction*, 326 Conn. 357, 368, 163 A.3d 597 (2017) (to invoke habeas court's jurisdiction, petitioner must allege interest sufficient to give rise to

[9] Neither the petition nor the petitioner's principal brief in this court elaborates on the nature of his claim that the application of P.A. 15-216 results in discrimination. The petitioner specifies for the first time in his reply brief that his claim sounds in equal protection but goes no further. Construing the petition in a manner most favorable to the petitioner, we conclude that he failed to allege sufficient facts to invoke the jurisdiction of the habeas court over his discrimination claim.

habeas relief). "In order . . . to qualify as a constitutionally protected liberty . . . the interest must be one that is *assured* either by statute, judicial decree, or regulation." (Emphasis in original; internal quotation marks omitted.) *Vitale* v. *Commissioner of Correction*, 178 Conn. App. 844, 867–68, 178 A.3d 418 (2017), cert. denied, 328 Conn. 923, 181 A.3d 566 (2018).

As this court previously has explained, "[o]ur appellate courts have concluded, consistently, that an inmate does not have a constitutionally protected liberty interest in certain benefits—such as good time credits, risk reduction credits, and early parole consideration—if the statutory scheme pursuant to which the commissioner is authorized to award those benefits is discretionary in nature." *Green* v. *Commissioner of Correction*, 184 Conn. App. 76, 86–87, A.3d (2018); see *Holliday* v. *Commissioner of Correction*, 184 Conn. App. 228, 235, A.3d (2018) (habeas court properly dismissed for lack of subject matter jurisdiction ex post facto claim based on 2013 statutory change regarding application of earned risk reduction credit toward parole eligibility); see also *Perez* v. *Commissioner of Correction*, supra, 326 Conn. 370–73 (no liberty interest in early parole eligibility or risk reduction credit); *Petaway* v. *Commissioner of Correction*, supra, 160 Conn. App. 733–34 (affirming judgment of habeas court based on lack of jurisdiction over ex post facto claim asserted in absence of allegation that 2013 statutory change regarding parole eligibility extended length of incarceration or delayed parole eligibility beyond time periods that existed at time of offense); *Abed* v. *Commissioner of Correction*, 43 Conn. App. 176, 182–83, 682 A.2d 558 (petitioner failed to state cognizable ex post facto claim based on prospective denial of discretionary, statutory good time credits), cert. denied, 239 Conn. 937, 684 A.2d 707 (1996).

In the present case, the statutory scheme that created the opportunity to earn risk reduction credit did not exist at the time of the petitioner's offense. It was not until 2011, upon the passage of the original legislation, that the petitioner became eligible to earn risk reduction credit toward the reduction of his sentence pursuant to § 18-98e. Although the petitioner was no longer eligible to earn risk reduction credit after the passage of P.A. 15-216, the 2015 amendments did not increase the petitioner's overall sentence. Rather, the 2015 amendments simply returned the petitioner to the position that he was in at the time of his offense. See *Perez* v. *Commissioner of Correction*, supra, 326 Conn. 378–80 (ex post facto inquiry requires comparison of challenged statute with statute in effect at time of offense).

Furthermore, during the period in which the petitioner was eligible to earn risk reduction credit pursuant to § 18-98e, such credit could be awarded only at the discretion of the respondent. See P.A. 11-51, § 22 ("any person sentenced to a term of imprisonment for a crime committed on or after October 1, 1994, and committed to the custody of the Commissioner of Correction on or after said date . . . may be eligible to earn risk reduction credit toward a reduction of such person's sentence . . . at the discretion of the Commissioner of Correction"); General Statutes (Rev. to 2013) § 18-98e (same). That is, the interest in earning risk reduction credit, as alleged by the petitioner, was not *assured* by § 18-98e at any time. Accordingly, the petitioner has not alleged a constitutionally protected liberty interest that would give rise to habeas relief. We conclude, therefore, that the habeas court lacked subject matter jurisdiction over the petitioner's ex post facto claim, and the petition was properly dismissed. See *Perez* v. *Commissioner of Correction*, supra, 326 Conn. 369 ("if the habeas court reached the correct decision, but on mistaken grounds,

this court will sustain the habeas court's action if proper grounds exist to support it").

II

We next turn to the petitioner's claim that the habeas court's articulation improperly modified its original judgment and must be stricken from the record. The petitioner contends that, rather than issuing a proper articulation, the habeas court improperly offered an entirely new legal basis for its original judgment of dismissal. The petitioner argues further that the habeas court issued its modified decision more than four months after the original judgment in violation of General Statutes § 52-212a. Because we conclude, in part I of this opinion, that the habeas court lacked subject matter jurisdiction over the petitioner's claims regarding his eligibility to earn risk reduction credit pursuant to § 18-98e, we need not address the petitioner's remaining contention that the habeas court's articulation constitutes an improper and untimely modification of the original judgment of dismissal. See id.

The judgment is affirmed.

In this opinion the other judges concurred.

JOLEN, INC. *v.* BRODIE AND STONE, PLC, ET AL.
(AC 40725)

Lavine, Keller and Bishop, Js.

Syllabus

The plaintiff sought to recover damages from the defendant B Co. for, inter alia, breach of fiduciary duty. The plaintiff and B Co. had entered into a distribution agreement in which B Co. agreed to be the plaintiff's distributing agent. After that agreement terminated, the plaintiff brought the present action alleging multiple claims arising out of the parties' business relationship, including that B Co. had breached certain fiduciary duties that it owed to the plaintiff. Thereafter, the trial court granted B

Co.'s motion for summary judgment on the ground that no fiduciary relationship existed between the parties. From the judgment rendered thereon, the plaintiff appealed to this court, claiming that, in light of the trial court's unchallenged determination that an agency relationship existed between the parties, its subsequent failure to conclude that such relationship was per se fiduciary in nature was incorrect as a matter of law. *Held* that the trial court improperly rendered summary judgment in favor of B Co. on the plaintiff's breach of fiduciary duty claim; in light of agency law, which makes clear that an agent is, by definition, a fiduciary, and given the trial court's conclusion, which B Co. did not challenge, that the operative terms of the distribution agreement established, as a matter of law, the existence of a principal-agent relationship between the parties, it necessarily followed that B Co. had been the plaintiff's fiduciary with respect to matters within the scope of its agency, and the court's contrary determination, therefore, was erroneous.

Argued October 17—officially released December 11, 2018

Procedural History

Action to recover damages for, inter alia, breach of fiduciary duties, and for other relief, brought to the Superior Court in the judicial district of Fairfield; thereafter, the court, *Krumeich*, *J.*, granted the defendants' motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Reversed*; *further proceedings*.

Frank J. Silvestri, *Jr.*, with whom was *Kristen G. Rossetti*, for the appellant (plaintiff).

Edward R. Scofield, with whom, on the brief, was *Carolyn A. Trotta*, for the appellees (defendants).

Opinion

BISHOP, J. The plaintiff, Jolen, Inc., appeals from the summary judgment rendered by the trial court in favor of the defendant, Brodie & Stone, PLC, and Brodie & Stone International, PLC,[1] on the plaintiff's claim of

[1] The undisputed evidence in the record reflects that Brodie & Stone, PLC, has been dormant since Brodie & Stone International, PLC, was created, and the parties have treated both defendants as a de facto single entity. For the sake of simplicity, we likewise refer to the defendants collectively as the defendant.

breach of fiduciary duty. The plaintiff claims on appeal that, in view of the court's unchallenged determination that an agency relationship existed between the parties, its subsequent failure to conclude that such relationship was per se fiduciary in nature was incorrect as a matter of law.[2] We agree and, accordingly, reverse the judgment of the trial court.

The following undisputed facts and procedural history are relevant to this appeal. The plaintiff is a United States based manufacturer of various products for the removal or lightening of unwanted body hair, including a bleach product that it produces in Connecticut.[3] The defendant is a United Kingdom based manufacturer, distributor, and seller of personal care products. By written agreement (distribution agreement) executed by the parties in 1995, the defendant agreed to act as the plaintiff's "sole and exclusive [d]istributing [a]gent" for the purposes of selling and distributing the plaintiff's bleach product[4] in the United Kingdom and the Republic

[2] The plaintiff also claims that the court erred in concluding that no fiduciary relationship existed between the parties under the undisputed facts of the case. Because we agree with the plaintiff's first claim, we need not address this issue.

[3] Up until 2012, the plaintiff also maintained a principal place of business in Connecticut.

[4] In or around 2000, the defendant also began both manufacturing and distributing a facial wax product on behalf of the plaintiff. The original 1995 distribution agreement, which explicitly pertained only to the bleach product, was not amended to include the new wax product. In the operative complaint, however, the plaintiff alleged that, through the parties' course of conduct, the defendant's responsibilities under the agreement were implicitly expanded to include the wax product and that the defendant was therefore the plaintiff's fiduciary with respect to both products. In their respective briefs on appeal, the parties note in passing their disagreement over whether the distribution of the wax product fell within the parameters of their contractual relationship. The trial court, however, had no occasion to address the scope of the defendant's alleged fiduciary duty, as the defendant's motion for summary judgment on the breach of fiduciary duty count was based solely on the ground that the defendant did not owe the plaintiff any fiduciary duty at all. Consequently, the issue on appeal is limited to whether the court erred in granting the defendant's motion on this ground; the issue of the scope of the parties' relationship is not presently before us.

of Ireland, in exchange for a 20 percent sales commission.

Under the distribution agreement, the plaintiff had its product shipped to the defendant in the United Kingdom and thereafter relied on the defendant to, inter alia, clear the plaintiff's product through customs; warehouse the product in the United Kingdom; advertise the product; promptly inform the plaintiff of any factors likely to be relevant to the distribution of the product; sell, ship, and invoice the product to customers; and account to the plaintiff for monies received and remit the funds to the plaintiff via a designated bank account. The defendant also was responsible for covering the costs associated with clearing the product through customs and delivering it to customers, albeit the plaintiff was required to reimburse the defendant for these expenses. While vesting the defendant with these broad responsibilities, the agreement concurrently constrained the defendant's conduct in carrying out its duties by requiring the defendant to, among other things, "at all times give proper consideration and weight to the interests of the [plaintiff] in all dealings and . . . abide by any rules and carry out any instructions from the [plaintiff] as to the sale, storage, pricing, distribution and advertising of the [p]roduct, and other related matters."

The parties continually renewed the distribution agreement until the plaintiff notified the defendant in October, 2014, that it would not be renewing the agreement upon its termination.[5] Thereafter, in October, 2015, the plaintiff commenced the present action

Thus, although we conclude that the defendant was the plaintiff's fiduciary by virtue of the parties' contractual relationship, we necessarily leave it to the trial court to determine the scope of this relationship on remand.

[5] The original term of the agreement was from May 1, 1995 through April 30, 1999. The agreement further provided, however, that unless notice of termination were given six months prior to the expiration of the term, the agreement would be deemed to have been renewed for another four years, with the new four year term beginning on the expiration date of the prior term.

against the defendant alleging multiple claims arising out of the parties' business relationship. In count two of the operative complaint,[6] the only count at issue in this appeal,[7] the plaintiff alleged, in essence, that by virtue of the distribution agreement, the parties had a principal-agent relationship pursuant to which the defendant owed the plaintiff certain fiduciary duties and that the defendant breached these duties in various respects, thereby causing the plaintiff to suffer damages.

On May 5, 2017, the defendant moved for summary judgment on the plaintiff's breach of fiduciary duty claim on the ground that no fiduciary relationship existed between the parties.[8] The plaintiff argued in opposition to the motion that, under the operative terms of the distribution agreement, the parties' relationship constituted an agency relationship as a matter of law and that the defendant was therefore a per se fiduciary of the plaintiff. At oral argument on the motion on June 13, 2017, the defendant responded that, even if the parties had a principal-agent relationship, the court nevertheless needed to make an independent determination as to whether this relationship was fiduciary in nature.

The following day, the court issued a memorandum of decision granting the defendant's motion for summary

[6] The plaintiff's second amended verified complaint, filed May 5, 2017, is the operative complaint.

[7] The plaintiff also alleged claims for breach of contract, an accounting, and violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq. The defendant moved for summary judgment on the CUTPA claim, which the court granted, but the plaintiff withdrew this claim before judgment could be rendered on it. The plaintiff also withdrew the claims for breach of contract and an accounting.

[8] The defendant's motion for summary judgment, as filed, was directed toward the plaintiff's first amended verified complaint. The parties subsequently stipulated, however, that the motion be applied to the operative, second amended verified complaint.

judgment. The court first addressed the issue of whether a principal-agent relationship existed between the parties. The court began by setting forth the well-established elements required to show the existence of such relationship under Connecticut law: (1) a manifestation by the principal that the agent will act for him, (2) acceptance by the agent of the undertaking, and (3) an understanding between the parties that the principal will be in control of the undertaking.[9] See *Beckenstein* v. *Potter & Carrier, Inc.*, 191 Conn. 120, 133, 464 A.2d 6 (1983). Regarding the standard by which courts determine whether these elements have been met, the court correctly noted that "the labels used by the parties in referring to their relationship are not determinative" and that, therefore, "a court must look to the operative terms of their agreement or understanding." (Internal quotation marks omitted.) Id., 133–34. The court then concluded that its "[r]eview of the operative [distribution] agreement, 'interpreted as a whole, with all relevant provisions [considered] together'; [id., 134]; demonstrate[d] that [the defendant] was [the plaintiff's] agent for the distribution of [the plaintiff's] products to customers in the markets in which [the defendant was] the exclusive distributer."[10]

[9] On appeal, the parties do not challenge the trial court's application of Connecticut law to the plaintiff's breach of fiduciary duty claim.

[10] We note that, "[a]lthough the question of agency is a question of fact when the evidence is conflicting or is susceptible of more than one reasonable inference . . . agency becomes a question of law [that may properly be resolved on a motion for summary judgment] when, as in the present case, the facts are undisputed." (Citation omitted.) *Yale University* v. *Out of the Box, LLC*, 118 Conn. App. 800, 813, 990 A.2d 869 (2010) (*Borden, J.*, dissenting), citing *Russo* v. *McAviney*, 96 Conn. 21, 24, 112 A. 657 (1921) ("Proof of agency is ordinarily a question of fact. . . . When the facts are undisputed it may then become a question of law." [Citations omitted.]); see also 1 Restatement (Third), Agency, § 1.02, comment (a), p. 50 (2006) ("[w]hether a relationship is one of agency is a legal conclusion made after an assessment of the facts of the relationship and the application of the law of agency to those facts").

The court further concluded, however, that "a contractual duty to act as [a] distributer of a manufacturer's product does not necessarily impose fiduciary duties on a distributer to the manufacturer" and that "[m]erely because the parties use the term agent does not determine whether the parties' relationship is [fiduciary in nature, i.e.,] characterized by a unique degree of trust and confidence between the parties, one of whom has superior knowledge, skill or expertise . . . ." (Internal quotation marks omitted.) Consequently, notwithstanding its determination that an agency relationship existed between the parties, the court proceeded to consider whether such relationship was fiduciary in nature and ultimately concluded that it was not. The court therefore rendered summary judgment in favor of the defendant on the plaintiff's breach of fiduciary duty claim.[11] This appeal followed.

The plaintiff claims on appeal that the court's conclusion that the defendant was its agent, but not its fiduciary, constitutes reversible error. The plaintiff argues that, given the numerous decisions from this court and our Supreme Court indicating that agents are per se fiduciaries, the trial court, after determining that the defendant was an agent of the plaintiff, was constrained to conclude that the defendant was therefore also a fiduciary. We agree.

Preliminarily, we set forth the applicable standard of review. "Practice Book [§ 17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most

[11] The plaintiff subsequently moved to reargue the defendant's motion for summary judgment, which the court denied.

favorable to the nonmoving party. . . . [T]he scope of our review of the trial court's decision to grant the [defendant's] motion for summary judgment is plenary." (Internal quotation marks omitted.) *Iacurci* v. *Sax*, 313 Conn. 786, 799, 99 A.3d 1145 (2014).

An examination of agency law generally makes clear that an agent is, by definition, a fiduciary. "Agency is defined as the *fiduciary relationship* that arises when one person (a principal) manifests assent to another person (an agent) that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act. 1 Restatement (Third), Agency, § 1.01, p. 17 (2006)." (Emphasis added; internal quotation marks omitted.) *Pelletier Mechanical Services, LLC* v. *G & W Management, Inc.*, 162 Conn. App. 294, 305, 131 A.3d 1189, cert. denied, 320 Conn. 932, 134 A.3d 622 (2016). "The word 'fiduciary' appears in [this] definition to characterize or classify the type of legal relationship that results if the elements of the definition are present and to emphasize that *an agency relationship creates the agent's fiduciary obligation as a matter of law*." (Emphasis added.) 1 Restatement (Third), supra, § 1.01, comment (e), p. 23; see also *Taylor* v. *Hamden Hall School, Inc.*, 149 Conn. 545, 552, 182 A.2d 615 (1962) ("[a]n agent is a fiduciary with respect to matters within the scope of his agency"). Thus, our Supreme Court has explicitly recognized that agents, as well as certain other categories of actors, "are per se fiduciaries by nature of the functions they perform." *Iacurci* v. *Sax*, supra, 313 Conn. 800. Only where the relationship at issue falls outside these per se categories must a court then proceed to determine on an ad hoc basis whether a fiduciary duty inheres in that relationship. See id. ("[b]eyond these per se categories . . . a flexible approach determines the existence of a fiduciary duty, which allows the law to adapt to evolving situations

wherein recognizing a fiduciary duty might be appropriate").

In the present case, the court concluded that the operative terms of the distribution agreement established as a matter of law the existence of a principal-agent relationship between the parties.[12] The defendant has not challenged this conclusion on appeal. Once the court made this legal determination, it necessarily followed that the defendant had been the plaintiff's fiduciary with respect to matters within the scope of its agency. *Taylor* v. *Hamden Hall School, Inc.*, supra, 149 Conn. 552. The court's contrary determination was therefore erroneous, and, consequently, the court erred in rendering summary judgment in the defendant's favor on the plaintiff's breach of fiduciary duty claim on that ground. See *Charter Oak Lending Group, LLC* v. *August*, 127 Conn. App. 428, 439–41, 14 A.3d 449 (trial court improperly determined that defendants owed no fiduciary duty to plaintiff where court had expressly found that relationship between parties was that of principal and agent; "the court's determination that the relationship was one of principal and agent is inconsistent with its subsequent determination that the relationship was not fiduciary in nature"), cert. denied, 302 Conn. 901, 23 A.3d 1241 (2011).

[12] The defendant originally contended in its appellate brief that the trial court had never made any determination as to whether it was in fact an agent of the plaintiff and that the court had merely identified the parties as they labeled themselves in the distribution agreement. Upon the motion of the plaintiff, this court subsequently took judicial notice of certain admissions made by Michael Eggerton, the defendant's sole shareholder, its chief operating officer, and the chairman of its board of directors, in a related federal court action. See *Jolen, Inc.* v. *Eggerton*, United States District Court, Docket No. 3:18-CV-00548 (VLB) (D. Conn.). In his answer to the plaintiff's complaint in that action, Eggerton admitted that "[t]he Superior Court [in the present action had] held that [the defendant] was [the plaintiff's] agent . . . ." In view of this admission, the defendant's counsel conceded at oral argument before this court that the trial court had clearly determined that a principal-agent relationship existed between the parties as to the distribution of the plaintiff's products.

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

In this opinion the other judges concurred.

BEATRICE FORGIONE *v.* MENNATO FORGIONE (AC 36991)

Keller, Bright and Beach, Js.

Syllabus

The defendant, whose marriage to the plaintiff previously had been dissolved, appealed to this court from the judgment of the trial court opening the judgment of dissolution and reissuing financial orders. He claimed that the court erred in its method of dividing the parties' assets because it failed to take into account an advance payment made by the plaintiff to the defendant against the defendant's equitable distribution and the resultant transfer of equity in the marital residence to the plaintiff. On appeal, this court had determined that, pursuant to statute (§ 46b-86 [a]), the trial court lacked subject matter jurisdiction to open the dissolution judgment for the purpose of redividing the parties' marital asssets and, accordingly, vacated the court's judgment and remanded the case for further proceedings. Thereafter, our Supreme Court granted the plaintiff's petition for certification to appeal and remanded the case to this court for reconsideration in light of *Reinke* v. *Sing* (328 Conn. 376). On remand, *held*:

1. Where, as here, the parties entered into a postjudgment stipulation to open the dissolution judgment so that the court could address anew all financial matters, including the division of assets, the trial court had subject matter jurisdiction and properly exercised its statutory authority to open the dissolution judgment.
2. The defendant could not prevail on his claim that the trial court erred in its method of dividing the parties' assets; although the defendant did not preserve his claim properly because he failed to distinctly raise it before the trial court, this court exercised its discretion to consider the merits of the claim, which was unavailing, as the trial court considered the advance payment when it issued new financial orders and ordered the defendant to transfer his title to the marital residence to the plaintiff, the defendant misrepresented the plaintiff's financial assets by affording her cetain additional cash for the advance payment that was not encumbered by a corresponding liability, there having been no indication that the plaintiff readily had cash in the amount of the advance payment available to pay to the defendant, and the record having indicated that the plaintiff had obtained the advance payment by way of a personal loan, and, thus, the defendant's claim that the plaintiff received a net

gain in the amount of the advance payment as a result of the transfer of assets related to the marital home found no support in the record.

Argued September 11—officially released December 11, 2018

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Hon. Stanley Novack*, judge trial referee, rendered judgment dissolving the marriage and granting certain other relief; thereafter, the court, *Emons*, *J.*, approved the stipulation of the parties to open the judgment as to financial issues; subsequently, the court, *Schofield*, *J.*, issued certain orders; thereafter, the court, *Schofield*, *J.*, granted the defendant's motion for reargument and issued certain orders, and the defendant appealed to this court, which vacated the judgment and remanded the case for further proceedings; subsequently, the defendant, on the granting of certification, appealed to our Supreme Court, which remanded the case to this court for reconsideration. *Affirmed.*

Thomas C. C. Sargent, for the appellant (defendant)

Norman A. Roberts, II, with whom, on the brief, was *Tara C. Dugo*, for the appellee (plaintiff)

Opinion

BRIGHT, J. This case returns to us on remand from our Supreme Court.[1] The defendant appeals from the

[1] This court previously determined that General Statutes § 46b-86 (a) deprived the trial court of subject matter jurisdiction to open, pursuant to the parties' stipulation, the dissolution judgment for the purpose of redividing the parties' marital assets. See *Forgione* v. *Forgione*, 162 Conn. App. 1, 129 A.3d 766 (2015), remanded for reconsideration, 328 Conn. 922, 181 A.3d 92 (2018). Subsequently, our Supreme Court granted the plaintiff's petition for certification and remanded the case to us with direction to reconsider our decision in light of *Reinke* v. *Sing*, 328 Conn. 376, 179 A.3d 769 (2018) (holding that § 46b-86 [a] does not deprive trial court of subject matter jurisdiction, and that trial court properly exercised its statutory authority under General Statutes § 52-212a to open dissolution judgment because parties voluntarily submitted to court's jurisdiction). See *Forgione* v. *Forgione*, 328 Conn. 922, 181 A.3d 92 (2018). At the outset, we conclude that the

judgment of the trial court opening the judgment of dissolution and reissuing financial orders. On appeal, the defendant claims that the trial court erred in its method of dividing the parties' assets because it failed to take into account an advance payment made by the plaintiff to the defendant. Although the defendant raises this claim for the first time on appeal, we exercise our discretion to consider the claim on the merits, and we affirm the judgment of the trial court.

The following undisputed facts and procedural history are relevant to our resolution of this appeal. On January 16, 2008, the plaintiff, Beatrice Forgione, commenced this dissolution action against the defendant, Mennato Forgione. On July 7, 2008, the parties entered into a prejudgment stipulation in which they agreed that the plaintiff would have exclusive possession of the marital home, and, in exchange, the plaintiff would pay the defendant $60,000 as an "advance" against the defendant's equitable distribution. The $60,000 advance represented approximately one half of the total equity in the marital home at that time. The plaintiff later testified that she obtained the $60,000 by way of a personal loan from one of her friends and, thereafter, paid the advance to the defendant. This testimony was corroborated by the plaintiff's itemization of a $60,000 liability, which she specifically identified as a "[l]oan for [a]dvance to [h]usband re property [distribution]," on her August 26, 2009 financial affidavit.

On August 26, 2009, the court rendered judgment dissolving the marriage of the parties. The dissolution judgment incorporated the parties' stipulated agreement that resolved, among other things, the issues

trial court in the present case had subject matter jurisdiction and properly exercised its statutory authority because, as in *Reinke*, the parties entered into a postjudgment stipulation to open the dissolution judgment so that the court could address anew all financial matters, including the division of assets.

of custody, insurance, distribution of marital assets and liabilities, child support, and alimony. The parties stipulated, in relevant part, that the defendant would transfer his interest in the marital residence to the plaintiff in consideration of the $60,000 advance that the plaintiff previously had paid to the defendant, and that the parties each would retain the remaining assets listed on their respective financial affidavits, including "deferred compensation" plans.

On March 12, 2012, the plaintiff filed a motion to open the dissolution judgment on the ground that the defendant intentionally had failed to disclose commissions he had received just prior to the dissolution judgment. On May 30, 2012, the parties entered a postjudgment stipulation to open the dissolution judgment for the purpose of redetermining "all issues of a financial nature . . . ." On the same date, the court approved the stipulation and opened the judgment.

On November 6, 2013, after a three day trial, the court issued a memorandum of decision in which it entered new financial orders concerning, among other things, child support, insurance, property distribution, liabilities, bank accounts and retirement funds, and counsel fees. As for property distribution, the court, in its new orders, recognized that the plaintiff previously had paid the $60,000 advance to the defendant and, thus, ordered the defendant to transfer his title to the marital residence to the plaintiff. As for bank accounts and retirement funds, the court ordered, in relevant part, that the "parties shall equally divide the remaining financial assets of the marriage." On November 22, 2013, the defendant filed a motion seeking reargument of the court's new financial orders regarding insurance and sanctions, and clarification as to the operative date that should be utilized when equalizing the parties' financial assets.

On February 3, 2014, after a hearing, the court issued a memorandum of decision addressing the disputes as to insurance and sanctions, and, further, deferring the selection of the "operative date of equalization of financial assets" until after the court received additional briefing from the parties. Accordingly, on February 26, 2014, the plaintiff filed a brief contending that the operative date should be the date of dissolution, August 26, 2009, and proffering a mathematical calculation of the parties' financial assets—bank accounts and retirement funds—on that date. On March 12, 2014, the defendant filed a brief concurring that the operative date should be August 26, 2009; however, he disagreed that the plaintiff's calculation "should have been made a part of the legal memorandum and, therefore, wishe[d] [it] stricken." The defendant provided no substantive objection to the plaintiff's calculation, and provided no calculation of his own.

On June 3, 2014, the court issued a memorandum of decision dividing the "remaining financial assets of the marriage." Therein, the court determined that the plaintiff's financial assets listed on her August 26, 2009 affidavit totaled $45,946, that the defendant's financial assets listed on his August 26, 2009 affidavit totaled $135,500,[2] and, consequently, the court ordered the defendant to pay the plaintiff an equalization payment of $44,777. The court adopted the method of calculation set forth by the plaintiff in her posttrial brief and only incorporated the financial assets that were itemized in the "bank accounts" and "deferred compensation plans" categories of the parties' respective affidavits. Thus, the court's calculation did not include the $60,000 advance payment received by the defendant, the $120,000 of

[2] The defendant updated his August 26, 2009 affidavit in 2013 to reflect, among other things, the commissions he failed to include in the affidavit he provided at the time the original judgment of dissolution was entered. The court relied on the updated affidavit in entering the June 3, 2014 judgment.

equity in the marital home retained by the plaintiff, or the $60,000 loan the plaintiff took to make the advance payment to the defendant.[3] This appeal followed. See footnote 1 of this opinion.

On appeal, the defendant claims that the court erred in its method of dividing the parties' financial assets because it failed to take into consideration the $60,000 advance against the defendant's equitable distribution and the resultant transfer of equity in the marital residence to the plaintiff. In response, the plaintiff contends, in relevant part, that we should decline to review the defendant's claim because it is raised for the first time on appeal. We agree with the plaintiff that the defendant did not preserve his claim properly; nevertheless, pursuant to the factors set forth by our Supreme Court in *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 157–58, 84 A.3d 840 (2014), we will exercise our discretion to consider the claim on the merits. We affirm the judgment of the trial court.

"It is well settled that [o]ur case law and rules of practice generally limit [an appellate] court's review to issues that are distinctly raised at trial. . . . [O]nly in [the] most exceptional circumstances can and will this court consider a claim, constitutional or otherwise, that has not been raised and decided in the trial court. . . . The reason for the rule is obvious: to permit a party to raise a claim on appeal that has not been raised at trial—after it is too late for the trial court or the opposing party to address the claim—would encourage trial by

[3] Although the $120,000 of equity in the marital home and the $60,000 liability incurred by the plaintiff to make the advance payment to the defendant were listed on the plaintiff's affidavit, the $60,000 advance was not listed on the defendant's updated affidavit. The defendant maintains that he spent the $60,000 advance prior to the date of dissolution and, alternatively, that any remaining funds derived from the advance payment were retained in his bank account.

ambuscade, which is unfair to both the trial court and the opposing party." (Internal quotation marks omitted.) *Chief Disciplinary Counsel* v. *Rozbicki*, 326 Conn. 686, 695, 167 A.3d 351 (2017), cert. denied, U.S. , 138 S. Ct. 2583, 201 L. Ed. 2d 295 (2018); see also Practice Book § 60-5 ("court shall not be bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial").

"A claim must be so stated as to bring to the attention of the court the *precise* matter on which its decision is being asked." (Emphasis in original; internal quotation marks omitted.) *State* v. *Fay*, 326 Conn. 742, 766, 167 A.3d 897 (2017). "[T]he determination of whether a claim has been properly preserved will depend on a careful review of the record to ascertain whether the claim on appeal was articulated below with sufficient clarity to place the trial court [and the opposing party] on reasonable notice of that very same claim." (Internal quotation marks omitted.) *Eubanks* v. *Commissioner of Correction*, 329 Conn. 584, 598, 188 A.3d 702 (2018).

Our Supreme Court addressed this issue on circumstances substantially similar to those presented here in *Intercity Development, LLC* v. *Andrade*, 286 Conn. 177, 182–89, 942 A.2d 1028 (2008). In *Intercity Development, LLC*, the plaintiff sought to foreclose on a mechanic's lien it had recorded on the defendants' property in connection with its construction of a house on the property. Id., 181. The plaintiff sought a judgment in the amount of $49,933.19 based on the amount it claimed was still owed under the parties' contract less the cost of completing its work. Id., 186–87. The defendants did not challenge at the trial court the methodology of the plaintiff's calculation of damages, and the court relied on that calculation when it rendered judgment for the plaintiff in the amount of $49,933.19. Id., 188–89. On appeal to this court, the defendants argued that the amount of the judgment was in error because it was

not based on the value of the services rendered or the materials furnished. *Intercity Development, LLC* v. *Andrade*, 96 Conn. App. 608, 609, 901 A.2d 731 (2006), rev'd, 286 Conn. 177, 182–89, 942 A.2d 1028 (2008). This court agreed and reversed the judgment of the trial court. Id., 611–14. After granting certification, our Supreme Court reversed this court's decision because the challenge to the methodology used by the trial court to calculate the amount of damages was raised for the first time on appeal. Specifically, our Supreme Court held that "[b]ecause the defendants never contested the plaintiff's calculation of the lien amount at trial, the Appellate Court should have declined to review the defendants' claim of impropriety in the trial court's method of valuation of the lien." *Intercity Development, LLC* v. *Andrade*, supra, 188. The court also rejected the defendants' claim that the trial court's error arose only after trial, and therefore was the proper subject of their appeal, because the plaintiff's method of calculation was set forth in its complaint, trial testimony, and post-trial brief. Id., 188–89.

After a careful review of the record, we conclude, consistent with our Supreme Court's analysis in *Intercity Development, LLC*, that the defendant failed to raise distinctly the present claim before the trial court. The defendant did not argue before the trial court that it should take into account the advance payment, or any element of the parties' exchange regarding the marital home, when dividing the parties' remaining financial assets, and he did not proffer any calculation that included the advance payment. He certainly did not advocate to the trial court the argument that he has made on appeal. Although the defendant objected to the calculation as set forth in the plaintiff's February 26, 2014 brief, it was on the procedural ground that it improperly was included in a memorandum of law, not on the substantive ground he now advances on appeal.

When presented with the plaintiff's method of calculation, it became the defendant's responsibility to raise distinctly his dispute regarding the calculation before the trial court. See id., 188–89; *Histen* v. *Histen*, 98 Conn. App. 729, 736–37, 911 A.2d 348 (2006) (declining to review claim that trial court made erroneous calculation because claim was never made before trial court). Indeed, after the court issued its June 3, 2014 decision containing the purportedly erroneous division, the defendant did not file a motion seeking to reargue that decision; rather, the defendant took an appeal therefrom. See *Intercity Development, LLC* v. *Andrade*, supra, 189.

Despite the defendant's failure to raise his claim properly in the trial court, we exercise our discretion to reach the merits of the defendant's claim, which was briefed by both parties, because "the minimal requirements for review [have been] met and . . . the party who raised the unpreserved claim cannot prevail." (Citation omitted; emphasis omitted; footnote omitted.) *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, supra, 311 Conn. 157–58.[4] The record reveals that the defendant's claim is without merit. First, contrary to the defendant's claim, the court did take the $60,000 advance into consideration when it issued new financial orders. In the November 6, 2013 memorandum of decision, the court recognized that the plaintiff previously had paid the $60,000 advance to the defendant and, thus, ordered the defendant to transfer his title to the marital residence to the plaintiff. The defendant acknowledges this fact, yet, still claims on appeal that the court's division was unequal.

[4] "Reviewing an unpreserved claim when the party that raised the claim cannot prevail is appropriate because it cannot prejudice the opposing party and such review presumably would provide the party who failed to properly preserve the claim with a sense of finality that the party would not have if the court declined to review the claim." *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, supra, 311 Conn. 158 n.28.

In support of his claim, the defendant proffers several calculations that merge the court's division of the parties' remaining financial assets with the court's division of the marital home. Therein, the defendant misrepresents the plaintiff's financial assets by affording her an additional $60,000 of cash for the advance payment, which was not encumbered by a corresponding liability. The defendant's injection of unencumbered cash is unsupported by the record because there is no indication that the plaintiff readily had $60,000 of cash available to pay to the defendant. To the contrary, the plaintiff's testimony and her financial affidavit, which represent the only evidence in the record relating to this issue, demonstrate that she obtained the $60,000 by way of a personal loan from a friend. The defendant's calculations, however, fail to account for or even consider this evidence. Instead, the defendant's argument is based on pure conjecture as to the source of the advance payment to the defendant. Thus, the premise of the defendant's argument—that the plaintiff received a $60,000 net gain as a result of the transfer of assets related to the marital home—finds no support in the record, and is, in fact, contradicted by it. Therefore, we are unpersuaded by the defendant's claim.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* ANTOINE GREENE
(AC 39995)

DiPentima, C. J., and Moll and Bishop, Js.

Syllabus

Convicted of the crime of manslaughter in the first degree, the defendant appealed to this court. The defendant originally was charged with the crime of murder in connection with the death of the victim. Following a hearing on probable cause, the trial court concluded that the state

had failed to establish that the defendant intentionally killed the victim and, therefore, found a lack of probable cause on the charge of murder, and the state filed an amended information charging the defendant with manslaughter in the first degree. The defendant filed a motion to dismiss the amended information, which the trial court denied. Following a trial to the jury, the defendant twice moved for a judgment of acquittal, which the court denied, and the jury found the defendant guilty of manslaughter in the first degree. Thereafter, the defendant filed a motion for a new trial, which the court denied, and the defendant appealed to this court. *Held:*

1. Contrary to the defendant's claim, the trial court's finding of a lack of probable cause on the murder charge did not deprive it of jurisdiction over the defendant with respect to the subsequent manslaughter charge in the amended information; although that court initially found that the state had not established probable cause for murder and the court did not make an express finding at the probable cause hearing of probable cause for the manslaughter charge, it could reasonably be inferred from the court's comments that it implicitly found that the state had established probable cause for manslaughter, as the court, at the probable cause hearing, inquired into whether the state intended to file an amended information and declined the defendant's request that his bail be substantially lowered, and the court subsequently made its finding of probable cause for manslaughter explicit while ruling on the defendant's motion to dismiss when it clarified that, as a result of the hearing on probable cause, it had found probable cause for the state to prosecute the defendant for the offense of manslaughter.

2. The defendant could not prevail on his claim that the evidence was insufficient to support a finding of probable cause that he was guilty of manslaughter in the first degree, which was based on his claim that the evidence presented at the probable cause hearing concerning the nature of the victim's injuries pointed only to an intent to kill and not merely an intent to cause serious physical injury: the trial court's initial finding of no probable cause for the specific intent to cause death did not preclude it from finding probable cause for the intent required for manslaughter, namely, to cause serious physical injury, and the facts in the record, which showed that the victim sustained sharp force injuries to his neck, that the defendant and the victim were alone in an apartment at the time of the victim's death, that there was no way for intruders to enter the apartment undetected because the entrances to the apartment were blocked, that DNA evidence linked the victim and the defendant to a knife found in the apartment, and that there were no weapons found near the victim's body or even in the same room as the victim, which effectively ruled out suicide, were sufficient to establish probable cause beyond mere suspicion that the defendant was the perpetrator and that he intended to cause, at the very least, serious physical injury

to the victim; accordingly, the trial court properly determined that there was sufficient probable cause to continue with the manslaughter charge.

3. The evidence was sufficient to sustain the defendant's conviction of manslaughter in the first degree, there having been sufficient evidence from which the jury reasonably could have inferred that the defendant intended to cause serious physical injury to the victim; the evidence presented at trial established that only the defendant and the victim were at the apartment at the time of the victim's death, the circumstances of the victim's death made it clear that the victim did not take his own life, DNA evidence linked the victim and the defendant to a knife recovered from the apartment, and the nature of the victim's wounds supported the finding that an individual acted with the intent to cause, at the very least, serious physical injury to the victim.

4. The defendant's claim that the trial court abused its discretion by denying his motion for a new trial was unavailing, there having been sufficient evidence for the jury reasonably to have found the defendant guilty of manslaughter in the first degree.

Argued October 15—officially released December 11, 2018

Procedural History

Substitute information charging the defendant with the crime of manslaughter in the first degree, brought to the Superior Court in the judicial district of New Britain, where the court, *Alander*, *J.*, denied the defendant's motion to dismiss; thereafter, the matter was tried to the jury before *Keegan*, *J.*; subsequently, the court, *Keegan*, *J.*, denied the defendant's motions for judgment of acquittal; verdict of guilty; thereafter the court, *Keegan*, *J.*, denied the defendant's motion for a new trial and rendered judgment in accordance with the verdict, from which the defendant appealed to this court. *Affirmed.*

Matthew D. Dyer, with whom was *Kristen Mostowy*, for the appellant (defendant).

James A. Killen, senior assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *Paul N. Rotiroti*, supervisory assistant state's attorney, for the appellee (state).

Opinion

BISHOP, J. The defendant, Antoine Greene, appeals from the judgment of conviction, rendered after a jury trial, of one count of manslaughter in the first degree in violation of General Statutes § 53a-55 (a) (1).[1] The defendant claims that the trial court erred by (1) denying his motion to dismiss after the court's finding of no probable cause for the state's initial charge of murder in violation of General Statutes § 53a-54a,[2] and (2) denying his motions for a judgment of acquittal and for a new trial on the basis that the evidence was insufficient to support a finding that he intended to cause serious physical injury to the victim.[3] We affirm the judgment of conviction.

The following procedural history and facts, including what the jury reasonably could have found from the evidence adduced at trial, are relevant to our consideration of the issues at hand. On March 21, 2015, the defendant was living with his mother, Jackie Greene, and the victim, William Greene, who was his father, in New Britain in the first floor apartment of a three-family house. The defendant's mother departed the home some time prior to 6 a.m., leaving the victim sleeping in the

[1] General Statutes § 53a-55 (a) provides in relevant part: "A person is guilty of manslaughter in the first degree when: (1) [w]ith intent to cause serious physical injury to another person, he causes the death of such person or of a third person . . . ."

[2] General Statutes § 53a-54a provides in relevant part: "A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person or of a third person or causes a suicide by force, duress or deception . . . ."

[3] The defendant's principal brief presents four claims on appeal. Because the claims regarding the defendant's motion to dismiss filed after the initial probable cause hearing implicate jurisdiction, we address these issues together. See part I of this opinion. We then address, in turn, the defendant's remaining claims regarding the sufficiency of the evidence for his conviction of manslaughter. The sufficiency claim pertains to the defendant's motions for a judgment of acquittal and his motion for a new trial. See part II of this opinion.

bedroom and the defendant awake in the living room. At approximately 8:11 a.m., New Britain police received an emergency call from the defendant stating that the victim was lying on the floor not breathing and that there was blood all over the carpet. At 8:13 a.m., New Britain police arrived at the apartment, followed shortly thereafter by emergency medical personnel.

When the police arrived they noticed a German shepherd on the back porch that they asked the defendant to restrain. The defendant reported that he and the victim were the only occupants in the apartment. Upon entering the apartment, the police found the victim lying face down on the living room floor in a pool of blood. The police did not locate any signs of forced entry. After securing the apartment, police allowed medical personnel to enter and tend to the victim. In the course of rendering medical assistance, the medical personnel turned over the victim's body and observed blood steaming from where the body had been lying, which indicated to the medical personnel that the victim's injuries were recent. On further examination, the medical personnel noticed an approximately six inch wound to the victim's neck. Detecting no pulse, the medical personnel presumed the victim's time of death to be approximately 8:27 a.m. While the medical personnel were tending to the victim, the police took multiple photographs and gathered evidence, which included seizing several knives from the kitchen.

While being questioned at the scene, the defendant indicated that he had not heard anyone in the apartment between the time of his mother's departure and his discovery of the victim lying on the living room floor. The police did not observe any blood on the defendant or his clothing. They described the defendant's demeanor as calm and not upset. The defendant agreed to accompany police back to the New Britain Police Department, where he was interviewed for several

hours and given the opportunity to speak with his mother and his uncle, Scott Davis.

The medical examiner who conducted an autopsy on the victim on March 22, 2015, noted cutting injuries to the victim's neck, as well as a cut to his left thumb. He opined that the injuries were consistent with having been inflicted by sharp force. The examiner testified that the victim's sharp force injuries were consistent with injuries caused by a knife. The examiner determined, as well, that the victim's right neck sharp force injury had severed the victim's carotid artery. He described the wound to the right side of the neck as a cut, due to the fact that the injury length on the skin exceeded the depth into the skin. The left side neck injury was a separate two inch cut. Finally, the medical examiner testified that the injury to the thumb was consistent with a defensive wound.

After the defendant's arrest on March 22, 2015, the state charged the defendant, by way of information filed on March 23, 2015, with murder in violation of § 53a-54a. Pursuant to General Statutes § 54-46a,[4] a probable cause hearing for the murder charge was held on June 8, June 9, and July 14, 2015. During the court's oral ruling on probable cause for the murder charge on July 21, 2015, the court, *Alander*, *J.*, indicated that it found

[4] General Statutes § 54-46a (a) provides in relevant part that "[n]o person charged by the state . . . shall be put to plea or held to trial for any crime punishable by death, life imprisonment without the possibility of release or life imprisonment unless the court at a preliminary hearing determines there is probable cause to believe that the offense charged has been committed and that the accused person has committed it. . . ." As such, a court obtains jurisdiction over any crime punishable by death, life imprisonment without the possibility of release, or life imprisonment upon a finding of probable cause for that crime. See *State* v. *Guess*, 44 Conn. App. 790, 794, 692 A.2d 849 (1997) ("[w]e have held . . . that where evidence offered at a probable cause hearing is insufficient to establish probable cause, the trial court lacks jurisdiction over the defendant's person" [internal quotation marks omitted]), aff'd, 244 Conn. 761, 715 A.2d 643 (1998).

incriminating the fact that the defendant and the victim were alone in the house at the time of the victim's death, that there were no signs of forced entry or any entry by a third party, that the front door was blocked and the back door was locked and guarded by a dog, that there were no weapons found near the victim or in the room where the victim was found, that the victim had not been deceased for very long when police and medical personnel arrived, that the victim had defensive wounds, and that DNA testing could not eliminate the victim as a contributor to blood found on a steak knife retrieved from the kitchen. The court found several facts to be exculpatory, including the fact that there was no blood observed on the defendant's body, hands, or clothes, that there were no signs of a struggle in the home, and that, because medical personnel opined that the victim was dead for less than one-half hour prior to being declared dead at 8:27 a.m. and the defendant's 911 call was at 8:11 a.m., this timeline gave the defendant very little time to change his clothes, wash his hands and body, clean the knife, and remove the knife from the scene before calling the police.

The court discounted testimony from Agustin Morales-Rojas, who testified that, while he and the defendant were incarcerated together, the defendant had told him that he had killed the victim. Additionally, the court did not credit the testimony of the defendant's uncle that the defendant had been under the influence of drugs on the day of the homicide. On the basis of the evidence adduced at the probable cause hearing, the court found that the state had failed to establish that the defendant intentionally killed the victim and, thus, concluded that the state had not established probable cause to charge the defendant with murder. Following the court's decision, the state, that same day and pursuant to Practice Book § 36-17, moved to file an amended information charging the defendant with

manslaughter in the first degree in violation of General Statutes § 53a-55 (a) (1).

On August 18, 2015, the defendant filed a pretrial motion to dismiss the substitute information pursuant to General Statutes § 54-56[5] and Practice Book § 41-8 (1), (2), (4), and (5).[6] The defendant claimed that the court lacked jurisdiction over him in the absence of a new warrant premised on a finding of probable cause by an independent magistrate. The defendant argued, as well, that there was insufficient evidence for substituting a charge of manslaughter for murder. The court, *Alander*, *J.*, denied the motion to dismiss on March 11, 2016. In doing so, the court clarified its earlier ruling on probable cause for the murder charge, stating that it did not find that there was insufficient evidence to establish probable cause that the defendant was the perpetrator of a crime. Rather, looking to the evidence before it, as well as DNA evidence linking both the victim and the defendant to a knife, the court stated that it had found that the state had established probable cause to charge the defendant with manslaughter.

[5] General Statutes § 54-56 provides: "All courts having jurisdiction of criminal cases shall at all times have jurisdiction and control over informations and criminal cases pending therein and may, at any time, upon motion by the defendant, dismiss any information and order such defendant discharged if, in the opinion of the court, there is not sufficient evidence or cause to justify the bringing or continuing of such information or the placing of the person accused therein on trial."

[6] Practice Book § 41-8 provides in relevant part: "The following defenses or objections, if capable of determination without a trial of the general issue, shall, if made prior to trial, be raised by a motion to dismiss the information:

"(1) Defects in the institution of the prosecution including any grand jury proceedings;

"(2) Defects in the information including failure to charge an offense;

* * *

"(4) Absence of jurisdiction of the court over the defendant or the subject matter;

"(5) Insufficiency of evidence or cause to justify the bringing or continuing of such information or the placing of the defendant on trial . . . ."

During the defendant's jury trial on the manslaughter charge in March and April, 2016, the state presented evidence that several knives seized from the kitchen of the apartment were examined by the state forensic laboratory for possible biological evidence. One steak-type knife with a serrated cutting edge and a wooden handle tested positive for the presence of biological material in two areas. The biological material was tested to determine its source by DNA analysis, and the result was then compared to DNA samples obtained from both the victim and the defendant using standard DNA typing procedures. The material found on the blade of the knife was consistent with the DNA of the victim, and the material found on the handle of the knife was a mixture of DNA from which neither the defendant nor the victim could be eliminated as contributors.

At the close of the state's case-in-chief, and again at the close of the defendant's case-in-chief, the defendant moved orally for a judgment of acquittal. Both motions were heard and denied by the court, *Keegan*, *J*. On April 7, 2016, a jury found the defendant guilty of manslaughter in the first degree in violation of § 53a-55 (a) (1). The defendant subsequently filed a motion for a new trial, dated April 11, 2016, which the court denied on June 2, 2016. This appeal followed.

I

We turn first to the defendant's claims that the court erred in denying his motion to dismiss because (1) the court's initial finding of no probable cause for murder deprived the court of jurisdiction over him for both the murder and the subsequent manslaughter charges, and (2) there was insufficient evidence of probable cause for the state to continue its prosecution of the manslaughter charge. We disagree.

A

The defendant's claim that the court lacked jurisdiction over him for the manslaughter charge after having

found no probable cause for the murder charge is not legally correct. This court has held that a trial court's finding of "a lack of probable cause to charge the defendant with murder [does not preclude] the state from proceeding to trial against the defendant on the lesser included offense of manslaughter in the first degree upon information." *State* v. *Timmons*, 7 Conn. App. 457, 462, 509 A.2d 64 (1986), appeal dismissed, 204 Conn. 120, 526 A.2d 1340 (1987). In *Timmons*, this court determined that the state had not established probable cause for murder because the defendant had been deprived of his constitutional right to a probable cause hearing. See id., 461–62. This court held, "however, that the [trial] court had proper jurisdiction over the charge of manslaughter in the first degree. The state was entitled to prosecute the defendant for manslaughter solely on the basis of the original information charging murder filed prior to his arraignment upon his arrest on a warrant that issued after a magisterial finding of probable cause. While the information specifically charged the defendant with murder, it served also to give him notice of all lesser included charges, such as manslaughter in the first degree of which he was ultimately convicted. Jurisdiction of his person was properly obtained, and retained for his trial and conviction on the charge of manslaughter in the first degree." Id., 463.

Similarly, in the case at hand, although the court initially found that the state had not established probable cause for murder, the court implicitly found that the state had established probable cause for manslaughter. Although the court did not make an express finding that the evidence presented at the probable cause hearing established probable cause that the defendant had committed the offense of manslaughter, that finding reasonably can be inferred from the court's comments.[7] In

[7] The court, *Alander, J.*, stated the following at the probable cause hearing: "[T]he elimination of alternative explanation for the victim's death *certainly leads me to suspect* that the defendant is responsible for the death

conjunction with issuing its ruling on probable cause, the court inquired into whether the state intended to file an amended information and declined the defendant's request that his bail be substantially lowered.[8] Additionally, the court later made its finding of probable cause for manslaughter explicit while ruling on the defendant's motion to dismiss.

The state, therefore, was entitled to prosecute the defendant for manslaughter on the basis of an amended information filed at the conclusion of the hearing on probable cause. See id. Practice Book § 36-17 provides in relevant part that "[i]f the trial has not commenced, the prosecuting authority may amend the information, or add additional counts, or file a substitute information

of [the victim] and it may even rise to the level of a strong possibility that the defendant intentionally murdered [the victim] but there's not enough [evidence] to say that the defendant must have been the perpetrator because we have no other explanation for [the victim's] death.

"The state must provide evidence that establishes the defendant *intentionally caused the death* of [the victim]. It must be more than mere suspicion. It must be enough to warrant a person of reasonable caution to believe that the defendant *intentionally killed* [the victim]. That standard was not met in this case *with respect to the charge of murder*. So I obviously find that the state has not established probable cause to charge [the defendant] *with the murder* of [the victim]." (Emphasis added).

[8] The court, *Alander, J.*, had the following exchanges with the parties at the probable cause hearing:

"The Court: Do you have [an] amended information?

"[The Prosecutor]: Yes, sir, I do.

"The Court: Okay. You want to file that?

"[The Prosecutor]: At this time, with the court's permission, I will be filing a substitute information, Your Honor, charging [the defendant] with manslaughter in the first degree.

"The Court: Okay. Now, there's been a bond set I assume for the murder charge. I don't know whether there needs to be a new bond set now, whether you're seeking a new bond. . . .

* * *

"The Court: I believe some reduction is warranted in light of the fact that the charge he's now facing is manslaughter in the [first] degree as opposed to murder but, frankly, I don't think a significant reduction is warranted because the charges he faces are still serious and so I'm going to reduce that bond to [$70,000] cash. . . ."

. . . .” Additionally, “[b]efore the commencement of trial, a prosecutor has broad authority to amend an information . . . .” *State* v. *Ayala*, 324 Conn. 571, 585, 153 A.3d 588 (2017). As noted, the court clarified that as a result of the hearing on probable cause, it had found probable cause for the state to prosecute the defendant for the offense of manslaughter. Accordingly, the court's initial determination of no probable cause for the murder charge did not preclude it from considering the subsequent manslaughter charge set forth in the state's amended information filed after the probable cause hearing.

B

The defendant claims, as well, that the circumstantial evidence presented at the probable cause hearing concerning the nature of the victim's physical injuries points only to an intent to kill and not merely an intent to cause serious physical injury. Thus, the defendant asserts that the court should have granted his motion to dismiss because there had been insufficient evidence that he had intended only to cause serious physical injury. We are unpersuaded.

“When assessing whether the state has sufficient evidence to show probable cause to support continuing prosecution [following a motion to dismiss under § 54-56], the court must view the proffered proof, and draw reasonable inferences from that proof, in the light most favorable to the state.” (Internal quotation marks omitted.) *State* v. *Pelella*, 327 Conn. 1, 19, 170 A.3d 647 (2017). Furthermore, “[i]n making a finding of probable cause, the trial court must determine whether the evidence offered would warrant a person of reasonable caution to believe that the accused had committed the charged offense. . . . The quantum of evidence necessary to establish probable cause exceeds mere suspicion, but is substantially less than that required for

conviction. Our cases have made clear [t]hat there is often a fine line between mere suspicion and probable cause, and [t]hat line necessarily must be drawn by an act of judgment formed in light of the particular situation and with account taken of all the circumstances." (Internal quotation marks omitted.) *State* v. *Guess*, 44 Conn. App. 790, 794, 692 A.2d 849 (1997), aff'd, 244 Conn. 761, 715 A.2d 643 (1998).

It is important to note that the intent to cause death and the intent to cause serious physical injury are not mutually exclusive as a matter of law. See *State* v. *Williams*, 237 Conn. 748, 753, 679 A.2d 920 (1996). In *Williams*, although the court acknowledged that attempted murder and assault in the first degree each "require the same mental state, namely, a specific intent . . . the particular intents required to [commit either offense] are not the same. For each intent, a distinct conscious objective is sought. A verdict of guilty of attempted murder requires a finding of the specific intent to cause death. . . . A verdict of guilty of assault in the first degree . . . in contrast, requires a finding of the specific intent to cause serious physical injury. . . . We can perceive no logical reason to preclude, as a matter of law, the simultaneous possession of these intents by a defendant toward the same victim. . . . A defendant can intend both to cause the victim a serious physical injury and to kill the victim. No temporal separation is required for the intent, but obviously one is required for the result." (Citations omitted; internal quotation marks omitted.) Id., 754–55.

As in *State* v. *Timmons*, supra, 7 Conn. App. 462, the trial court's initial finding of no probable cause for the specific intent to cause death in the present case did not preclude it from finding probable cause for the similar, yet separate, intent required for manslaughter in the first degree. Thus, the court was free to make a

separate determination of probable cause for manslaughter.

The defendant nonetheless argues that the injuries sustained by the victim, namely, the sharp force injuries, "substantial enough to sever the trachea and both carotid arteries without anything more can only indicate intent to kill" and, thus, no reasonable fact finder could find that the defendant had only the intent to cause serious physical injury. (Emphasis omitted.) As we have indicated, however, the absence of proof of an intent to kill does not preclude, as a matter of law, the finding of an intent to cause serious physical injury. In support of his argument, the defendant relies on our Supreme Court's decision in *State* v. *Rasmussen*, 225 Conn. 55, 72, 621 A.2d 728 (1993), in which the court determined that "the cumulative effect of the evidence in the record compelled the jury . . . to find that [the defendant] had intended to kill his wife." Specifically, the court stated that "[i]t requires nothing more than common sense to conclude that slashes to the neck of a conscious victim that severed the victim's jugular vein, trachea, larynx and esophagus and the impalement of the victim by a spear are evidence of an intent to kill rather than mere recklessness or intent to injure seriously." Id. In *Rasmussen*, the defendant argued that he should have been charged on the lesser included charge of manslaughter, as opposed to murder. See id., 68. The court, however, found that neither the state nor the defendant had introduced sufficient evidence to justify a finding of guilt of the lesser included offense.[9] Id., 72–73.

The case before us is not controlled by *Rasmussen*. Unlike in *Rasmussen*, where the defendant argued that

[9] In *Rasmussen*, the court determined "that in order to meet the third prong of [*State* v. *Whistnant*, 179 Conn. 576, 588, 427 A.2d 414 (1980)], there must be sufficient evidence, introduced by either the state or the defendant . . . to justify a finding of guilt of the lesser offense." *State* v. *Rasmussen*, supra, 225 Conn. 67–68.

the evidence presented entitled him to a lesser included charge of manslaughter, the defendant in the present case argues that a lack of evidence of an intent to murder precludes a subsequent charge of manslaughter in light of the victim's injuries. Also, in ruling on the defendant's motion to dismiss in the present case, the court indicated that it had found sufficient evidence establishing probable cause that the defendant was the perpetrator of the crime notwithstanding the severe nature of the injuries sustained by the victim. The court considered the facts that no one else was in the apartment during the time between when the defendant's mother departed and the victim's death, there was no way for intruders to enter the apartment undetected because the front door of the apartment was blocked and the back door was locked and guarded by a dog, there was DNA evidence linking the victim and the defendant to a knife, and there were no weapons found near the victim's body or even in the same room as the victim, thus, effectively ruling out suicide. These findings are supported by the record and, taken together, are more than enough to establish probable cause beyond mere suspicion that the defendant was the perpetrator and that he had intended to cause serious physical injury to the victim. See *State* v. *Guess*, supra, 44 Conn. App. 794. Accordingly, we conclude that the court properly determined that there was sufficient probable cause to continue with the manslaughter charge.

II

We next turn to the defendant's claims that the trial court erred in denying his motions for a judgment of acquittal and his motion for a new trial because there was insufficient evidence for a jury to find beyond a reasonable doubt that he intended to cause serious physical injury to the victim. We disagree.

A

"A motion for judgment of acquittal must be granted if the evidence would not reasonably permit a guilty finding. . . . In ruling on a motion for judgment of acquittal, the trial court must determine whether a rational trier of fact could find the crime proven beyond a reasonable doubt." (Citation omitted; footnote omitted.) *State* v. *Nival*, 42 Conn. App. 307, 308–309, 678 A.2d 1008 (1996). Additionally, "[i]n reviewing the sufficiency of the evidence to support a criminal conviction we apply a two-part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [finder of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . .

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

"Moreover, it does not diminish the probative force of the evidence that it consists, in whole or in part, of evidence that is circumstantial rather than direct. . . . It is not one fact, but the cumulative impact of a multitude of facts which establishes guilt in a case involving substantial circumstantial evidence. . . . In evaluating evidence, the [finder] of fact is not required to accept

as dispositive those inferences that are consistent with the defendant's innocence. . . . The [finder of fact] may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical. . . .

"Finally, [a]s we have often noted, proof beyond a reasonable doubt does not mean proof beyond all possible doubt . . . nor does proof beyond a reasonable doubt require acceptance of every hypothesis of innocence posed by the defendant that, had it been found credible by the [finder of fact], would have resulted in an acquittal. . . . On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the [finder of fact's] verdict of guilty." (Internal quotation marks omitted.) *State* v. *Franklin*, 175 Conn. App. 22, 30–31, 166 A.3d 24, cert. denied, 327 Conn. 961, 172 A.3d 801 (2017).

"To convict the defendant of manslaughter in the first degree, the state was required to prove beyond a reasonable doubt that (1) the defendant intended to cause serious physical injury to the victim and (2) he caused [the victim's] death. . . . The intent to cause serious physical injury required for a conviction of manslaughter in the first degree under " 53a-55 (a) (1), by definition, require[s] a jury's finding that the defendant caused a physical injury which creates a substantial risk of death, or which causes serious disfigurement, serious impairment of health or serious loss or impairment of the function of a bodily organ. . . . A person's intent may be inferred from his conduct, as well as the surrounding circumstances, and is an issue for the trier of fact to decide. . . . [A] factfinder may infer an intent to cause serious physical injury from circumstantial evidence such as the type of weapon used, the manner in which it was used, the type of wound inflicted and

the events leading up to and immediately following the incident." (Citations omitted; internal quotation marks omitted.) *State* v. *James*, 54 Conn. App. 26, 30–31, 734 A.2d 1012, cert. denied, 251 Conn. 903, 738 A.2d 1092 (1999).

In the present case, there was sufficient evidence from which the jury reasonably could have inferred that the defendant intended to cause serious physical injury. The evidence presented at trial established that only the defendant and the victim were at their home at the time of the victim's death, and the circumstances of the victim's death made it clear that the victim did not take his own life. Additionally, the nature of the victim's wounds supported the finding that an individual acted with the intent to cause, at the very least, serious physical injury to the victim. Moreover, it was determined that the victim had died shortly after emergency personnel arrived, and that DNA evidence linked the victim and the defendant to a knife recovered from the home. Accordingly, the evidence was sufficient to sustain a conviction of manslaughter in the first degree.

B

"[O]ur standard of review of the trial court's denial of a motion for a new trial is limited to a determination of whether, by such denial, the court abused its discretion. . . . As a reviewing court considering the trial court's decision granting or denying a motion for a new trial, we must be mindful of the trial judge's superior opportunity to assess the proceedings over which he or she has personally presided." (Citations omitted; internal quotation marks omitted.) *State* v. *Roberson*, 62 Conn. App. 422, 425–26, 771 A.2d 224 (2001). "In determining whether there has been an abuse of discretion, every reasonable presumption should be given to the correctness of the [trial] court's ruling." *Palkimas* v. *Lavine*, 71 Conn. App. 537, 544, 803 A.2d 329, cert. denied, 262 Conn. 919, 812 A.2d 863 (2002).

Indeed, "[t]he trial court should not set [aside] a verdict . . . where there [is] some evidence upon which the jury [reasonably could have] based its verdict, but [the court should set aside the verdict] where the manifest injustice of the verdict is so plain and palpable as clearly to denote that some mistake was made by the jury in the application of legal principles, or as to justify the suspicion that [the jurors] or some of them were influenced by prejudice, corruption or partiality." (Internal quotation marks omitted.) *State* v. *McCarthy*, 105 Conn. App. 596, 601, 939 A.2d 1195, cert. denied, 286 Conn. 913, 944 A.2d 983 (2008).

In the present case, the defendant argues that because "the only evidence presented at trial leads to the inescapable conclusion that the defendant intended to kill [the victim]," the trial court abused its discretion in denying the defendant's motion for a new trial. Because we hold that there was sufficient evidence for the jury reasonably to find the defendant guilty of manslaughter in the first degree in violation of § 53a-55 (a) (1), we likewise reject the defendant's claim that the trial court's denial of his motion for a new trial was a manifest abuse of its discretion.

The judgment is affirmed.

In this opinion the other judges concurred.

MICHAEL J. FIONDELLA, JR., TRUSTEE, ET AL. *v.* CITY OF MERIDEN ET AL.
(AC 40813)

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

Syllabus

The plaintiffs, owners of certain real property in a subdivision in Meriden, brought this action against the defendants A and H, owners of real property in the subdivision, and their attorney, M, alleging claims for,

inter alia, fraud and civil conspiracy, and seeking injunctive and declaratory relief, as well as monetary damages. In 2004, A and H, represented by M, had brought a declaratory judgment action asserting adverse possession of certain land in the subdivision that comprised portions of a driveway that was adjacent to their home but was located on abutting land. The trial court rendered judgment in favor of A and H in that action, finding that they had acquired title to the disputed portions of the driveway by way of adverse possession, and this court affirmed the trial court's judgment. Thereafter, the plaintiffs, certain abutting landowners in the subdivision, commenced the present action, claiming that the defendants had failed to give them notice of the declaratory judgment action, as required by the applicable rule of practice (§ 17-56 [b]), and conspired and schemed to conceal the declaratory judgment action from the plaintiffs. The defendants subsequently filed a motion to dismiss for lack of subject matter jurisdiction, claiming that the alleged wrongful conduct was shielded by the litigation privilege. The trial court granted the motion to dismiss and rendered judgment thereon, from which the plaintiffs appealed to this court. *Held* that the trial court improperly granted the defendants' motion to dismiss and applied the litigation privilege in favor of the defendants to conclude that it lacked subject matter jurisdiction; because the primary allegation of fraud in the plaintiffs' complaint concerned the defendants' intentional and wrongful conduct in depriving the plaintiffs of notice of the declaratory action and concealing that action, which did not occur during a judicial proceeding or involve the defendants' conduct or statements made during a judicial proceeding, the defendants were not shielded by the litigation privilege, and, therefore, the trial court was not without subject matter jurisdiction.

Argued October 9—officially released December 11, 2018

Procedural History

Action seeking damages for, inter alia, fraud, and seeking declaratory and injunctive relief, brought to the Superior Court in the judicial district of New Haven at Meriden, where the court, *Hon. John F. Cronan*, judge trial referee, granted the motion to dismiss filed by the defendant Adele G. Eberhart et al., and rendered judgment thereon, from which the plaintiffs appealed to this court. *Reversed; further proceedings.*

Dominic J. Aprile, for the appellants (plaintiffs).

Vincent T. McManus, Jr., for the appellees (defendant Adele G. Eberhart et al.).

LAVINE, J. The plaintiffs, Michael J. Fiondella, Jr., trustee of the Jo-An Carabetta 1983 Irrevocable Trust (trust), and The Meriden Homestead, LLC, appeal from the judgment of the trial court dismissing the counts of the complaint alleged against the defendants, Adele G. Eberhart, Harry S. Eberhart, and Vincent T. McManus, Jr.[1] On appeal, the plaintiffs claim that the court improperly (1) applied the litigation privilege in favor of the defendants to conclude that it lacked subject matter jurisdiction and (2) construed the fraud and civil conspiracy allegations against the defendants. We agree that the court improperly applied the litigation privilege to determine that it lacked subject matter jurisdiction. We, therefore, reverse the judgment of the trial court.[2]

The historical facts underlying the present appeal were set out in *Eberhart* v. *Meadow Haven, Inc.*, 111 Conn. App. 636, 960 A.2d 1083 (2008), a declaratory judgment action in which the Eberharts sought to obtain ownership of certain land by means of adverse possession. Id., 638. The land at issue lies under a driveway adjacent to their home in the Shaker Court subdivision (subdivision) in Meriden. Id. On October 5, 1966, Meadow Haven, Inc. (Meadow Haven), conveyed lot seven in the subdivision to the Eberharts. Id. Lot seven is one of thirty lots in the subdivision and sits on the corner of Sandy Lane, a public way, and Shaker Court,

[1] McManus, an attorney, represented the Eberharts in the underlying declaratory judgment action and in the present case. The city of Meriden, James Anderson, former city zoning enforcement officer, and Dominick Caruso, former city planner, also were served as defendants. They are not parties to this appeal, and we refer to them as the city defendants in this opinion. We refer to Adele G. Eberhart and Harry S. Eberhart jointly as the Eberharts where necessary, and to the Eberharts and McManus collectively as the defendants.

[2] Because we conclude that the trial court improperly dismissed the counts against the defendants for lack of subject matter jurisdiction, we do not reach the plaintiffs' second claim.

an unpaved right-of-way. Id. When the Eberharts moved into their home on lot seven, they used the driveway that Meadow Haven had installed to reach Sandy Lane. Id.

The Eberharts later learned that the driveway was not located on lot seven but on an abutting lot. Id., 639. The Eberharts informed Joseph Carabetta, a Meadow Haven principal, who had the land surveyed. He then resubdivided the abutting lot to move the Eberharts' property line to encompass the driveway. A deed reflecting the enlargement of lot seven, however, never was filed in the land records. Id. The revised subdivision, therefore, never went into effect, but the Eberharts relied on Carabetta's representations that the "problem had been fixed." Id., 640. The Eberharts made exclusive use of the driveway, planted a hedge, installed light posts and planters, and maintained the driveway and lawn over the disputed area. Id.

In 2004, the Eberharts commenced an action seeking a declaratory judgment that they were the legal owners of the land under the driveway by operation of the doctrine of adverse possession. Following a trial, the court, *Jones*, *J.*, found by clear and convincing evidence that the Eberharts were the owners of the subject parcels by adverse possession and rendered a declaratory judgment in their favor. Id., 638–39. Meadow Haven appealed, and this court affirmed the declaratory judgment. Id., 649.

On July 7, 2016, the plaintiffs commenced the present action alleging claims for fraud, slander of title, and civil conspiracy. Specifically, the plaintiffs alleged that they were owners of certain lots in the subdivision, that the defendants failed to give them notice of the declaratory judgment action, and that they only recently had learned of the declaratory judgment. On December 5, 2016, the defendants filed a motion to dismiss the

present action on the ground that the court lacked subject matter jurisdiction because the litigation privilege shielded them from the claims alleged by the plaintiffs.[3] The plaintiffs filed an opposition to the motion to dismiss, arguing that the defendants were not protected by the litigation privilege because the allegations of the complaint were not predicated on statements made in the course of a declaratory judgment action but on the defendants' intentional conduct to conspire and conceal the declaratory judgment action from them.

The motion to dismiss was heard at short calendar on May 25, 2017. The court, *Hon. John F. Cronan*, judge trial referee, issued a memorandum of decision on August 18, 2017, granting the defendants' motion on the ground that the litigation privilege shielded the defendants from the plaintiffs' claims.[4] The plaintiffs

[3] The motion to dismiss addressed the counts alleged against the defendants, namely, counts one, two, six, seven and eight. The motion to dismiss did not address the counts alleged against the city defendants.

[4] In its memorandum of decision, the trial court stated that its decision was guided by *MacDermid, Inc.* v. *Leonetti*, 310 Conn. 616, 629–30, 79 A.3d 60 (2013) (whether and what form of immunity applies in given case is matter of policy that requires balancing of interests), and *Rioux* v. *Barry*, 283 Conn. 338, 350–51, 927 A.2d 304 (2007) (same). The court noted that the plaintiffs did not allege that the defendants had abused the judicial system and pursued litigation for an unlawful or improper purpose. In other words, the plaintiffs were not challenging the purpose of the declaratory judgment action. See *Varga* v. *Pareles*, 137 Conn. 663, 667, 81 A.2d 112 (1951) (abuse of process lies against any person using legal process against another in improper manner or to accomplish purpose for which it was not designed).

The court, however, stated that the plaintiffs' claim occurred during the course of the judicial proceedings and that the defendants' actions were shielded by the litigation privilege. The court found that the plaintiffs' slander of title claim against the defendants arose from the testimony Anderson gave at trial and that those statements were privileged. With respect to the plaintiffs' claims of civil conspiracy, the court stated that there is no independent cause of action for civil conspiracy and that to state a cause of action, a claim of civil conspiracy must be joined with allegations of a substantive tort. See *Larobina* v. *McDonald*, 274 Conn. 394, 408, 876 A.2d 522 (2005). The court reasoned that the plaintiffs' slander of title claims were the underlying actions on which civil conspiracy was based. Because

appealed, claiming, in essence, that the court improperly granted the defendants' motion to dismiss pursuant to the litigation privilege. We agree.

"The standard of review for a court's decision on a motion to dismiss . . . is well settled. A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . [O]ur review of the court's ultimate legal conclusion and resulting [determination] of the motion to dismiss will be de novo. . . . When a . . . court decides a jurisdictional question raised by a pretrial motion to dismiss, it must consider the allegations of the complaint in their most favorable light. . . . In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. . . . The motion to dismiss . . . admits all facts, which are well pleaded, invokes the existing record and must be decided upon that alone. . . . In undertaking this review, we are mindful of the well established notion that, in determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged." (Citations omitted; internal quotation marks omitted.) *Dayner* v. *Archdiocese of Hartford*, 301 Conn. 759, 774, 23 A.3d 1192 (2011).

the defendants were shielded by the litigation privilege with respect to the slander of title claim, the court concluded that there was no underlying tort to support the civil conspiracy claims.

We note that in ruling on a motion to dismiss, the question before the court generally is whether the court has subject matter jurisdiction. See Practice Book § 10-30. It is not to determine whether the complaint states a cause of action on which relief may be granted, which properly is raised by means of a motion to strike. See Practice Book § 10-39. "[A] motion to strike challenges the legal sufficiency of a pleading, and, consequently, requires no factual findings by the court. . . . We take the facts to be those alleged in the complaint . . . and we construe the complaint in the manner most favorable to sustaining its legal sufficiency. . . . [I]f facts provable in the complaint would support a cause of action, the motion to strike must be denied." *Larobina* v. *McDonald*, supra, 274 Conn. 400.

We begin with a review of the law regarding the litigation privilege. "The litigation privilege developed centuries ago in the context of defamation claims. See *Simms* v. *Seaman*, 308 Conn. 523, 531, 69 A.3d 880 (2013). The privilege evolved, in part, to protect lawyers from civil actions for words spoken during the course of legal proceedings. . . . Absolute immunity for defamatory *statements* made in the course of judicial proceedings has been recognized by common-law courts for many centuries and can be traced back to medieval England. . . . The rationale articulated in the earliest privilege cases was the need to bar persons accused of crimes from suing their accusers for defamation. . . .

"Connecticut has long recognized the litigation privilege, and our Supreme Court has stated that the privilege extends to judges, counsel and witnesses participating in judicial proceedings. . . . [O]ur Supreme Court explained that the privilege was founded upon the principle that in certain cases it is advantageous for the public interest that persons should not be in any way fettered in their statements, but should speak out the whole truth, freely and fearlessly. . . .

"It is well settled that communications uttered or published in the course of judicial proceedings are absolutely privileged [as] long as they are in some way pertinent to the subject of the controversy. . . . The effect of an absolute privilege is that damages cannot be recovered for the publication of the privileged *statement* even if the statement is false and malicious." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Villages, LLC* v. *Longhi*, 166 Conn. App. 685, 699–700, 142 A.3d 1162, cert. denied, 323 Conn. 915, 149 A.3d 498 (2016).

Our Supreme Court "consistently [has] applied the doctrine of absolute immunity to defamation actions

arising from judicial or quasi-judicial proceedings." *Rioux* v. *Barry*, 283 Conn. 338, 345, 927 A.2d 304 (2007). It has expanded "absolute immunity to bar retaliatory civil actions beyond claims of defamation. For example, [our Supreme Court has] concluded that absolute immunity bars claims of intentional interference with contractual or beneficial relations arising from *statements made* during a civil action. . . . [It has] also precluded claims of intentional infliction of emotional distress arising from *statements made* during judicial proceedings on the basis of absolute immunity. . . . Finally, [it] most recently applied absolute immunity to bar retaliatory claims of fraud against attorneys for their actions during litigation." (Citations omitted; emphasis added; internal quotation marks omitted.) *Bruno* v. *Travelers Cos.*, 172 Conn. App. 717, 726, 161 A.3d 630 (2017); see also *Simms* v. *Seaman*, supra, 308 Conn. 566–69 (litigation privilege afforded to any act occurring during course of judicial proceeding).

Our Supreme Court, however, has "recognized a distinction between attempting to impose liability upon a participant in a judicial proceeding for the *words used* therein and attempting to impose liability upon a litigant for his improper use of the judicial system itself. See *DeLaurentis* v. *New Haven*, [220 Conn. 225, 263–64, 597 A.2d 807 (1991)] (whether or not a party is liable for vexatious suit in bringing an unfounded and malicious action, he is not liable for the *words used* in the pleadings and documents used to prosecute the suit . . .). In this regard, [our Supreme Court has] refused to apply absolute immunity to causes of action alleging the improper use of the judicial system." (Emphasis altered; internal quotation marks omitted.) *MacDermid, Inc.* v. *Leonetti*, 310 Conn. 616, 629, 79 A.3d 60 (2013).

In their brief, the plaintiffs argue that their cause of action does not arise out of statements made in the course of litigation; rather, the claims arise out of the

intentional conduct of the defendants, who purposely took steps to conceal from the plaintiffs that they had commenced the declaratory judgment action.[5] The primary allegation of fraud concerns the defendants' intentional and wrongful conduct in depriving the subdivision lot owners of notice and their purposeful concealment of the actions that they knew were contrary to the property rights and interests of the lot owners.[6] In support of their position, the plaintiffs note that, pursuant to Practice Book § 17-56 (b),[7] the defendants were obligated to join them in the declaratory judgment action or to provide them with notice of its

[5] The plaintiffs attempt to bolster their argument that the defendants sought to conceal the declaratory judgment action by bringing that prior action in the judicial district of New Haven, rather than in Meriden where the subdivision is located and the parties reside.

[6] Specifically the plaintiffs alleged: "26. As part of, and in furtherance of, their continuous scheme and conspiracy, the Defendants agreed that Defendant Anderson would provide testimony in the [declaratory judgment action], which testimony was knowingly contrary to City of Meriden records, official maps and other documents, or was in reckless disregard of the truth.

"27. As part of, and in furtherance of, their continuous scheme and conspiracy, the Defendants concealed their continuous course of conspiratorial conduct and other wrongful acts from the Plaintiffs, from the Court and from the public at large.

* * *

"33. After the events recited in the foregoing paragraphs occurred, and after the Defendants achieved the goal of their conspiracy through the overt acts set forth above, the Defendants further agreed and conspired with the intent to and for the purpose of preventing Plaintiffs from discovering the true facts regarding Defendants' conduct and to prevent Plaintiffs from being able to ascertain the existence of the causes of action set forth in the prior counts of this Complaint."

[7] Practice Book § 17-56 (b) provides in relevant part: "All persons who have an interest in the subject matter of the requested declaratory judgment that is direct, immediate and adverse to the interest of one or more of the plaintiffs or defendants in the action shall be made parties to the action or shall be given reasonable notice thereof. . . . The party seeking the declaratory judgment shall append to its complaint . . . a certificate stating that all such interested persons have been joined as parties to the action or have been given reasonable notice thereof. If notice was given, the certificate shall list the names, if known, of all such persons, the nature of their interest and the manner of notice."

pendency. This is so, they claim, because "the notice requirement ensures that interested persons are aware of the requested declaratory relief and are able to move to intervene to protect their interests, should they choose to do so." *Batte-Holmgren* v. *Commissioner of Public Health*, 281 Conn. 277, 288, 914 A.2d 996 (2007).

The plaintiffs contend that lot owners in a subdivision are required to be joined or given notice of a declaratory judgment action; see *Mannweiler* v. *LaFlamme*, 232 Conn. 27, 33, 653 A.2d 168 (1995); and that a lot owner may reasonably anticipate the use of streets disclosed on the subdivision map. See *Lucy* v. *Oram*, 114 Conn. 642, 647, 159 A. 655 (1932) (so-called *Whitton* rule: test of when lot owner, who purchases lot in development where streets are shown on plan, will be permitted to enforce right to use street, depends upon whether street is of benefit to owner). The plaintiffs' complaint alleges that the deeds to their properties reference the subdivision map that depicts access via Shaker Court.[8] On the basis of the deeds, public documents and notice requirements, the plaintiffs alleged that the defendants conspired and schemed with the city defendants to deprive them of notice of the declaratory judgment action.

The plaintiffs also argue that the trial court improperly relied on *Simms* v. *Seaman*, supra, 308 Conn. 523,

[8] The complaint alleges in relevant part: "11. On April 26, 1972, lot numbers for the lots show on that certain Map No. 3372 entitled, 'Resubdivision of Country View Heights Section II Shaker Court–Meriden' dated March 27, 1972 (the 'Shaker Court Resubdivision Map'), were approved by the Tax Assessor of the City of Meriden.

"12. 24 Shaker Court is and has been at all times relevant designated by the Tax Assessor of the City of Meriden as 'Map/Lot: 0911-0323-0003-005A Card Number 1.'

"13. Shaker Court is and has been at all times relevant listed as a public street on the official City of Meriden Zoning Map, through and including the Map Revision dated November 14, 2013 and effective as of November 14, 2013 (the 'Zoning Map'), and is shown on the Zoning Map as a public street in the same fashion as all other public streets are shown."

and factually similar cases, in which the claim of fraud was asserted against a party opponent in prior litigation and the statement was made during the course of a judicial proceeding. The present action is not factually similar because the plaintiffs were not parties in the declaratory judgment action and their fraud claim is not based on statements made in that action. This court has stated that the "policy and history of the [litigation] privilege lead us to conclude that [the privilege] extends to bar claims of fraud against a party opponent." *Tyler* v. *Tatoian*, 164 Conn. App. 82, 92, 137 A.3d 801, cert. denied, 321 Conn. 908, 135 A.3d 710 (2016). The fraud the plaintiffs alleged against the defendants is not asserted pursuant to prior litigation between them.

Most importantly, the plaintiffs' claims focus on the alleged wrongful *conduct* engaged in by the defendants, rather than on the words uttered during a judicial proceeding. The plaintiffs alleged that the defendants engaged in fraud by purposefully concealing the existence of the declaratory judgment action as part of a scheme and conspiracy. They argue, and we agree, that the facts of this case are somewhat similar to those of *Villages, LLC* v. *Longhi*, supra, 166 Conn. App. 685. In *Villages, LLC*, this court determined that a member of the planning and zoning commission who engaged in ex parte communications and was biased against the plaintiff, Villages, LLC, was not protected by the litigation privilege when she participated in the commission's meeting to act on that plaintiff's applications. Id., 707. In its memorandum opposing a motion to dismiss, Villages, LLC argued that "its claims are not predicated on what the defendant [commission member] *stated* at the commission meeting, but on her bias and ex parte communication . . . ." (Emphasis in original.) Id., 696. This argument is legally similar to the one made by the plaintiffs in the present case. We conclude that the allegations of the plaintiffs' complaint in the present case are

not predicated on statements made during the course of litigation, but are based on the defendants' intentional conduct that did not occur during a judicial proceeding. The defendants, therefore, are not shielded by the litigation privilege.

Whether the plaintiffs will prevail on the merits of their claim is, of course, not before us at this time.[9] They have persuaded us, however, that, with respect to the claims alleged, the defendants are not protected by the litigation privilege and the court, therefore, was not without subject matter jurisdiction. The plaintiffs' claims are predicated on the defendants' alleged intentional conduct to deprive them of notice of the declaratory judgment action rather than on the defendants' conduct or statements made during a judicial proceeding. The court, therefore, improperly granted the defendants' motion to dismiss.

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

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* BRETT B.*
(AC 41288)

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

Syllabus

Convicted of the crimes of murder and violation of a standing criminal protective order in connection with the deaths of his mother, B, and

[9] In their brief on appeal, the defendants failed to address squarely the litigation privilege. They raised arguments more applicable to a motion to strike such as whether the complaint fails to state a cause of action or whether the action is barred by the statute of limitations, and other arguments more properly directed to the merits of the plaintiffs' cause of action. We decline to address those arguments as they are not pertinent to an analysis of the trial court's subject matter jurisdiction.

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

two individuals, R and J, who lived with her, the defendant appealed. The defendant and B had had an altercation while he was living in her home, which resulted in the issuance of a protective order that prohibited him from contacting her or going to her residence. After the defendant moved out of the home, R and J moved into the home. The police found the bodies of B, R and J in the home, where they had repeatedly been struck in the head. DNA was found on a checkbook, a plastic bag and a cell phone charger that were recovered from the home. C, a forensic expert for the state, testified that the defendant was a partial match as to the DNA on the checkbook, and a possible contributor to the DNA on the bag and cell phone charger. V, another forensic expert for the state, testified that a bloodstain that was found on a tissue that was recovered from the home appeared to have been caused by a finger, rather than by blood spatter from R's wounds. L, another forensic expert for the state, testified that bloody foot impressions from the crime scene were consistent in size and shape with the known foot impressions of the defendant, and that both impressions exhibited a swiping motion in the big toe area. On appeal, the defendant claimed, inter alia, that he was denied his right to a fair trial as a result of certain prosecutorial improprieties during closing argument and the admission of V's testimony. *Held*:

1. The defendant could not prevail on his claim that the prosecutor misstated or exaggerated the significance of certain DNA evidence and implied to the jury that he had knowledge outside the record with respect to the bloody foot impressions:

a. The prosecutor did not make any improper statements or mislead the jury about the DNA evidence from the bag, checkbook and cell phone charger: the prosecutor's statements were made while he set forth his theory of the case, it would have been clear to the jury that if evidence tended to demonstrate that the defendant was a possible contributor to a DNA profile, it was being asked by the state to draw every reasonable inference to conclude that it was the defendant's DNA that was found on those items, and the jury was able to evaluate the prosecutor's arguments in light of C's testimony and the statistical evidence she presented; moreover, the prosecutor properly asked the jury to infer from the totality of the evidence that in those instances in which there were multiple possibilities as to the source of the DNA, the defendant was the far more likely contributor, and the defendant had ample opportunity to object to and correct any misstatement by the prosecutor but did not do so, which suggested that he did not believe that the prosecutor's remarks warranted such intervention.

b. The prosecutor did not imply to the jury that he had knowledge outside the record with respect to the significance of the toe swipe evidence, as his argument was confined to the evidence, the defendant never objected to L's testimony about the swipe marks, the prosecutor's mention of a fact that was in evidence could not have been improper,

and the prosecutor never indicated that the swipe mark had significance beyond the fact that it was a trait shared by the defendant and the person who left the bloody foot impressions.

2. The trial court did not abuse its discretion when it admitted V's testimony about the bloodstain on the tissue or when it denied the defendant's motion to strike that testimony and ruled that the jury was capable of determining the cause of the bloodstain on the basis of its knowledge and experience:

a. The defendant could not prevail on his claim that the trial court committed plain error when it permitted V to give expert testimony regarding bloodstain pattern analysis when she had not previously been disclosed or qualified as an expert in bloodstain patterns or blood spatter analysis: defense counsel essentially acquiesced to the admission of V's opinion testimony by failing to seasonably object to V's qualifications to give an opinion about the mechanism by which the blood was transferred to the tissue or to whether her opinion was based on scientific methods, and by failing to ask for a continuance or an opportunity to voir dire her outside the presence of the jury, and it was not until the defendant moved to strike her testimony that he objected to it, which was limited to a claim of unfair surprise and that the testimony fell outside the standard recognized for scientific evidence; accordingly, the defendant failed to demonstrate that by allowing V to express an opinion as to the cause of a bloodstain, the court committed the type of obvious and readily discernible error that would warrant application of the plain error doctrine.

b. The defendant's claim that the trial court improperly denied his motion to strike V's testimony about how the blood was transferred to the tissue was unavailing; although the court refused to grant the defendant's motion to strike, the court nevertheless effectively granted the relief he sought by indicating to the jurors that they could decide for themselves on the basis of their own observations whether they agreed with what the court referred to as V's subjective opinion about how the bloodstain got on the tissue, and, thus, the court, through its comments, stripped from V's testimony any patina of expert gloss regarding her opinion, the defendant never objected to the court's statement that the jury could use its own powers of observation to determine whether the blood was a result of blood spatter or someone having touched the tissue with a bloody finger, which suggested that the defendant was satisfied with the court's resolution of the matter, and the defendant did not ask the court to conduct a hearing as to whether V's observations were properly viewed as scientific evidence.

c. The defendant could not prevail on his claim that the trial court improperly admitted V's opinion testimony regarding the cause of the bloodstain, which was based on his assertion that her opinion had not been disclosed previously and, therefore, that it unfairly ambushed the defense; the defendant never asked for a continuance to attempt to

remedy the alleged unfair surprise, there was no testimony that V's opinion involved scientific techniques or obscure scientific theories that would have alerted the court that a hearing pursuant to *State* v. *Porter* (241 Conn. 57) was necessary, which the defendant never requested, the defendant did not cite a single case in which expert testimony was struck or precluded on the ground that the opinion offered had not been previously disclosed in a report, and the rule that the defendant proposed, which would preclude a forensic expert from giving opinion testimony unless it previously had been disclosed, was too rigid and would hamstring the discretion of the trial court, which has far less draconian remedies available to it.

Argued September 18—officially released December 11, 2018

Procedural History

Substitute information charging the defendant with three counts of the crime of murder and with one count of the crime of violating a standing criminal protective order, brought to the Superior Court in the judicial district of Hartford and tried to the jury before *Kwak*, *J.*; thereafter, the court denied the defendant's motion to strike certain testimony; verdict and judgment of guilty, from which the defendant appealed. *Affirmed.*

Lisa J. Steele, assigned counsel, for the appellant (defendant).

Matthew A. Weiner, assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *David L. Zagaja*, senior assistant state's attorney, for the appellee (state).

Opinion

PRESCOTT, J. The defendant, Brett B., appeals from the judgment of conviction, rendered after a jury trial, of three counts of murder in violation of General Statutes § 53a-54a (a) and one count of violating a standing criminal protective order in violation of General Statutes § 53a-223a (a). The defendant claims on appeal that (1) he was denied his right to a fair trial because the prosecutor committed improprieties during closing argument by (a) misrepresenting to the jury that certain

DNA found at the crime scene belonged to the defendant despite testimony from the state's DNA expert that the defendant was only a possible contributor, and (b) misleading the jury regarding foot impression evidence; and (2) the trial court abused its discretion by admitting into evidence previously undisclosed opinion testimony from the state's forensic expert that a bloodstain found on a tissue at the crime scene appeared to be caused by a finger rather than by blood spatter, which, if credited, tended to implicate the defendant as the perpetrator. We reject the defendant's claims and, accordingly, affirm the judgment of conviction.

The jury reasonably could have found the following facts. In the late 2000s, the defendant lived with his father, A, in a single-family raised ranch home in East Hartford (East Hartford home). The defendant grew up in the East Hartford home and had lived there intermittently during his adulthood. The main floor of the East Hartford home had two bedrooms connected by a short hallway leading to the kitchen and living room, with a bathroom located off that hallway near the two bedrooms. A third bedroom was located in the home's finished basement.

In 2009, the defendant's mother, B, moved into the East Hartford home. B, who was divorced from A, had lived for the preceding four years with the defendant's sister, C, in Manchester.[1] Although A and B were civil to each other, B primarily kept to the main level of the home while A stayed in the finished basement. While the defendant was living at the East Hartford house, he occupied one of the two main floor bedrooms.

On March 26, 2010, the defendant and B had an altercation that resulted in the defendant's arrest and an

[1] B moved out of C's home after she and C had an argument that resulted in the police being called. B suffered from dementia that complicated her relationship with her children.

eventual conviction of a misdemeanor. The defendant moved out of the East Hartford home and into his sister's house in Manchester. On May 10, 2010, the court issued a protective order prohibiting the defendant from assaulting, threatening or harassing B. The protective order was modified on June 23, 2010, to a full no contact protective order, which prohibited the defendant from contacting B in any manner or going to her residence. At the defendant's sentencing, the court again modified the no contact order to a standing criminal protective order. See General Statutes § 53a-40e. The defendant was unhappy with the situation involving his mother and had remarked to a cousin on one occasion that B "needed to be dead."

During the summer of 2010, A's health deteriorated. He died on September 15, 2010, leaving B as the sole occupant of the East Hartford home. The defendant indicated to several people that he blamed B for A's death and was furious with her. Despite the criminal protective order in place, B remained concerned about her safety and believed that her life was in danger.

Approximately one month following A's death, B invited Michael Ramsey and Pamela Johns to move into the basement bedroom of the East Hartford home. The defendant was angry that B had allowed Ramsey and Johns to move into the house, referring to them as "homeless people." Despite the protective order, neighbors spotted the defendant near the East Hartford home. On one occasion, a neighbor observed the defendant get out of the passenger side of a white Nissan Altima, hide behind a line of bushes, and watch the house. On another occasion, a different neighbor saw someone fitting the defendant's description driving a white Nissan Altima, and then watched him get out of the car and enter a wooded area behind the East Hartford home. B knew that the defendant was watching the house, telling a friend on November 22, 2010, that

she was "worried of the fact that [the defendant] was roaming around the house . . . ." The friend told B to call the police.

A short time later, sometime between November 23, 2010, and the early morning hours of Thanksgiving Day, November 25, 2010, B, Johns, and Ramsey were brutally murdered in the East Hartford home, each having been struck repeatedly in the head with an object like a Sheetrock hammer.[2] The bodies were discovered on Thanksgiving Day by police officers who had been conducting a wellness check on B at the request of a niece living out of state. The bodies were all located near one another, with B's and Ramsey's bodies found in the main floor bathroom, and Johns' body found just outside that bathroom in the hallway. There were no signs of forced entry. The front door of the home was locked, but a rear sliding glass door was not. Both women were found wearing jewelry. B's bedroom and the basement bedroom where Ramsey and Johns were staying had been ransacked, although a purse containing $1350 in cash was found hidden under B's bedroom desk. The bedroom that the defendant formerly had occupied was not disturbed.

A neighbor and former friend of A's noticed the police presence on Thanksgiving and contacted the defendant by phone to inform him that something was happening at the East Hartford home. The defendant responded to the neighbor that "maybe they're all poisoned in there, maybe they're all dead," and, "maybe they're going to come and blame me for this."

Investigators processed the bloody crime scene over the course of seven days. Among the items that were

[2] Although the murder weapon never was recovered, a state medical examiner testified at trial that the injuries to the victims were created by an object with both a round, blunt side and a hatchet-type side, such as found on a Sheetrock hammer.

collected and sent to the state forensic laboratory for processing were a plastic bag found behind a bookcase in the defendant's former bedroom, a checkbook and a cell phone charger found on B's bed, and a tissue found in the doorway of the defendant's former bedroom near a piece of skull from one of the victims. The side of the tissue that was facing out into the hallway had blood on it. It was later determined that the blood and skull fragment belonged to Ramsey, but another portion of the tissue contained dried mucous or saliva connected to the defendant through DNA. Bloody foot impressions that were made by socked feet were discovered in the kitchen and photographed for further analysis.

Because of the domestic complaints by B against the defendant and C, they were identified immediately by the police as possible suspects. The day the bodies were found, the police executed a warrant to search the defendant's person. The defendant had visible marks on his body, including what appeared to be scratches and an injured toe. During the course of the investigation, the police also obtained and executed a search warrant for a white Nissan Altima that was registered to C's daughter, who lived with C and the defendant. The warrant was executed on January 6, 2011, at the East Hartford home. When police informed C, who had driven the vehicle to the East Hartford home that day, that they were seizing the vehicle pursuant to a warrant, C asked if she could remove some items from the trunk of the car. Specifically, she sought to retain possession of two cell phones and chargers that she indicated to police belonged to Johns and Ramsey. She was not allowed to remove the items, and was questioned by the police as to where she had obtained those phones. C indicated that she had found them that same day in the basement bedroom, but, when pressed, claimed she could not remember where in the room she found them.

The phones never yielded any useful information to the investigation.

During the pendency of the criminal investigation into the murders, the defendant became incarcerated on an unrelated drug charge. While in prison, he had a conversation in the prison's dayroom with another inmate, William McCauley. McCauley told the defendant that he was serving a sentence for vehicular manslaughter, after which the defendant asked McCauley if he had killed a close friend. McCauley indicated that he had killed his best friend and that he still had dreams about the incident. The defendant responded that he had "similar dreams" and that, although he was in prison on a drug charge, the authorities were "trying to get him for a triple homicide around Thanksgiving time." McCauley's cellmate, Rocco Strazza, who was also in the dayroom at the time the defendant spoke with McCauley, claimed that he overheard the defendant say that he was "the one who did the triple homicide."

The defendant eventually was charged with three counts of murder and with one count of violating a standing criminal protective order. The defendant's first trial ended in a mistrial. He was tried a second time, and the jury in the second trial returned a guilty verdict on all charges. The court, *Kwak*, *J.*, sentenced the defendant to a total effective term of 180 years of incarceration, with a mandatory minimum sentence of seventy-five years of incarceration. This appeal followed. Additional facts will be set forth as necessary.

I

The defendant first claims that, during closing and rebuttal arguments, the prosecutor improperly mischaracterized or overstated portions of the forensic evidence and that those improprieties deprived the defendant of his right to a fair trial. More particularly,

the defendant claims that the prosecutor misstated or exaggerated the significance of (1) certain DNA evidence collected from items at the crime scene and (2) bloody foot impressions found in the kitchen. Because we do not agree that any of the challenged remarks were improper, we reject the defendant's claim.

We begin by noting that the defendant concedes that he did not object at trial to any of the remarks he now challenges on appeal. As our Supreme Court has explained, however, this is not fatal to a prosecutorial impropriety claim. See *State* v. *Stevenson*, 269 Conn. 563, 572–73, 849 A.2d 626 (2004). "This does not mean, however, that the absence of an objection at trial does not play a significant role in the determination of whether the challenged statements were, in fact, improper. . . . To the contrary, we continue to adhere to the well established maxim that defense counsel's failure to object to the prosecutor's argument when it was made suggests that defense counsel did not believe that it was [improper] in light of the record of the case at the time." (Internal quotation marks omitted.) *State* v. *Maner*, 147 Conn. App. 761, 782, 83 A.3d 1182, cert. denied, 311 Conn. 935, 88 A.3d 550 (2014). This is particularly true if, as in the present case, a defendant claims prosecutorial impropriety stemming from a prosecutor's discussion of DNA evidence. Such discussions require precise and nuanced distinctions in nomenclature that easily may be misconveyed or misunderstood, especially in light of the zealous advocacy that is part and parcel of a closing argument. If a prosecutor's arguments do not portray accurately the DNA evidence as it was presented to the jury or stray too far from reasonable inferences that may be drawn from such evidence, a contemporaneous objection by defense counsel would permit any misstatements, whether inadvertent or intentional, to be remedied immediately.

"The standard we apply to claims of prosecutorial impropriety is well established. In analyzing claims of prosecutorial impropriety, we engage in a two step analytical process. . . . The two steps are separate and distinct. . . . We first examine whether prosecutorial impropriety occurred. . . . Second, if an impropriety exists, we then examine whether it deprived the defendant of his due process right to a fair trial. . . . In other words, an impropriety is an impropriety, regardless of its ultimate effect on the fairness of the trial. Whether that impropriety was harmful and thus caused or contributed to a due process violation involves a separate and distinct inquiry. . . . [If] a defendant raises on appeal a claim that improper remarks by the prosecutor deprived the defendant of his constitutional right to a fair trial, the burden is on the defendant to show . . . that the remarks were improper . . . ." (Internal quotation marks omitted.) *State* v. *Grant*, 154 Conn. App. 293, 319, 112 A.3d 175 (2014), cert. denied, 315 Conn. 928, 109 A.3d 923 (2015). The defendant also has the burden to show "that, considered in light of the whole trial, the improprieties were so egregious that they amounted to a denial of due process." *State* v. *Payne*, 303 Conn. 538, 563, 34 A.3d 370 (2012).[3]

Certainly, "prosecutorial [impropriety] of a constitutional magnitude can occur in the course of closing arguments. . . . When making closing arguments to the jury, [however, counsel] must be allowed a generous latitude in argument, as the limits of legitimate argument and fair comment cannot be determined precisely

[3] In his brief, the defendant seems to attempt to shift the burden to the state to demonstrate that any established impropriety was harmless beyond a reasonable doubt. Because the defendant's claim, however, implicates only his general due process right to a fair trial and not an alleged deprivation of a "specifically enumerated constitutional right, such as the fifth amendment right to remain silent or the sixth amendment right to confront one's accusers"; *State* v. *Payne*, supra, 303 Conn. 563; the burden of demonstrating harm from any claimed impropriety remains with the defendant. See id., 562–63 (clarifying applicable standard of review).

by rule and line, and something must be allowed for the zeal of counsel in the heat of argument. . . . Thus, as the state's advocate, a prosecutor may argue the state's case forcefully, [provided the argument is] fair and based upon the facts in evidence *and the reasonable inferences to be drawn therefrom*. . . .

"While the privilege of counsel in addressing the jury should not be too closely narrowed or unduly hampered, it must never be used as a license to state, or to comment upon, or to suggest an inference from, facts not in evidence, or to present matters which the jury ha[s] no right to consider." (Emphasis added; internal quotation marks omitted.) *State* v. *Ciullo*, 314 Conn. 28, 37–38, 100 A.3d 779 (2014). "A prosecutor may invite the jury to draw reasonable inferences from the evidence; however, he or she may not invite sheer speculation unconnected to evidence. . . . Moreover, when a prosecutor suggests a fact not in evidence, there is a risk that the jury may conclude that he or she has independent knowledge of facts that could not be presented to the jury." (Citations omitted.) *State* v. *Singh*, 259 Conn. 693, 718, 793 A.2d 226 (2002). Because "[t]he prosecutor's office carries a special prestige in the eyes of the jury . . . [i]t is obligatory for prosecutors to find careful ways of inviting jurors to consider drawing argued inferences and conclusions and yet to avoid giving the impression that they are conveying their personal views to the jurors." (Citations omitted; internal quotation marks omitted.) Id., 722. With these principles in mind, we turn to whether the prosecutor's challenged remarks in the present case were improper.

A

The defendant first contends that the prosecutor mischaracterized the DNA evidence by arguing to the jury that the defendant's DNA was found on several pieces of evidence, which, according to the defendant, did

not accurately reflect the testimony of the state's own expert. The defendant's claim focuses on what he characterizes as misstatements about DNA collected from three pieces of evidence: the checkbook found on B's bed, the phone charger located nearby, and the handles of the bloodstained plastic bag found stuffed behind a bookcase in the defendant's former bedroom. The defendant argues that, with respect to those items, the state's expert testified that the defendant only was a possible contributor, and that other male relatives who shared the same Y chromosome, a group that included the defendant's father, A, could have accounted for those results. The defendant notes that the misstatement was particularly significant in this case because both the defendant and A had lived in the East Hartford house and, thus, could have deposited DNA prior to the murders, and there was no evidence presented at trial establishing when the DNA at issue had been deposited or how long it could have been present on the items.

The state responds that the prosecutor's challenged remarks were supported by the testimony of its expert and that it was not unreasonable or improper for the prosecutor to urge the jury to infer, in light of the evidence as a whole, that it was the defendant's DNA that was found rather than the DNA of his father, who had died two months prior to the murders. On the basis of our review of the entirety of the closing arguments, we conclude that the prosecutor's remarks were not improper.[4]

[4] As part of this claim, the defendant quotes from statements made by the prosecutor to the court outside the presence of the jury while arguing against the defendant's motion for a judgment of acquittal. The defendant has not challenged the court's ruling on the motion for a judgment of acquittal on appeal. Further, because those remarks were not made during closing arguments, they fall outside the scope of the defendant's prosecutorial impropriety claim.

The following additional facts are relevant to this claim. Cheryl Carreiro, a DNA analyst from the state forensic laboratory, testified for the state regarding the results of DNA analysis that she performed on biological samples collected at the crime scene or later obtained from items collected at the crime scene. She prepared a number of reports that were admitted through her as full exhibits. During direct examination, she indicated that she had compared DNA profiles derived from the crime scene biological samples with DNA profiles derived from known samples obtained from the three victims and the defendant. She also provided statistical data regarding possible contributors to the various DNA profiles she developed from those samples.

Carreiro performed two types of DNA tests on samples collected in this case: an "Identifiler" test, which looks at both male and female DNA, and a "Yfiler" or Y-STR DNA test that only looks for male DNA and, thus, can be useful in analyzing mixed biological samples that contain large amounts of female DNA masking trace amounts of male DNA. See *State* v. *Phillips*, 160 Conn. App. 358, 125 A.3d 280, cert. denied, 320 Conn. 903, 127 A.3d 186 (2015). Relevant to the defendant's claim on appeal, Carreiro provided testimony about the DNA profiles developed from the biological samples taken from the checkbook, the phone charger, and the plastic bag handles.

With respect to the checkbook, Carreiro indicated that biological samples were taken from the checkbook's exterior and interior cover, the top check, and the edges of the checks. When asked to describe the results of DNA testing of those samples, Carreiro first indicated that both the Identifiler and Yfiler results demonstrated that the biological samples taken from the checkbook resulted in a "mixed sample."[5] With respect

[5] As used in this context, a mixed sample refers to a biological sample that contains DNA from multiple contributors.

to the three victims, only B was found to be a contributor to the Identifiler profile. Johns and Ramsey were eliminated as contributors. Carreiro testified that the defendant could not be eliminated as a contributor to the Identifiler profile. She explained that "the expected frequency of individuals who cannot be eliminated as a contributor . . . is approximately one in 10,000 in the African-American population, approximately one in 880 in the Caucasian population, and approximately one in 3400 in the Hispanic population." Carreiro described the Yfiler results as "inconclusive as to whether [the defendant] could be a contributor to the Yfiler DNA profile."

The prosecutor then asked Carreiro the following follow-up question without any objection from defense counsel: "On the Identifiler, however, in comparison to the known sample of [the defendant], on the swabbing of the checkbook . . . is it fair to say that you identified a partial profile consistent with that of him?" Carreiro responded: "Yes. He cannot be eliminated as a contributor, and that is a partial match." Turning to the result of the DNA analysis of biological samples taken from the cell phone charger, Carreiro testified that this also resulted in a "mixed sample." The Identifiler profile yielded inconclusive results as to whether the defendant could be a contributor. With respect to the Yfiler results, Carreiro indicated that "[the defendant] or another member of the same paternal lineage cannot be eliminated as a contributor," and "[t]he expected frequency of individuals who cannot be eliminated as a contributor to the Yfiler . . . is approximately one in forty-three in the African-American population, approximately one in eighteen in the Caucasian population, and approximately one in thirty-six in the Hispanic population." When asked in a follow-up question whether she had "developed a partial DNA profile consistent with that of [the defendant] on the Y profiler," Carreiro answered:

"The Yfiler was—was a partial result, and it was, cannot be eliminated."

Multiple biological samples were taken from the white plastic bag. One sample was taken from visible reddish brown stains on the bag that were identified as human blood. Additional samples were taken from the interior and exterior handles of the plastic bag. Regarding the samples taken from the handles, Carreiro testified that this was a "mixed sample." Ramsey and B were both included as contributors to the Identifiler profile, and Johns could not be eliminated as a contributor. According to Carreiro, the defendant also is "included as a contributor" to the Identifiler profile, and "[the defendant] or another member of the same paternal lineage is included as a contributor to the Yfiler DNA profile." The expected frequency of individuals who could be a contributor to both the Identifiler and Yfiler profiles is "approximately one in seven million in the African-American population, approximately one in 880,000 in the Caucasian population, and approximately one in 4.2 million in the Hispanic population."

The prosecutor asked Carreiro about a summary table she had included in her report regarding the swabbing of the bag's interior and exterior handle. In particular, he inquired whether she had identified "the full profile of three individuals and the partial profile of [Johns]." Carreiro responded: "Yes. The . . . first inclusion is [Ramsey], the second is [B]. The third cannot be eliminated, [Johns], and the fourth [the defendant]." On cross-examination, defense counsel elicited testimony from Carreiro that the defendant's father, A, was "another member of the same paternal lineage" and would have the same Y-STR profile as the defendant.

During closing argument, the prosecutor set forth the state's theory of the case and, in that context, made the following statements regarding the DNA evidence,

including statements challenged by the defendant, which are emphasized: "Answer the $20,000 question then. How does [the defendant's] DNA end up on items in the house when he hasn't been there in about six months? We know the answer. This is the tissue as it was found in the doorway of his bedroom next to what appeared to be a piece of a skull. The tissue was recovered and photographed by the state forensics lab. You see a large amount of blood in this picture, and you see at the other end of the tissue what was described as a yellowish mucous-like item consistent with mucous, tested positive for the presence of amylase. In place and in time, the defendant is connected to one of the victims. And not one of the victims innocently with touch DNA, with bloodshed. The blood on that tissue is that of [Ramsey]. The remnants of blood on his nose, DNA's back to [the defendant].

"[The defendant], I would claim, ladies and gentlemen, who is covered in blood, and he blew his nose. And look at the back of that tissue. The back of the tissue is actually more evidence of blood, consistent with transfer or smearing. In a vacuum, as the lab people will say, when you get that material and put it in a test tube and get someone's DNA, they can't look at the DNA and date it. They can't look at the DNA and say, I can tell you when it was deposited on an item such as the Kleenex. But what you ladies and gentlemen know from the evidence is, the defendant blew his nose, and his bloody face and/or hands had blood [on] them, which passed over to that Kleenex. There's no way around it. And you know what? That's the first of the items.

"This is a picture of [B]'s room and [B]'s bed. You'll notice on the bed is a cell phone with a charger attached to it, a checkbook with checks inside it, and another set of checks next to it, seized. But let's not go to the lab yet, ladies and gentlemen. Let's look at what you

see here because you know why, that's important. And if we're all on board that the attack happened at night, is [B] sleeping with her checks and her checkbook and her phone not plugged in, yet plugged into the phone itself, the charger, and what appears to be a tin of Altoids that [a detective] described? No. Those items were deposited and thrown and put on the bed close in time to when the attack happened. That's what's important to understand. This is where you use your common sense.

"And let's go to the results of the analysis conducted on those items. [*The defendant*], *in a partial DNA profile, is found on the wall end portion of the charger of that phone.* And on the checkbook, [the forensic examiner] examined the checkbook. And from swabbing the blue section of the checkbook and top of the checks and the edges, she came up with—you have the reports—[*B*] *obviously was on this checkbook. But who else was on this checkbook? In a partial profile,* [*the defendant*].

"Let's get to time and place, ladies and gentlemen. *The defendant, who hasn't been in the house since at least June, 2010, though he claims back to March, 2010, this check is dated November 15, 2010, and there are no additional written checks from the checks in here. The register itself starts recording back in August 11th. This, ladies and gentlemen, dates the DNA.*

"And the bag, again, from the starting point that [the defendant] is not in that house, a bag stuffed behind a bookcase in his room. You'll remember that the doorway is over here. It made entire sense when [the detective] said she can't imagine, based on her training and experience, that blood on that bag came from cast-off or spatter from the attack that happened in the hallway. Hey, and let's face it, we saw the photos. There was blood everywhere. So, literally, you saw it proof positive

the blood flew everywhere, but what the blood didn't do is, it didn't take corners.

"And there virtually was no way that the blood found on that bag, which was [B]'s blood, came as cast-off or spatter. It was deposited there by someone who was bloody. And you know who that bloody person was? [The defendant]. *Ladies and gentlemen, we have the trifecta in that bag. You saw the picture from the lab. You've seen what looked like kitchen bags, if they come either folded in a box or rolled up in a roll. This bag appeared to have been opened at one time. Is it part of the cleanup process, ladies and gentlemen? But the swabbing at the top of the bag has DNA profiles of all four people involved: the three victims and [the defendant]*.

"Now, [the defendant] arguably never had contact with [Johns] or [Ramsey]. They moved in somewhere in October, and he hadn't been in the house for about six or seven months by then. Or was he? There's no way around it, ladies and gentlemen. In time and in place, the DNA results tell you a story.

"I touched already on the bag. The bag speaks to evidence of someone making some attempt at cleaning up. Look at the entire scene. Look at what was presented to you from the scene. We have a virtual bloodbath in the hallway and the bathroom where the three victims were found.

"Questions were asked of detectives, and, I think, of some of the forensic analysts at the lab as to the likelihood that the attacker would be covered with blood. Yes. Yes. And the simple answer to that is, look at the exterior of the house. There's not a lot of blood outside. There were one or two drops. One right outside the slider and then one on the stairs.

"It answers a question. The attacker stayed in that house, changed clothes, bagged up bloody items,

cleaned himself before he exited because if we're to assume that a bloodied attacker left through one of those doors without doing any of that, then you would've had a blood trail, and you don't." (Emphasis added.)

The prosecutor also briefly revisited the DNA evidence in his rebuttal argument, stating: "For you, as you assess this evidence, it makes it easier for you because not one of these items of evidence stands alone. Collectively, they paint a picture as to who the killer is. *And again, the entirety of the checkbook, which spans from August to November, the defendant isn't, shouldn't, and per his own words, wasn't in that house. And the most compelling piece of evidence is that bag. That bag, which has the DNA of every individual involved in this crime, the three victims and the defendant*." (Emphasis added.)

The defendant argues that the emphasized portions of the prosecutor's arguments sought to mislead the jury by asserting facts not in evidence, which is improper. *State* v. *Singh*, supra, 259 Conn. 718. With respect to the checkbook, the defendant claims that the prosecutor's statement that his DNA was found "[i]n a partial profile" was misleading because, to the extent that the statement referred to the Yfiler profile, the defendant's DNA could not be distinguished from A, who was living at the East Hartford home until mid-September, 2010, after the checkbook began to be used in August, 2010. The defendant argues that the prosecutor also misstated the DNA results with respect to the cell charger by indicating that the defendant's DNA was found "in a partial DNA profile." The defendant asserts that this was incorrect because Carreiro had testified that the Identifiler profile was inconclusive as to the defendant and that the Yfiler had indicated only that the defendant or a member of the same parental lineage could not be eliminated as a contributor. Finally, with

respect to the bag handles, the defendant notes that Carreiro testified that "[the defendant] or another member of the same paternal lineage is included as a contributor" to the Yfiler profile, whereas the prosecutor stated in closing argument and rebuttal that the mix sample obtained from the bag included DNA from the defendant.

"We long have held that a prosecutor may not comment on evidence that is not a part of the record and may not comment unfairly on the evidence in the record." *State* v. *Fauci*, 282 Conn. 23, 49, 917 A.2d 978 (2007). "It is not, however, improper for the prosecutor to comment upon the evidence presented at trial *and to argue the inferences that the jurors might draw therefrom* . . . ." (Emphasis added; internal quotation marks omitted.) *State* v. *Gibson*, 302 Conn. 653, 660, 31 A.3d 346 (2011). We previously have held that, if the evidence presented at trial is that the defendant is included as a contributor to a DNA profile, then it is not necessarily improper for a prosecutor to argue to a jury during closing argument that the DNA found was the defendant's as long as that is a reasonable inference to be drawn in light of the evidence as a whole. See *State* v. *Jones*, 115 Conn. App. 581, 597–600, 974 A.2d 72, cert. denied, 293 Conn. 916, 979 A.2d 492 (2009). We see no reason why this same principle would not also apply to instances in which the defendant could not be eliminated as a contributor. See *State* v. *Small*, 180 Conn. App. 674, 687–88, 687 n.3, 184 A.3d 816 (finding claim unpreserved but observing in dicta that it was not improper for prosecutor to invite jury to draw inference that defendant's DNA was on mop handle in light of expert testimony that he could not be eliminated as contributor), cert. denied, 328 Conn. 938, 184 A.3d 268 (2018). In either instance, the defense was not precluded from arguing that the inconclusive nature of the

DNA evidence left reasonable doubt about the defendant's guilt on the basis of the statistical probabilities presented.

Here, the prosecutor's statements regarding the DNA evidence were made in the context of his setting forth the state's theory of the case, and much of the prosecutor's closing argument focused on the evidence other than DNA that tended to support the theory that the defendant had committed the murders. It would have been clear to the jury that if evidence tended to demonstrate that the defendant was a possible contributor to a DNA profile, the state was asking the jury to draw every reasonable inference to conclude that it was, in fact, the defendant's DNA that was found, and not that of another possible contributor. The jury had heard Carreiro's testimony and was able to evaluate the state's closing arguments in light of its own understanding of that testimony, which also included statistical evidence about the likelihood that the defendant's DNA was the source of the profiles developed from the crime scene evidence. The defendant's argument with respect to the checkbook, which focuses on the Yfiler profile, also misses the mark because it ignores the fact that Carreiro testified that the defendant could not be eliminated as a contributor and, thus, "was a partial match," with respect to the Identifiler profile. Further, although it may be accurate with respect to the charger and bag to note that the Yfiler results indicated that both the defendant and A were possibly contributors to the DNA found on those items, the prosecutor properly asked the jury not to look at the results of each item individually, but to view all the evidence presented collectively in order to "paint a picture as to who the killer is." In other words, the prosecutor was asking the jury to infer from the totality of the evidence presented, including all the nonscientific evidence, that in those instances in which there were multiple possibilities as to the

source of the DNA, the defendant was the far more likely contributor.

It was not necessary for the jury to have found that the state had proven beyond a reasonable doubt that the DNA in question belonged to the defendant in order properly to use that evidence, in conjunction with other evidence, to assess whether the state had met its burden of proving beyond a reasonable doubt that it was the defendant who had committed the murders. Although the state has the burden to prove beyond a reasonable doubt all elements necessary for the commission of a crime, including identity, subordinate facts, such as whose DNA was present on a particular item of evidence, may be established by inference or circumstantial proof and need not be established beyond a reasonable doubt. See *State* v. *McDonough*, 205 Conn. 352, 355, 533 A.2d 857 (1987) ("[if] a group of facts are relied upon for proof of an element of the crime it is their cumulative impact that is to be weighed in deciding whether the standard of proof beyond a reasonable doubt has been met and each individual fact need not be proved in accordance with that standard"), cert. denied, 485 U.S. 906, 108 S. Ct. 1079, 99 L. Ed. 2d 238 (1988).

The prosecutor never stated that the defendant's DNA was found on any item from which he had been eliminated as a possible contributor to the DNA profile, which would have been improper. To the extent that the prosecutor may have used imprecise language or terminology, the defendant had ample opportunity to object and to correct any perceived misstatement but elected not to do so, suggesting that he did not believe at the time that the remarks warranted such intervention. When considered within the context of the state's entire argument and allowing some leeway for zealous advocacy, as we must, we cannot conclude that the prosecutor made any statements that reasonably can be viewed

as improper under the circumstances or that the jury likely was misled by the prosecutor's arguments.[6]

B

We next turn to the defendant's contention that the prosecutor engaged in prosecutorial impropriety by misleading the jury about the significance of bloody foot impressions found at the crime scene. We are not persuaded that the prosecutor's remarks were improper.

The following additional facts are relevant to our consideration of this aspect of the defendant's prosecutorial impropriety claim. At trial, the state called as a witness Lisa Ragaza, a state forensic science examiner specializing in the analysis of imprints. She testified about comparisons that she made between the foot impressions found in the kitchen at the crime scene and known foot impressions the East Hartford Police Department later obtained from the defendant. She testified that the impressions from the crime scene were consistent in size and shape with the known foot impressions of the defendant. She also testified that

[6] The defendant also suggests that the prosecutor employed "the prosecutor's fallacy" during his closing argument. There is no merit to this argument.

"A prosecutor employs the prosecutor's fallacy by equating random match probability with source probability in relation to DNA evidence. Random match probability and source probability are distinguishable. The prosecutor's fallacy is the assumption that the random match probability is the same as the probability that the defendant was not the source of the DNA sample. . . . Random match probability is the probability a member of the general population would share the same DNA with the defendant. . . . Source probability is the probability that someone other than the defendant is the source of the DNA found at the crime scene." (Internal quotation marks omitted.) *State* v. *Small*, supra, 180 Conn. App. 685.

The prosecutor in this case never mentioned the probability statistics testified to by Carreiro, did not equate random match probability with source probability, and never expressed that there was a certain percentage probability that the defendant was guilty on the basis of the DNA evidence. We agree with the state that no part of the prosecutor's closing argument implicates the prosecutor's fallacy.

both the crime scene impression and the known impression of the defendant exhibited a common characteristic, a "swiping motion" in the big toe area of the impression. The defendant did not object to this testimony.[7]

As to her final conclusions, Ragaza testified as follows on direct examination by the prosecutor:

"Q. Now, Ms. Ragaza, you're not here, or, tell me, yes or no, are you capable of saying the known impressions that were submitted by the East Hartford Police Department—so I'll hold up a transparency. The known impressions by the East Hartford Police Department, the person who made those actually made what was submitted from the crime scene.

"A. No, I cannot.

"Q. And why not?

"A. There's no individual characteristics present in the imprints from the crime scene that would allow me to make an identification or an individualization as to who made those imprints.

"Q. Okay. However, based on your examination, you are of the conclusion that they are consistent in size and shape?

"A. Uh, yes.

"Q. Let me ask you. I want to ask you to—in reviewing all of the prints from the crime scene with these photographs that look to be coming off of linoleum, for lack

[7] For example, the defendant never raised any objection that the testimony regarding the "swiping motion" was speculative or that such a characteristic lacked evidentiary significance and, therefore, should not have been admitted. Once admitted, for the reasons we discuss, the prosecutor was free to refer to any evidence in his closing argument as long as he did not invite the jury to draw unreasonable inferences from that evidence. See *State* v. *Elmer G.*, 176 Conn. App. 343, 382, 170 A.3d 749, cert. granted on other grounds, 327 Conn. 971, 173 A.3d 952 (2017).

of a better word, did you see both left foot and right foot impressions?

"A. Yes.

"Q. And of the right foot impressions, did all of them that show a portion of the toes appear to have that swiping motion from the big toe noticed?

"A. Yes, I did notice that.

"Q. And of all the—the left foot impressions from the crime scene, were there a number of those observed by you?

"A. Uh, yes. There was more than just that one.

"Q. And of those, did you observe any swiping characteristics or what you observed on the big toe of left foot impressions?

"A. No, I did not see that.

"Q. And of the known prints that were submitted by the East Hartford police, did you observe the swiping motion of the big toe consistently in the right foot impressions?

"A. Uh, yes. It was consistent.

"Q. And did you observe any of that swiping characteristic in any of the left foot impressions submitted by the East Hartford Police Department?

"A. I don't believe so."

Again, no objections were made by the defendant to Ragaza's testimony.

As part of cross-examination, defense counsel sought to clarify that Ragaza could not tell the jury about any "individualizing identifying factors . . . ." Ragaza responded: "Right. There's nothing individualizing." Defense counsel inquired further: "So, it would be fair

to say that the sock prints, the impressions that you looked at and in some ways using a—an unsocked or just barefoot impression, they could've been made by anyone who has a similarly sized foot?" Ragaza responded: "Yes. That's correct."

During closing argument, the prosecutor argued as follows with respect to the bloody foot impressions: "And there are footprints in the kitchen, socked footprints. Further evidence that someone is removing clothing, changing clothing, packaging up bloody clothing before his exit. We know where the person exited. We know the route they took in exiting. . . .

"The footprints, ladies and gentlemen. They simply do it. They're in blood. They speak to the here and now as it relates to the attack. You saw the photographs. You saw the transparent overlays. You make a decision.

"[Ragaza] from the lab testified. She indicated that footprint analysis is not individualizing, it's not exacting. She could not say the test prints were made by the defendant. She could not say from looking at his footprints that he made the prints at the crime scene, but what she could say is they were consistent in size and shape. And then you, for your own analysis, had an opportunity to compare those. They are, remarkably, incredibly, the same prints. These are enormous feet. They're size thirteen prints.

"*The person at the crime scene continually made a swipe with his right big toe, and* [*the defendant*] *makes that same swipe with his right big toe. All of the left prints at the crime scene in that kitchen didn't have such a swipe, and none of the left prints that* [*the defendant*] *provided in December had a swipe. You ultimately decide if those are his prints in socks.* Again, what killer removes his socks if he's not cleaning himself up? Or removes his shoes?" (Emphasis added.)

The defendant takes exception to the emphasized portion of the prosecutor's argument. The defendant acknowledges that it was proper for the jury to be asked to decide from its common knowledge the significance of the fact that the defendant shared the same size footprint as whoever left the bloody foot impressions at the crime scene. He nevertheless maintains that because the jury was never provided information about "the swipe mark's frequency," presumably meaning the frequency of its occurrence in the general population, the significance of the swipe mark fell beyond the jury's common knowledge. According to the defendant, "[t]he prosecutor's claim that the mark was significant implied that the state had knowledge beyond that in the record."

The prosecutor, however, clearly confined his argument to the evidence as it was presented. The defendant never objected to Ragaza's testimony describing the swipe marks she observed on the footprint evidence. Merely mentioning a fact that is in evidence cannot, by itself, be an impropriety. *State* v. *O'Brien-Veader*, 318 Conn. 514, 547, 122 A.3d 555 (2015) ("[i]t is not improper for the prosecutor to comment upon the evidence presented at trial and to argue the inferences that the jurors might draw therefrom" [internal quotation marks omitted]). The state never indicated that the swipe mark had any particular significance beyond the fact that, like foot size and shape, it was a trait shared by the defendant and the person who left the impressions at the crime scene. As the state indicated in its appellate brief, "the prosecutor expressly recognized the limits of Ragaza's analysis as well as the jury's role as ultimate decision maker." The defendant has failed to convince us that the jury reasonably would have construed the state's argument as implying that it had knowledge outside the record with respect to the significance of the toe swipe evidence. Nothing in the prosecutor's argument regarding the foot impression evidence was improper.

In sum, because we conclude that none of the challenged statements of the prosecutor were improper, we reject the defendant's prosecutorial impropriety claim.

II

The defendant next claims that the court abused its discretion by allowing one of the state's forensic experts, Anita Vailonis, to provide previously undisclosed opinion testimony and by denying the defendant's subsequent motion to strike that testimony. Specifically, the defendant challenges the admissibility of Vailonis' testimony that the bloodstain found on the tissue collected at the crime scene appeared to have been caused by a finger, presumably that of the killer, rather than by blood spatter from wounds received by Ramsey during the murder. The defendant's theory regarding the tissue was that it was discarded in the East Hartford home during the time he lived there and, by happenstance, was on the floor near his former bedroom at the time of the murders. The defendant argues that the state elicited this "surprise" testimony to bolster its own theory that the tissue was not present at the East Hartford home from an earlier, unknown time, but was deposited at the time of the incident by the killer, who, given the brutality of the killings, likely would have been covered in the victims' blood. Because the defendant's DNA was found on the used portion of the tissue, this tended to support an inference that he was the killer.

The defendant does not dispute that it was his DNA extracted from the portion of the tissue where the mucous with the presence of amylase was detected. Likewise, it is not disputed by the parties that Ramsey was the source of the blood found on the tissue. Carreiro testified that the testing of the bloodstained portion of the tissue demonstrated that it was a "mixed sample," with Ramsey "included as a contributor" but

the other victims and the defendant eliminated as contributors. Carreiro indicated that the expected frequency of individuals who could have contributed to the DNA profile was "less than one in seven billion in the African-American, Caucasian and Hispanic populations." As to touch DNA obtained from the portion of the tissue identified as containing saliva or nasal secretions, Carreiro explained: "The Identifiler results are consistent with [the defendant] being the source of the Identifiler DNA profile . . . . The expected frequency of individuals who could be the source of the Identifiler DNA profile . . . is less than one in seven billion in the African-American, Caucasian, and Hispanic populations." The three victims were eliminated as possible sources of the touch DNA.

On appeal, the defendant makes three arguments in support of his evidentiary claim. First, the defendant contends that Vailonis gave expert bloodstain pattern analysis testimony without ever properly having been disclosed or qualified as an expert in bloodstain patterns or blood spatter analysis. Second, the defendant takes issue with the trial court's rationale for denying his motion to strike Vailonis' testimony, namely, its conclusion that the jury was capable of determining the cause of the bloodstain on the basis of its own knowledge and experience. Third, the defendant maintains that Vailonis' opinion regarding the cause of the bloodstain ambushed the defense because it was not disclosed prior to trial either in response to the defendant's request for disclosure, in Vailonis' forensic report, or as part of her testimony at the defendant's first trial.[8]

[8] The defendant also invites us to exercise our supervisory authority over the administration of justice to adopt a rule that would require all forensic experts to document and disclose their conclusions and the basis for them before being permitted to testify regarding the same. We decline that invitation. Exercise of our inherent supervisory authority "is an extraordinary remedy to be invoked only when circumstances are such that the issue at hand, while not rising to the level of a constitutional violation, is nonetheless

The state responds that we should reject the defendant's claim because Connecticut law does not require pretrial disclosure of every aspect of an expert's testimony, the defendant opened the door to the challenged testimony on cross-examination, and whether the stain looked like it was made by a finger was a matter the jury could decide without expert testimony. For the reasons that follow, we are unconvinced that the court abused its discretion in admitting Vailonis' testimony or in denying the defendant's motion to strike, and, thus, we reject the defendant's claim.

The following additional facts and procedural history are relevant to our discussion of this claim. On April 9, 2015, the defendant filed a request for disclosure, seeking, inter alia, "any reports or statements of experts made in connection with the offense charged, including results of . . . scientific tests, experiments or comparisons, which are material to the preparation of the defense or are intended for use by the prosecuting authority as evidence in chief at the trial." The state produced all relevant forensic reports. One report described the bloodstain observed on the tissue found at the crime scene, but did not opine on the mechanism by which the blood was transferred onto the tissue.

As part of her direct testimony, Vailonis explained that she was a forensic science examiner at the state forensic laboratory and discussed her educational background and experience. Her duties at the laboratory included examining evidence for the presence of blood

of utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Lockhart*, 298 Conn. 537, 576, 4 A.3d 1176 (2010). The rule proposed by the defendant would unnecessarily burden the wide discretion we have afforded to trial courts to determine on a case-by-case basis the admissibility of expert testimony. Further, safeguards already exist to prevent unfair surprise, such as the granting of a continuance to the opposing party if warranted.

or other body fluids and preparing samples for DNA analysis. She received a number of items collected from the crime scene in the present case and prepared several reports setting forth her observations, findings, and analysis. Those reports were admitted as full exhibits.

One item Vailonis was questioned about during her direct testimony was the tissue found near the door of the defendant's former bedroom. Vailonis testified that she observed reddish brown stains on one area of the tissue that she later determined was consistent with human blood, and another area she described as having a "crusty texture" that tested positive for amylase, a substance present in saliva and nasal secretions. She photographed the tissue and took samples of both areas and sent them for DNA testing. Photographs of the two significant areas of the tissue were marked as state's exhibits 179 and 180 and were admitted into evidence. The photographs were displayed on a projector for the jury, and Vailonis used a laser pointer to indicate to the jury the bloodstained area and the "crusty" area containing the amylase.

On cross-examination, the defense pursued a line of questioning intended to establish that Vailonis could not determine precisely how old the tissue was or how long any substance had been present on the tissue. She agreed that she could not provide that information. Vailonis also agreed with defense counsel that she had no way of knowing whether the presence of the amylase was the result of someone blowing his or her nose or spitting into the tissue.[9]

[9] The following is the relevant portion of the colloquy between Vailonis and defense counsel during cross-examination about the tissue:

"Q. You made three different pieces out of what was the wad of tissue?

"A. Yes.

"Q. Okay. Was it one of them that had a blood-like substance on it?

"A. Yes.

"Q. Okay. And then the other two were the one—pieces that it appeared that there was something on it, but it was—did not appear to be blood?

"A. I tested that area for the presence of amylase, the enzyme that is used

On redirect examination, the prosecutor sought to counter defense counsel's suggestion that the defendant could have used the tissue when he lived at the East Hartford home and that Ramsey's blood was transferred to the tissue through spatter caused by the violent assault on Ramsey. The following colloquy occurred:

"Q. Ms. Vailonis, [defense counsel] asked you whether or not you—you were able to agree with the possibility that the tissue appeared to have been someone blowing their nose based on the crusty material you observed in there?

in our saliva secretions to digest carbohydrates. So, the—that was the two pieces I sent.

"Q. Okay. Fair to say with regard to that particular item, that tissue, you can't determine how old that tissue is?

"A. No, I cannot.

"Q. Or how long a substance has been on that tissue?

"A. I—no.

"Q. All right. Even—even the blood-like substance, you wouldn't know?

"A. No.

"Q. Just based on your training and experience can you look at a—blood-like stain and make a determination that, well, that one appears to be older, this one appears to be newer?

"A. Well, in grand terms, yes. If something is very, very old, I can tell a very, very old stain from a newer stain, but it would have to be years or decades later.

"Q. And a lot of that would be based on the fact that the item itself happens to be old?

"A. And the bloodstain kind of fades out.

"Q. Okay. But with regard to [the tissue], you can't make a determination like that?

"A. Correct.

"Q. And with regard to this—the amylase, that comes from—this could be something as if someone had blown their nose in a Kleenex?

"A. Correct.

"Q. Or had spit something into Kleenex?

"A. Yes.

"Q. Right. The amylase would be present in both of those particular scenarios?

"A. Yes.

"Q. Okay. And fair to say you don't know how it got there?

"A. I do not."

"A. Yes.

"Q. Did you observe other areas of blood on that tissue?

"A. Yes.

"Q. And in looking at the areas of—of blood on that tissue, do you have any opinion based on your training and experience as to how or what it appears? What mechanism took place in depositing it on that area?

"A. Yes.

"Q. In observing state's exhibit 179, what did that stain appear to look like to you? (state's exhibit [number] 179 projected on the screen)

"A. That stain appears to be some sort of fingerprint to me, bloodied hand with bloody fingers holding a tissue with—on one side and then the amylase-positive area of the tissue on the other side. So, a bloody fingerprint impression-type of stain opposite the amylase-positive area.

"Q. Are you, based on your training and experience, familiar with drops or—or the—the evidence of drops or dripping stains being observed on fabrics?

"A. Yes. I've taken courses and I—I am proficiency tested in blood spatter analysis.

"Q. Showing you state's exhibit 180. Do these stains that are exhibited on this vantage point of the tissue seem to be consistent with drops or drips? (state's exhibit [number] 180 projected on the screen)

"A. They do not.

"Q. And do you have an opinion based on your training as to what they are consistent of? What caused them?

"A. They appear to me to be some sort of transfer from one surface to another onto that paper product."

At no point during the prosecutor's redirect examination of Vailonis did defense counsel raise any objection. He did not object to the scope of Vailonis' testimony, her qualifications to provide an opinion as to the mechanism by which the blood was transferred to the tissue, or to the form of any of the prosecutor's questions.

On recross-examination, defense counsel challenged Vailonis regarding the opinion that she expressed during redirect examination:

"Q. Ms. Vailonis, with regard to that particular analysis, have you prepared a report with regard to that testimony?

"A. I have not.

"Q. Have you been asked to prepare a report in any way with regard to what we just saw and your opinion about it being a thumbprint?

"A. I have not, nor did I say thumbprint, but a finger type-print.

"Q. And did you—was that information provided in any kind of—or included in any kind [of] report that was provided by your laboratory?

"A. No.

"Q. And with regard to your opinion about that, what degree of scientific certainty and reliability do you have in making that opinion?

"A. There—there is my knowledge, and my experience, and my training that I rely on. I have had—I'm pushing thirty years of forensic experience, and I've examined very, very many items of evidence that are bloody. And that is what it appears to me to look like.

"Q. Have you been ever asked to express an opinion on that particular item of evidence before today?

"A. No.

"Q. And with regard to that, what standards did you use in reaching your opinion.

"A. My—

"Q. —besides your training and experience. What scientific standards did you use in reaching that opinion?

"A. I don't believe there are any scientific standards by which I compare a stain to. I'm not quite sure what you're asking.

"Q. Well, when you give an opinion about something, there has to be some kind of—and you claim to be a scientist and have this experience and education and training, there has to be a standard by which you have made your opinion that that's a fingerprint, or thumbprint, or something. I'm just wondering what is it exactly? What standards did you use in reaching that opinion?

"A. My experience and training."

At this point in the proceedings, defense counsel asked the court to strike Vailonis' testimony regarding the cause of the bloodstain on the tissue, claiming that such testimony fell "outside the standards here as we recognize them for scientific testimony." The prosecutor responded that a proper foundation for the testimony had been laid, "and it is follow-up based on [defense] counsel's willingness to ask her a question about how other items got on that—could've been deposited on that item of evidence." The following colloquy ensued:

"[Defense Counsel]: And I, also, Your Honor, would say that because there's never been a report provided to the defense with regard to its—it's basically ambush to the defense that I can't then present a witness to be able to counter this opinion that's being offered for the first time and has never been offered in a report.

"[The Prosecutor]: Your Honor, I don't believe there's a basis for it. It's follow-up. There was—neither was there a report existing indicating that she was of the opinion that someone blew their nose in this tissue. But that was elicited by [defense] counsel.

"The Court: Was that in the report?

"[The Prosecutor]: No.

"The Court: Okay. Anything else, [defense counsel]?

"[Defense Counsel]: I don't think we're talking about the idea of it being someone blowing their nose in it, Your Honor. We're talking about this, fingerprints, or—or thumbprint, whatever it is, and I didn't inquire about that, Your Honor.

"The Court: Well, you did—well, you didn't object when he was questioning [Vailonis] regarding the tissue in the follow-up.

"[Defense Counsel]: I had no idea where he was going, Your Honor.

"The Court: Well, he was—it was brought up on your cross-examination, correct, the tissue?

"[Defense Counsel]: Right. Exactly, brought up on his direct, Your Honor.

"The Court: Well, I thought you brought that up on cross-examination. Yeah, you discussed it, so.

"[Defense Counsel]: Oh, it was discussed, Your Honor, yes.

"The Court: Yeah. All right. Well, she did say it's not a scientific method, and this is purely based on her experience of thirty years or so of forensic analysis. So, I'm going to deny your motion to preclude her testimony. Certainly, the jury can decide themselves, based on the exhibits, whether or not it appears to be what it is, and that's just purely her subjective opinion. All right. Anything else?

"[The Prosecutor]: No, Your Honor."

The following standard of review and other legal principles govern our consideration of the defendant's evidentiary claim. "[T]he trial court has broad discretion in ruling on the admissibility . . . of evidence . . . . The trial court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion. . . . We will make every reasonable presumption in favor of upholding the trial court's ruling . . . and . . . upset it [only] for a manifest abuse of discretion." (Internal quotation marks omitted.) *State* v. *Thompson*, 305 Conn. 412, 434, 45 A.3d 605 (2012), cert. denied, 568 U.S. 1146, 133 S. Ct. 988, 184 L. Ed. 2d 767 (2013).

Our deferential standard generally applicable to review of evidentiary rulings applies equally to rulings on the admissibility of expert testimony. "[U]nless [the court's wide] discretion has been abused or the ruling involves a clear misconception of the law, the trial court's decision will not be disturbed. . . . In determining whether there has been an abuse of discretion, the ultimate issue is whether the court could reasonably conclude as it did." (Internal quotation marks omitted.) *State* v. *Guilbert*, 306 Conn. 218, 229–30, 49 A.3d 705 (2012).

"Expert testimony should be admitted when: (1) the witness has a special skill or knowledge directly applicable to a matter in issue, (2) that skill or knowledge

is not common to the average person, and (3) the testimony would be helpful to the court or jury in considering the issues. . . . In other words, [i]n order to render an expert opinion the witness must be qualified to do so and there must be a factual basis for the opinion. . . .

"It is well settled that [t]he true test of the admissibility of [expert] testimony is not whether the subject matter is common or uncommon, or whether many persons or few have some knowledge of the matter; but it is whether the witnesses offered as experts have any peculiar knowledge or experience, not common to the world, which renders their opinions founded on such knowledge or experience any aid to the court or the jury in determining the questions at issue. . . . Implicit in this standard is the requirement . . . that the expert's knowledge or experience . . . be directly applicable to the matter specifically in issue. . . .

"Beyond these general requirements regarding the admissibility of expert testimony, [t]here is a further hurdle to the admissibility of expert testimony when that testimony is based on . . . scientific [evidence]. In those situations, the scientific evidence that forms the basis for the expert's opinion must undergo a validity assessment to ensure reliability. . . . In [*State* v. *Porter*, 241 Conn. 57, 68, 698 A.2d 739 (1997), cert. denied, 523 U.S. 1058, 118 S. Ct. 1384, 140 L. Ed. 2d 645 (1998)], [our Supreme Court] followed . . . *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and held that scientific evidence should be subjected to a flexible test, with differing factors that are applied on a case-by-case basis, to determine the reliability of the scientific evidence. . . . Following [*Porter*], scientific evidence, and expert testimony based thereon, usually is to be evaluated under a threshold admissibility standard [relating to] the reliability of the methodology underlying the evidence." (Citations omitted; internal quotation

marks omitted.) *State* v. *Guilbert*, supra, 306 Conn. 230–31.

With these principles in mind, we turn to the arguments raised by the defendant in support of his evidentiary claim.

A

The defendant first argues that the court improperly permitted Vailonis to give expert bloodstain pattern analysis testimony without her having been disclosed or qualified as an expert in bloodstain patterns or blood spatter analysis. The defendant concedes that defense counsel did not raise this particular objection before the trial court, arguing that counsel was "surprised by her testimony . . . ." The defendant nevertheless contends that "[i]t was plain error to permit a witness to give expert opinion testimony in a separate area without formally qualifying her as an expert witness in that area." The state argues that we should decline to review this unpreserved aspect of the defendant's claim. The state further argues that the defendant cannot succeed under the plain error doctrine; see Practice Book § 60-5; because there was no clear and obvious error here, and he has failed adequately to brief his entitlement to such extraordinary relief. We agree with the state on both grounds.

"[I]n order to preserve an evidentiary ruling for review, trial counsel must object properly. . . . In objecting to evidence, counsel must properly articulate the basis of the objection so as to apprise the trial court of the precise nature of the objection and its real purpose, in order to form an adequate basis for a reviewable ruling. . . . *Once counsel states the authority and ground of* [*the*] *objection*, *any appeal will be limited to the ground asserted.* . . . [T]hese requirements are not simply formalities. [A] party cannot present a case to the trial court on one theory and then

seek appellate relief on a different one . . . . For this court to . . . consider [a] claim on the basis of a specific legal ground not raised during trial would amount to trial by ambuscade, unfair both to the [court] and to the opposing party. . . . Thus, because the essence of preservation is fair notice to the trial court, the determination of whether a claim has been properly preserved will depend on a careful review of the record to ascertain whether the claim on appeal was articulated below with sufficient clarity to place the trial court on reasonable notice of that very same claim." (Citations omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Miranda*, 327 Conn. 451, 464–65, 174 A.3d 770 (2018).

Even if a claim is unpreserved, however, an appellate court "may in the interests of justice notice plain error not brought to the attention of the trial court. . . ." Practice Book § 60-5. Application of the plain error doctrine is nevertheless "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. *Myers*, 290 Conn. 278, 287–88, 963 A.2d 11 (2009). "[Thus, a] defendant cannot prevail under [the plain error doctrine] . . . unless he demonstrates that the claimed error is both so clear and so harmful that a failure to reverse the judgment would result in manifest injustice." (Internal quotation marks omitted.) *State* v. *Fagan*, 280 Conn. 69, 87, 905 A.2d 1101 (2006), cert. denied, 549 U.S. 1269, 127 S. Ct. 1491, 167 L. Ed. 2d 236 (2007).

During the state's redirect examination of Vailonis and prior to her giving her opinion about the origin of the bloodstain on the tissue, she testified that her background and experience included having been "proficiency tested in blood spatter analysis." She then gave her opinion that the bloodstain on the tissue appeared

to have been made by "some sort of fingerprint" rather than from blood that was cast onto the tissue as a drop or drip. She clarified on cross-examination that she was not saying the stain was a thumbprint or fingerprint, but "a finger-type print," i.e., the stain was made by a finger. At no point during this testimony did the defendant raise *any* objection to the testimony, nor did he ask for a continuance or for an opportunity to voir dire Vailonis outside the presence of the jury. By failing to make a seasonable objection to Vailonis' qualifications to give an opinion about the mechanism by which the blood was transferred to the tissue or to whether her opinion was based on scientific methods that should be subject to a validity assessment in accordance with *Porter*, defense counsel essentially acquiesced to the admission of this opinion testimony. The defendant allowed the testimony to come in unchallenged and failed to alert the court to any potential error until much later in the examination of this witness.

This inaction was compounded by defense counsel's subsequent recross-examination of Vailonis. Counsel asked Vailonis whether her opinion about the cause of the bloodstain was in any report she had filed. She indicated that it was not. That line of questioning may have implicated the credibility of and possibly the weight that should be afforded to Vailonis' opinion, but did not go to its admissibility. In addition, Vailonis indicated in response to questions on recross-examination that her opinion was made on the basis of her specialized knowledge and experience in observing bloodstains, not on any particular scientific method. That testimony seems to undermine any assertion that the court should have recognized sua sponte the need for a *Porter* hearing. See *State* v. *Guilbert*, supra, 306 Conn. 230–31 (additional hurdle of *Porter* hearing needed only if innovative scientific methodology underlies opinion testimony); *State* v. *Vumback*, 68 Conn.

App. 313, 329–31, 791 A.2d 569 (2002) (if witness does not apply scientific instrument or test to evidence, *Porter* not applicable), aff'd, 263 Conn. 215, 819 A.2d 250 (2003).

It was not until the defendant, in hindsight, moved to strike the testimony that he elected to raise any objection to Vailonis' testimony, and even then that objection was limited to a claim of unfair surprise and that the testimony fell outside the standard recognized for scientific evidence. The defendant was silent as to whether Vailonis properly had been disclosed or was sufficiently qualified as an expert in the field of blood spatter analysis. The defendant never articulated to the trial court the argument he now raises on appeal, and, accordingly, we decline to review it as unpreserved.

We further decline to order a new trial on the basis of plain error. Although the defendant contends that the state had an obligation to "formally" qualify Vailonis as an expert in blood spatter analysis, she testified without objection that she had both training and expertise in this area. The defendant has failed to demonstrate that by allowing Vailonis to express an opinion as to the cause of a bloodstain, the court committed the type of obvious and readily discernible error that would warrant application of the plain error doctrine.

We also agree with the state that the defendant's briefing of plain error borders on inadequate. The defendant cites § 7-1 of the Connecticut Code of Evidence in support of his claim,[10] but provides no analysis of that code section or its applicability to the circumstances here. The defendant also cites without analysis

[10] Section 7-1 of the Connecticut Code of Evidence provides: "If a witness is not testifying as an expert, the witness may not testify in the form of an opinion, unless the opinion is rationally based on the perception of the witness and is helpful to a clear understanding of the testimony of the witness or the determination of a fact in issue."

this court's discussion of impermissible lay opinions in *State* v. *Holley*, 160 Conn. App. 578, 620–22, 127 A.3d 221 (2015). Our decision in *Holley*, however, was reversed by our Supreme Court after the filing of the defendant's brief and, thus, is of limited precedential value. See *State* v. *Holley*, 327 Conn. 576, 175 A.3d 514 (2018). We simply are unpersuaded that the defendant's unpreserved evidentiary claim rises to the level of an "extraordinary [situation 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. *Myers*, supra, 290 Conn. 287–88.

B

The defendant next argues that the trial court improperly denied his oral motion to strike Vailonis' testimony on the basis of its erroneous conclusion that the jury was capable of determining the cause of the bloodstain from its own knowledge and experience. We are not persuaded that the court abused its discretion in declining to strike the testimony.

A careful review of the record leads us to conclude that although the trial court refused to grant the defendant's motion to strike Vailonis' testimony, the court nevertheless effectively granted the relief he sought by indicating to the jurors that they could decide for themselves on the basis of their own observations whether they agreed with what the court referred to as Vailonis' subjective opinion about how the bloodstain got on the tissue. Stated another way, the court through its comments stripped from Vailonis' testimony any patina of expert gloss regarding her opinion about the mechanism by which the blood was transferred to the tissue.

The defendant, in raising the motion to strike, claimed that Vailonis' testimony fell "outside the standards . . .

for scientific testimony." Thus, the defendant was concerned that if Vailonis' testimony was allowed to stand, it would do so with an impermissible patina of expert opinion and, thus, might unfairly carry with it a far greater weight than that to which it was entitled. The trial court's statement in denying the motion to strike essentially transformed Vailonis' opinion from expert testimony to merely a lay opinion that was based on her observations, which the jury was instructed to evaluate for itself on the basis of its own observation of the evidence.

The defendant never objected to the court's statement to the jury that, in essence, the jury could use its own powers of observation to determine whether the blood on the tissue was a result of blood spatter or someone touching the tissue with a bloody finger. The fact that the defendant raised no further objection to the court's ruling or asked to be heard further on the topic suggests that the defendant was satisfied with the court's resolution of the matter.

Finally, at no time during the colloquy on the defendant's oral motion to strike did the defendant expressly ask the court to conduct a *Porter* hearing at which a record could have been made as to whether Vailonis' observations regarding the bloodstain were properly viewed as scientific evidence, what standards, if any, were applicable to determinations involving the causality of bloodstains, and whether those standards were followed here. We need not decide those issues here because they were not expressly raised by the defendant before the trial court.

C

Finally, the defendant argues that the court improperly admitted Vailonis' opinion regarding the cause of the bloodstain because that opinion had not been disclosed previously and, therefore, unfairly ambushed the

defense. The defendant maintains that he was not provided with a report or any other notice indicating that Vailonis had formed an opinion as to how the bloodstain on the tissue was formed. As a result, the defendant claims, he had no opportunity to research Vailonis' credentials, to consult with his own experts, or to research "whether her admittedly subjective opinion could have been affected by knowing the prosecution theory of the case and that the first trial ended in a mistrial."[11] We are unpersuaded for a number of reasons.

First, and perhaps most importantly, although the defendant claims that he was ambushed by Vailonis' testimony, he never asked for a continuance in order to attempt to remedy the alleged unfair surprise. See *State* v. *White*, 139 Conn. App. 430, 441, 55 A.3d 818 (2012) (defendant required to utilize available court procedures to protect rights, including requests for continuance), cert. denied, 307 Conn. 953, 58 A.3d 975 (2013). Such a request would have allowed the court to weigh the possibility of granting the defendant additional time to assess whether it would be necessary to consult his own expert or to conduct additional research. The defendant suggests that the court likely would have been unwilling to grant a continuance at this stage of the proceedings. By failing to inquire, however, the defendant deprived the court of the opportunity to assess the situation and to exercise its discretion. See *State* v. *Hoskie*, 74 Conn. App. 663, 673–74, 813

[11] The defendant also makes a number of arguments suggesting that he had no opportunity to discover whether Vailonis followed proper methodology or what that methodology required. Vailonis testified, however, that she had not engaged in any scientific method in reaching her conclusion that the blood on the tissue appeared to have been transferred by a finger and not by blood spatter. Instead, she relied only on her training and experience observing bloody objects. There is nothing in the record to suggest that she employed any scientific methodology and, as indicated previously, the defendant could have asked questions relative to her qualifications, but chose not to do so, nor did he ask for a continuance to do further research.

A.2d 136 (declining to speculate how trial court would have responded to timely request for continuance), cert. denied, 263 Conn. 904, 819 A.2d 837 (2003); see also *State* v. *Cooke*, 134 Conn. App. 573, 578–79, 39 A.3d 1178 (noting trial court's broad discretion to remedy discovery issues and that rectification of prejudice by granting continuance preferred to suppressing otherwise admissible evidence, " 'a severe sanction which should not be invoked lightly' "), cert. denied, 305 Conn. 903, 43 A.3d 662 (2012).

Second, the defendant contends that prior disclosure would have allowed the trial court to exercise its gatekeeping function "to preclude the use of testimony based on obscure scientific theories . . . that [have] the potential to mislead lay jurors awed by an aura of mystic infallibility surrounding scientific techniques, experts and the fancy devices employed." (Internal quotation marks omitted.) *State* v. *Griffin*, 273 Conn. 266, 281, 869 A.2d 640 (2005). Vailonis indicated in her testimony, however, that her opinion that the bloodstain on the tissue appeared to be made by a finger rather than from blood spatter was observational in nature. No testimony was ever elicited that her opinion involved scientific techniques or obscure scientific theories that would have alerted the court that a *Porter* hearing was necessary. Moreover, the defendant never requested a hearing.

Third, the defendant has not cited to a single case in which a court has stricken or precluded expert testimony on the ground that the opinion offered had not been previously disclosed in a report. In fact, as the defendant recognizes, our Supreme Court has upheld the admission of expert testimony given at trial despite there having been no prior disclosure in a report. See *State* v. *Genotti*, 220 Conn. 796, 808–809, 601 A.2d 1013 (1992).

Finally, the defendant urges us to hold that a forensic expert cannot give any opinion testimony unless there was "prior disclosure of the expert's intention to so testify, and prior disclosure of the expert's opinion and basis for it." Such a rule, if adopted, would be far too rigid in its application and would unnecessarily hamstring the discretion of the trial court, which, as we have already indicated, has far less draconian remedies available to it if the court determines that the defendant has been unfairly surprised, such as granting a continuance or allowing the defendant to conduct further voir dire outside the presence of the jury.

In sum, we are not persuaded that the court abused its considerable discretion by denying the defendant's unseasonable motion to strike Vailonis' opinion testimony.

The judgment is affirmed.

In this opinion the other judges concurred.