STATE OF CONNECTICUT *v.* STEPHANIE U.*
(AC 41793)

Bright, C. J., and Prescott and Elgo, Js.

Syllabus

Convicted of various crimes in connection with her actions while attempting to pick up her child from day care while allegedly under the influence of intoxicating liquor or drugs, the defendant appealed to this court. The defendant testified on her own behalf at trial. During cross-examination, the prosecutor asked the defendant whether she had an interest in the outcome of the trial and implied that the defendant had the opportunity to tailor her testimony by taking the stand after observing the testimony of all of the other witnesses. Additionally, during the rebuttal portion of her closing argument, the prosecutor argued that the defendant was the only witness who had the opportunity to hear the testimony of the other witnesses prior to giving her own testimony, that she had a vested interest in the outcome of the case, and that the jurors could consider that interest in their decision-making process. On appeal,

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

the defendant claimed, inter alia, that the prosecutor's questioning and argument constituted generic tailoring, which violated her right to confrontation and her right to testify on her own behalf under both the state and federal constitutions. *Held*:

1. The defendant failed to prove her unpreserved claim that the prosecutor violated her state constitutional rights to confront witnesses against her and to testify on her own behalf: although the state's tailoring questions and argument were generic because they were not tied to evidence that specifically gave rise to an inference of tailoring and instead focused on the defendant's presence in the courtroom, her ability to observe the proceedings, and her interest in the outcome of the trial, the defendant failed to prove that the state constitution offered greater protection than the federal constitution and, accordingly, failed to establish a constitutional violation under *State* v. *Geisler* (222 Conn. 672), as the language of article first, § 8, of the Connecticut constitution was virtually identical to that of the sixth amendment to the federal constitution, Connecticut's early recognition of a defendant's right to testify provided no insight as to whether the state historically viewed generic tailoring as improper, most of the cases that the defendant claimed were persuasive precedent from other states relied on the supervisory authority of the courts and on public policy to prohibit generic tailoring arguments or questions rather than on their state constitutions, the United States Supreme Court in *Portuondo* v. *Agard* (529 U.S. 61) held that generic tailoring arguments did not violate the federal constitution, Connecticut precedent after *Portuondo* did not demonstrate that the state courts considered generic tailoring arguments to raise state constitutional issues, and the defendant's argument that public policy considerations required a conclusion that generic tailoring arguments violated the state constitution was not compelling.
2. The prosecutor did not deny the defendant her due process of law under either the federal or state constitutions: the defendant's claim was unpreserved and it failed under the third prong of *State* v. *Golding* (213 Conn. 233); moreover, our Supreme Court in *State* v. *Medrano* (308 Conn. 604) held that a trial court's instruction that a jury could consider the defendant's interest in the outcome of the case did not implicate the defendant's right to due process, and the defendant in this case failed to demonstrate that a prosecutor's similar argument could have more of an impact on her due process rights than a court's jury instruction.
3. The prosecutor did not deprive the defendant of a fair trial when she argued that the defendant had tailored her testimony and that she had a motive to lie: the defendant failed to establish a claim of prosecutorial impropriety because she failed to prove that the prosecutor's argument and questions infringed on her constitutional rights.
4. This court declined to employ its supervisory authority over the administration of justice to expand the Supreme Court's decision in *State* v.

Medrano (308 Conn. 604) to prohibit a prosecutor from making arguments about the defendant's interest in the outcome of his or her criminal trial, the defendant having failed to persuade this court that such argument merits the exercise of that authority.

5. Although the defendant was not entitled to a new trial because the prosecutor's generic tailoring questions and comments did not affect the fairness of her trial, this court exercised its supervisory authority over the administration of justice to prohibit prosecutors from employing generic tailoring arguments in future criminal cases: this court determined that generic tailoring arguments should be prohibited because they were likely to implicate the perceived fairness of the judicial system and could give rise to a danger of juror misunderstanding; accordingly, this court held that, prior to asking tailoring questions or before making such comments in closing arguments in the future, a prosecutor must inform the trial court and the defendant of her intention to do so and, if the defendant objects, the trial court must determine that the prosecutor's questions or argument are specific before allowing the state to proceed.

6. The defendant could not prevail on her claim that her conviction of attempt to commit risk of injury to a child should be vacated because the crime was cognizable: our Supreme Court determined in *State* v. *Sorabella* (277 Conn. 155) that attempt to commit risk of injury to a child was a cognizable offense and this court was bound by that decision.

Argued January 5—officially released August 24, 2021

Procedural History

Substitute information charging the defendant with the crimes of operating a motor vehicle while under the influence of intoxicating liquor or drugs, operating a motor vehicle while her license was under suspension and attempt to commit risk of injury to a child, brought to the Superior Court in the judicial district of Tolland, geographical area number nineteen, and tried to the jury before *Seeley, J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

Laila M. G. Haswell, senior assistant public defender, for the appellant (defendant).

James M. Ralls, assistant state's attorney, with whom were *Matthew C. Gedansky*, state's attorney, and *Jaclyn*

Dulude, assistant state's attorney, for the appellee (state).

Opinion

BRIGHT, C. J. The defendant, Stephanie U., appeals from the judgment of conviction of operating a motor vehicle while under the influence of intoxicating liquor or drugs in violation of General Statutes § 14-227a (a) (1), operating a motor vehicle while her operator's license was under suspension in violation of General Statutes § 14-215 (a), and attempt to commit risk of injury to a child in violation of General Statutes §§ 53-21 (a) (1) and 53a-49 (a) (2). On appeal, the defendant claims that (1) the prosecutor violated her state constitutional rights to confront witnesses against her and to testify on her own behalf by improperly attacking her credibility during cross-examination and in her closing rebuttal argument by suggesting that she had tailored her testimony to conform to the evidence she had overheard during her trial, (2) the prosecutor denied her due process of law under both the federal and state constitutions when, during cross-examination, the prosecutor asked the defendant whether she had an interest in the outcome of the trial, and when, during rebuttal argument, the prosecutor told the jury that it could consider the defendant's vested interest in the outcome of the trial, (3) prosecutorial impropriety deprived her of a fair trial when the prosecutor argued that she had tailored her testimony and that she had a motive to lie, (4) this court, in the alternative, should order a new trial after we employ our supervisory authority to prohibit questions and arguments that amount to generic tailoring and/or telling or implying to the jury that it can or should discredit the defendant's trial testimony because she has an "interest in the outcome" of her trial, and (5) her conviction of attempt to commit risk of injury to a child should be vacated because it is not a cognizable crime. We reject the defendant's claims, although we

agree with her request to exercise our supervisory authority over the administration of justice on the issue of generic tailoring. Nevertheless, because we conclude that the prospective rules we articulate regarding generic tailoring would not have changed the outcome of the defendant's trial, we affirm the judgment of the trial court.

The following facts, as reasonably could have been found by the jury on the basis of the evidence presented at trial, and the relevant procedural history, inform our review of the defendant's claims. On October 30, 2015, at approximately 5 p.m., the defendant arrived to pick up her one year old child at a Vernon day care center. Jessica Woodruff also was there to pick up her own child, and she witnessed the defendant stumbling out of a vehicle, having difficulty walking into the day care, repeatedly stumbling, having difficulty "hold[ing] herself up," and falling backward. Woodruff believed that the defendant was intoxicated. Once inside, several people, including Woodruff; the assistant director of the day care, Kathleen Wheeler; and a teacher at the day care, Elyse DeGemmis, observed the defendant slur, mumble, and grab onto various objects in an effort to support herself. Wheeler and DeGemmis were so concerned that they called 911.

Detective John Divenere of the Vernon Police Department was dispatched to the day care on a report of an intoxicated woman attempting to pick up her child. On his arrival, someone pointed out the defendant. When Divenere asked the defendant for identification, she handed him her state identification card and, when asked about her driver's license, she told him that it had been suspended. Divenere observed that the defendant's eyes were glassy, her speech was slow and slurred, and she was having difficulty maintaining her balance. The defendant denied to Divenere that she had taken drugs or alcohol, or that she had medical issues,

disabilities, or diabetes. Divenere administered two "preliminary" tests that are not part of the field sobriety tests, namely, the "alphabet" test and the "counting backwards" test. At his request, the defendant performed each test several times. The defendant slurred her speech and skipped letters and numbers during each of the tests. The defendant appeared intoxicated to Divenere, who then administered several field sobriety tests, all of which the defendant failed. Officer David Provencher, who also had arrived at the day care, recorded on his body camera the defendant performing the field sobriety tests. Divenere arrested the defendant and took her to the police station.[1]

At approximately 6 p.m., while at the police station, Divenere advised the defendant of her rights. The defendant again denied that she had any medical issues or that she had consumed alcohol. She did state that she was prescribed Xanax but that she had not taken it that day. Divenere observed that the defendant did not smell of alcohol or marijuana, her eyes were not bloodshot or red, and her pupils were not dilated or constricted. Divenere did not find any drugs, drug paraphernalia, or alcohol in the defendant's vehicle or purse. Divenere administered a Breathalyzer test, which resulted in a reading of zero. He then asked the defendant to take a urine test, which the defendant initially agreed to take but then declined.[2]

On the basis of this evidence, the jury found the defendant guilty of illegal operation of a motor vehicle while

[1] After Divenere arrested the defendant, a staff member of the day care telephoned the defendant's grandmother, who picked up the child.

[2] The court instructed the jury that it could draw an adverse inference from the defendant's refusal but that it was not required to do so. The court instructed: "Evidence was presented that after the defendant submitted to a breath test, she refused to submit to a urine test. If you find that the defendant did refuse to submit to the urine test, you may make any reasonable inference that follows from that fact, but you are not required to do so."

under the influence of intoxicating alcohol or drugs, illegal operation of a motor vehicle while her license was under suspension, and attempt to commit risk of injury to a child. The court accepted the jury's verdict and sentenced the defendant to a total effective term of five years of imprisonment, execution suspended after eighteen months, followed by five years of probation. This appeal followed. Additional facts will be set forth as necessary.

I

The defendant claims that the prosecutor violated her state constitutional rights, under article first, § 8, to confront witnesses against her and to testify on her own behalf by improperly attacking her credibility when engaging in a generic tailoring argument, by suggesting during cross-examination and during closing rebuttal argument that she had tailored her testimony to conform to the evidence that she heard during her criminal trial. The defendant did not preserve her claim and asks for review pursuant to *State* v. *Golding*, 213 Conn. 233, 239–240, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015).[3]

[3] "Pursuant to *Golding*, a defendant can prevail on a claim of constitutional error not preserved at trial only if all of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. In the absence of any one of these conditions, the defendant's claim will fail. . . . *State* v. *Golding*, supra, 213 Conn. 239–40; see also *In re Yasiel R.*, [supra, 317 Conn. 781] (modifying third prong of *Golding*)." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Weatherspoon*, 332 Conn. 531, 548 n.9, 212 A.3d 208 (2019). "The appellate tribunal is free, therefore, to respond to the defendant's claim by focusing on whichever condition is most relevant in the particular circumstances." (Internal quotation marks omitted.) *State* v. *Papantoniou*, 185 Conn. App. 93, 102–103, 196 A.3d 839, cert. denied, 330 Conn. 948, 196 A.3d 326 (2018).

We conclude that the defendant's claim is reviewable but that it fails under the third prong of *Golding*. In particular, we conclude that the defendant has failed to prove that the state constitution offers greater protection than the federal constitution with respect to confrontation rights, and, therefore, she cannot establish that a state constitutional violation exists.

The following additional facts are necessary to our consideration of the defendant's claim. During trial, the defendant testified on her own behalf. She explained to the jury that she had experienced mental health issues, including mood disorders, anxiety, and bipolar disorder, since she was a child, and that she takes Xanax as needed. She also testified that the day before this incident, she had gotten into a verbal altercation with a coworker and quit her job. The defendant further explained that, on the day of the incident, she met with her manager and someone from human resources to ask for her job back, but she was not successful. She testified that, later in the day, when it was time to pick up her child from day care, her grandmother, who had been providing transportation, was unavailable; so, despite knowing that her license was under suspension, she drove to the day care to pick up her child. She denied that she had been disorientated when she went to the day care, but she testified that the body camera video convinced her that she had undergone a mental health episode while at the day care center. She explained that the video showed her experiencing tics and pulling her hair, which signaled a mental health episode.

During cross-examination, the prosecutor asked the defendant:

"Q. And you've had an opportunity to sit in court and listen to all of the witnesses testify in this case; correct?

"A. Yes.

"Q. So you've been able to listen to their testimony and figure out what you're going to say today; correct?

"A. What I'm going to say today?

"Q. Yeah; during your testimony.

"A. No.

"Q. You haven't listened to their testimony?

"A. Yes. I've listened to what they've had to say.

"Q. Okay. And you have a lot riding on this case, don't you?

"A. Today?

"Q. Sure.

"A. Well, yeah. I have my son, my apartment. I have a life. My son is everything to me."

The next day, during the rebuttal portion of her closing argument, the prosecutor argued in relevant part: "Also consider the fact that the only witness to have sat in on the testimony of all the other witnesses in this case is the defendant. None of the other witnesses got to hear the others' testimony. The defendant knew what everyone said and had that knowledge when she testified. She has a vested interest in the outcome of this case. And that can also be taken into account when you're deliberating this case.

"Does it make sense, with regard to the day care workers, that three independent individuals who have no interest in this case would tell you similar stories and describe similar behaviors of the defendant; that this would be untruthful or lying testimony, as indicated by defense counsel?

"The defendant testified that she did not act in any way as described by the day care workers. Totally

unequivocal; I did not act that way at all. These are individuals out in the community, going about their day-to-day lives, going to work, picking up children. Think about how those witnesses testified, as opposed to the defendant."

On appeal, the defendant argues that, "[d]uring cross-examination, the state asked the defendant point blank whether she had listened to all of the witnesses who had testified beforehand and 'figured out' what she was going to say. Furthermore, in its rebuttal, the state argued that the defendant was the only witness who heard all of the other testimony, and she tailored her evidence accordingly. These generic tailoring arguments violated the defendant's right of confrontation and right to testify because they turned the defendant's unassailable rights to be present during all the testimony and to testify on her own behalf into a weapon used against her. This court must hold, under the Connecticut constitution article [first], § 8 . . . that the state may not raise generic tailoring claims at any point in the trial."

A

We first consider whether the questions and remarks of the prosecutor amounted to generic tailoring.

"A prosecutor makes a tailoring argument when he or she attacks the credibility of a testifying defendant by asking the jury to infer that the defendant has fabricated his testimony to conform to the testimony of previous witnesses. See *Portuondo* v. *Agard*, 529 U.S. 61, 73, 120 S. Ct. 1119, 146 L. Ed. 2d 47 (2000). The term most frequently is used to refer to a prosecutor's direct comment during closing argument on the defendant's opportunity to tailor his testimony, although a prosecutor sometimes also will use cross-examination to convey a discrediting tailoring message to the jury. There

are two types of tailoring arguments: generic and specific. The former occurs when the prosecutor argues the inference solely on the basis of the defendant's presence at trial and his accompanying opportunity to fabricate or tailor his testimony. *State* v. *Alexander*, 254 Conn. 290, 300, 755 A.2d 868 (2000); see also *State* v. *Daniels*, 182 N.J. 80, 98, 861 A.2d 808 (2004) ([g]eneric accusations occur when the prosecutor, despite no specific evidentiary basis that [the] defendant has tailored his testimony, nonetheless attacks the defendant's credibility by drawing the jury's attention to the defendant's presence during trial and his concomitant opportunity to tailor his testimony). A specific tailoring argument, by contrast, occurs when a prosecutor makes express reference to the evidence, from which the jury might reasonably infer that the substance of the defendant's testimony was fabricated to conform to the state's case as presented at trial. See *State* v. *Daniels*, supra, 98 ([a]llegations of tailoring are specific when there is evidence in the record, which the prosecutor can identify, that supports an inference of tailoring)." (Footnote omitted; internal quotation marks omitted.) *State* v. *Weatherspoon*, 332 Conn. 531, 543–44, 212 A.3d 208 (2019).

In *Weatherspoon*, our Supreme Court concluded that the prosecutor's tailoring argument was specific because it "contained two different but related evidence-based assertions: first, the discrepancy between the defendant's pretrial statement to [the police] and his in-court trial testimony supports the inference that his in-court testimony is false; and second, the defendant's false testimony about his memory allowed him to conform his recitation of events to that of [another witness'] trial testimony, thereby supporting a reasonable inference of tailoring." Id., 549–50. By contrast, "[g]eneric tailoring arguments occur when the prosecution attacks the defendant's credibility by simply draw-

ing the jury's attention to the defendant's presence at trial and his resultant opportunity to tailor his testimony." (Internal quotation marks omitted.) *State* v. *Papantoniou*, 185 Conn. App. 93, 99 n.11, 196 A.3d 839, cert. denied, 330 Conn. 948, 196 A.3d 326 (2018).

Our Supreme Court in *Weatherspoon* was asked to decide whether generic tailoring arguments, which do not violate the federal constitution; see *Portuondo* v. *Agard*, supra, 529 U.S. 70–73; violate a defendant's right to confrontation under article first, § 8, of the Connecticut constitution. *State* v. *Weatherspoon*, supra, 332 Conn. 543. The court did not reach the question because it concluded that the tailoring argument made by the prosecutor in that case was a specific tailoring argument and the defendant had not claimed on appeal that specific tailoring arguments violate the state constitution. Id., 549–50.

In the present case, the defendant argues that the prosecutor's questions during cross-examination of the defendant and her remarks during her rebuttal closing argument were generic tailoring, and she asks that we address the state constitutional question not reached by our Supreme Court in *Weatherspoon*. The state argues that we should not reach the constitutional question because, as in *Weatherspoon*, the state's tailoring argument in the present case was specific and not generic. We agree with the defendant that the state's tailoring argument was generic.

During cross-examination, the prosecutor asked the defendant about her ability to listen to all of the arguments and figure out what she was going to say before she testified. Such questioning focused the jury's attention, not on any specific evidence that the defendant tailored her testimony but, instead, on the defendant's mere presence in the courtroom, her opportunity to

observe the proceedings, her ability to tailor her testimony on the basis of her presence in the courtroom and her observations, and the fact that she had a vested interested in the outcome of her criminal trial.

Then, during the rebuttal portion of her closing argument, the prosecutor similarly called to the jury's attention the fact that the defendant was the only testifying witness to have heard all of the trial testimony, and that she knew the substance of each witness' testimony before she, herself, testified. The prosecutor then again tied that argument to the fact that the defendant had a vested interest in the proceedings.

The state argues that the defendant is viewing the tailoring questions and remarks of the prosecutor out of context. According to the state, the tailoring comments were anchored sufficiently to evidence presented at trial to make them specific and not generic. With respect to the tailoring questions asked during cross-examination, the state argues that those questions followed the prosecutor's questions about the defendant's mental health, to which the defendant attributed her behavior on the day of her arrest. The state argues that the prosecutor's questions were intended to show that "the defendant tailored her testimony to the state's evidence of intoxication when she claimed, for the first time at trial, that her long-standing psychiatric problems mimicked drug induced intoxication." With respect to the comments made during the prosecutor's rebuttal closing argument, the state argues that, immediately following the prosecutor's "generic remarks," she compared the defendant's testimony to the consistency of the evidence from the day care workers, the police and the video recordings of the defendant's behavior. We are not persuaded that the record supports either of the state's arguments.

First, the prosecutor's questions that preceded her generic tailoring questions were unrelated to the defendant's testimony that her psychiatric problems caused her behavior that led to her arrest. Instead, the prosecutor's questions focused on the defendant's performance of the field sobriety tests, whether the defendant refused to provide a urine sample because she knew that it would show the presence of Xanax in her system, her long history of taking Xanax, and whether she took it on the day she was arrested to cope with the stressful situation at work. The fact that the defendant was present in court and heard the testimony of others was wholly unrelated to the inferences the state was asking the jury to draw from the defendant's answers to these questions. Because there is no connection between the tailoring questions asked by the state and the questions that preceded them, the tailoring questions were generic and not specific.

Second, the prosecutor's tailoring comments during her rebuttal closing argument were similarly generic because the argument that followed, on which the state relies, was not based on evidence that had any correlation to the defendant's presence in court. In particular, the prosecutor argued that the testimony of other witnesses regarding the defendant's behavior was more believable than the defendant's because the testimony of those witnesses was consistent with each other and those witnesses had no motivation to lie. In making this argument, the prosecutor made specific reference to the defendant's testimony that she did not act as those witnesses described. Thus, unlike in *Weatherspoon*, the prosecutor in the present case did not argue that defendant tailored her testimony to be consistent with the testimony of the state's witnesses. To the contrary, she argued that the defendant's testimony was flatly contrary to the testimony of more believable witnesses. Because the prosecutor's tailoring comments

were not tied to specific evidence that gave rise to an inference of tailoring, the tailoring comments were generic, not specific.

B

Having concluded that the prosecutor's tailoring arguments were generic and not specific, we consider the question not reached in *Weatherspoon*—whether the prosecutor's generic tailoring questions and argument violated the defendant's state constitutional rights to confront witnesses and to testify on her own behalf in violation of article first, § 8.[4] The defendant argues that under the factors set forth in *State* v. *Geisler*, 222 Conn. 672, 684–85, 610 A.2d 1225 (1992), she has established a state constitutional violation. We are not persuaded.

"In . . . *Geisler* . . . we identified six nonexclusive tools of analysis to be considered, to the extent applicable, whenever we are called on as a matter of first impression to define the scope and parameters of the state constitution: (1) persuasive relevant federal precedents; (2) historical insights into the intent of our constitutional forebears; (3) the operative constitutional text; (4) related Connecticut precedents; (5) persuasive precedents of other states; and (6) contemporary understandings of applicable economic and sociological norms, or, as otherwise described, relevant public policies. . . . These factors, [commonly referred to as the *Geisler* factors and] which we consider in turn, inform our application of the established state constitutional standards . . . to the defendant's claims in the present

[4] Article first, § 8, of the constitution of Connecticut provides in relevant part: "In all criminal prosecutions, the accused shall have a right to be heard by himself and by counsel . . . [and] to be confronted by the witnesses against him . . . . No person shall be compelled to give evidence against himself, nor be deprived of life, liberty or property without due process of law . . . ."

case." (Citation omitted; internal quotation marks omitted.) *State* v. *McCleese*, 333 Conn. 378, 387–88, 215 A.3d 1154 (2019). Because "[i]t is not critical to a proper *Geisler* analysis that we discuss the various factors in any particular order or even that we address each factor"; id., 388; we review the *Geisler* factors in the order briefed by the defendant.

1

The first *Geisler* factor the defendant discusses is the operative constitutional text. See id., 387. Article first, § 8, of the Connecticut constitution provides in relevant part: "In all criminal prosecutions, the accused shall have a right to be heard by himself and by counsel . . . [and] to be confronted by the witnesses against him . . . . No person shall be compelled to give evidence against himself, nor be deprived of life, liberty or property without due process of law . . . ." The defendant concedes that this *Geisler* factor favors the state. We agree.

As the defendant acknowledges, the language of article first, § 8, regarding the right to confrontation is virtually identical to that in the sixth amendment to the federal constitution. Compare U.S. Const., amend. VI ("[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him"), with article first, § 8, of the Connecticut constitution ("[i]n all criminal prosecutions, the accused shall have a right . . . to be confronted by the witnesses against him"). Because the United States Supreme Court has concluded that generic tailoring arguments do not violate federal constitutional rights; *State* v. *Weatherspoon*, supra, 332 Conn. 545–46; we agree with the defendant that this factor favors the state.

2

The next *Geisler* factor that the defendant discusses is the historical insights into the intent of our constitutional forebears. See *State* v. *McCleese*, supra, 333 Conn.

387. She concedes that the right to confrontation in the sixth amendment to the United States constitution and in article first, § 8, are nearly identical. She argues, however, that Connecticut has a long history of concern regarding a defendant's rights under article first, § 8; see *State* v. *Cassidy*, 236 Conn. 112, 122–24, 672 A.2d 899, cert. denied, 519 U.S. 910, 117 S. Ct. 273, 136 L. Ed. 2d 196 (1996), overruled in part by *State* v. *Alexander*, 254 Conn. 290, 295–96, 755 A.2d 868 (2000); and that this court should conclude that generic tailoring arguments impermissibly burden a defendant's right to testify. She contends that this *Geisler* factor favors the defendant. We conclude that this factor favors the state.

The defendant cites to historical facts in Connecticut that demonstrate the importance of the right to testify on one's own behalf throughout our history. We readily acknowledge the historical and continued importance of such a right. Nevertheless, Connecticut's early recognition of a defendant's right to testify provides no insight into whether generic tailoring was historically viewed as improper. In fact, the United States Supreme Court rejected a similar argument in *Portuondo* v. *Agard*, supra, 529 U.S. 65–66.

In *Portuondo*, the defendant argued that the prosecutor's generic tailoring argument violated his right to due process in the same way that a prosecutor violates a defendant's due process rights by commenting on a defendant's refusal to testify. Id., 64–65. In rejecting the defendant's argument, the court stated: "As an initial matter, [the defendant's] claims have no historical foundation, neither in 1791, when the Bill of Rights was adopted, nor in 1868 when, according to our jurisprudence, the [f]ourteenth [a]mendment extended the strictures of the [f]ifth and [s]ixth [a]mendments to the [s]tates. The process by which criminal defendants were brought to justice in 1791 largely obviated the need for comments of the type the prosecutor made

here. Defendants routinely were asked (and agreed) to provide a pretrial statement to a justice of the peace detailing the events in dispute. See Moglen, The Privilege in British North America: The Colonial Period to the Fifth Amendment, in The Privilege Against Self-Incrimination 109, 112, 114 (R. Helmholz et al. eds. 1997). If their story at trial—where they typically spoke and conducted their defense personally, without counsel, see J. Goebel & T. Naughton, Law Enforcement in Colonial New York: A Study in Criminal Procedure (1664–1776), p. 574 (1944); A. Scott, Criminal Law in Colonial Virginia 79 (1930)—differed from their pretrial statement, the contradiction could be noted. See [L.] Levy, Origins of the Fifth Amendment and Its Critics, 19 Cardozo L. Rev. 821, 843 (1997). Moreover, what they said at trial was not considered to be evidence, since they were disqualified from testifying under oath. See 2 J. Wigmore, Evidence § 579 (3d. [E]d. 1940).

"The pretrial statement did not begin to fall into disuse until the [1830s], see Alschuler, A Peculiar Privilege in Historical Perspective, in The Privilege Against Self-Incrimination, supra, [198], and the first [s]tate to make defendants competent witnesses was Maine, in 1864, see 2 Wigmore, supra, § 579, [701]. In response to these developments, some [s]tates attempted to limit a defendant's opportunity to tailor his sworn testimony by requiring him to testify prior to his own witnesses. See 3 J. Wigmore, Evidence §§ 1841, 1869 (1904); Ky. Stat., ch. 45, § 1646 (1899); Tenn. Code Ann., ch. 4, § 5601 (1896). Although the majority of [s]tates did not impose such a restriction, there is no evidence to suggest they also took the affirmative step of forbidding comment upon the defendant's opportunity to tailor his testimony." *Portuondo* v. *Agard*, supra, 529 U.S. 65–66.

Consistent with this history, in *State* v. *Weatherspoon*, supra, 332 Conn. 545, our Supreme Court explained that the issue of generic tailoring was not addressed in

Connecticut until 1996: "Our court *first addressed* the constitutionality of tailoring arguments in *State* v. *Cassidy*, [supra, 236 Conn. 120–29]." (Emphasis added.) We conclude that this factor favors the state.

3

The next *Geisler* factor discussed by the defendant is the persuasive precedents of other states. See *State* v. *McCleese*, supra, 333 Conn. 387. She argues that several states that have considered generic tailoring since the United States Supreme Court decided *Portuondo* barred its use as violative of their state constitution or public policy. The defendant, citing, as examples, *Martinez* v. *People*, 244 P.3d 135 (Colo. 2010) (en banc); *State* v. *Walsh*, 125 Hawaii 271, 260 P.3d 350 (2011); *Commonwealth* v. *Gaudette*, 441 Mass. 762, 808 N.E.2d 798 (2004), which relied on *Commonwealth* v. *Person*, 400 Mass. 136, 508 N.E.2d 88 (1987); *State* v. *Swanson*, 707 N.W.2d 645 (Minn. 2006); *State* v. *Daniels*, supra, 182 N.J. 80; *People* v. *Pagan*, 2 App. Div. 3d 879, 769 N.Y.S.2d 741 (2003); and *State* v. *Wallin*, 166 Wn. App. 364, 269 P.3d 1072 (2012), contends that this factor favors the defendant.

The state responds that the few jurisdictions cited by the defendant either fail to explain their rationale or utilize "conclusory" reasoning, and they often ignore the "legitimate concerns" voiced by the majority in *Portuondo*. Furthermore, the state argues, "only one [state], Hawaii, seems to have [banned generic tailoring] as a matter of state constitutional law." The state contends, therefore, that this *Geisler* factor favors the state. We conclude that, although several states prohibit generic tailoring, our review of the cases relied on by the defendant reveals that nearly all of them do so on policy, rather than state constitutional, grounds. See also K. Kumor, "State Criminal Procedure Rights: How Much

Should the U.S. Supreme Court Influence?," 89 Fordham L. Rev. 931, 939 (2020) ("[O]nly five states have expanded on this federal precedent, and only one has used its state constitution to do so. The five states are Colorado, Hawaii, Massachusetts, Minnesota, and New Jersey, with Hawaii being the only state to rely on its state constitution. All other states with opinions on this issue have conformed to the Supreme Court's holding." (Footnotes omitted.)).

A review of the cases relied on by the defendant confirms the state's argument. In *Commonwealth* v. *Person*, supra, 400 Mass. 139, a case decided before *Portuondo*, the prosecutor had argued to the jury that "because the defendant [had] sat through all the [c]ommonwealth's evidence he was able to fabricate a cover story tailored to answer every detail of the evidence against him . . . ." The Supreme Judicial Court of Massachusetts held that such argument amounted to prosecutorial impropriety because "[t]he defendant is entitled to hear the [c]ommonwealth's evidence and to confront the witnesses against him." Id., 139–40. The court, however, declined to consider the constitutional implications, if any, of the prosecutor's generic tailoring argument. Id., 142 n.7.

Seventeen years after *Person*, the Supreme Judicial Court of Massachusetts decided *Commonwealth* v. *Gaudette*, supra, 441 Mass. 762. In *Gaudette*, which was decided after *Portuondo*, the state requested, in light of *Portuondo*, that the court reconsider its *Person* prohibition on the prosecutor's use of generic tailoring arguments. Id., 763. The court, without considering whether generic tailoring violated the Massachusetts constitution, reaffirmed its holding in *Person*, stating that "it is impermissible for a prosecutor to argue in closing that the jury should draw a negative inference from the defendant's opportunity to shape his testimony to con-

form to the trial evidence unless there is evidence introduced at trial to support that argument." Id., 767.

In *Martinez* v. *People*, supra, 244 P.3d 136–37, "[d]uring closing rebuttal argument, the prosecutor twice [had] accused the defendant of tailoring his testimony to meet the facts testified to by prior witnesses. The prosecutor did not, however, tie these accusations of tailoring to evidence presented at trial. Rather, the prosecutor said that the defendant's mere presence at trial enabled him to tailor his testimony." Although the defendant objected to this argument, he did not raise a constitutional ground in his objection. Id., 139. The Supreme Court of Colorado, therefore, would not consider whether the prosecutor's argument infringed on the defendant's rights under the Colorado constitution. Id. Nevertheless, the court held that such argument was improper "as a matter of sound trial practice" due to "constitutional concerns." Id., 141.

In *State* v. *Daniels*, supra, 182 N.J. 88, 98, the Supreme Court of New Jersey, although not ruling on whether generically tailored comments by the prosecutor were "constitutionally permissible" concluded that "[p]rosecutorial comment suggesting that a defendant tailored his testimony inverts [several constitutional] rights, permitting the prosecutor to punish the defendant for exercising that which the [c]onstitution guarantees." The court also opined that generic tailoring arguments "undermine the core principle of our criminal justice system—that a defendant is entitled to a fair trial"—and "debase the truth-seeking function of the adversary process, violate the respect for the defendant's individual dignity, and ignore the presumption of innocence that survives until a guilty verdict is returned. . . . We simply cannot conclude that generic accusations are a legitimate means to bring about a just conviction. . . . Therefore, pursuant to our supervisory authority, we hold that prosecutors are prohibited from making

generic accusations of tailoring during summation." (Citations omitted; internal quotation marks omitted.) Id., 98. The court, thereafter, held that such argument is prohibited during cross-examination as well. Id., 99.

Similarly, in *State* v. *Swanson*, supra, 707 N.W.2d 657–58, the Minnesota Supreme Court concluded: "We believe, however, that although not constitutionally required, the better rule is that the prosecution cannot use a defendant's exercise of his right of confrontation to impeach the credibility of his testimony, at least in the absence of evidence that the defendant has tailored his testimony to fit the state's case." The court noted that the Supreme Judicial Court of Massachusetts had taken the same approach in *Gaudette*. Id., 658 n.2.

The only case offered by the defendant that clearly held that generic tailoring violated the state constitution is *State* v. *Walsh*, supra, 125 Hawaii 286–87.[5] In *Walsh*, "the prosecutor [had] accused [the defendant] of tailoring his testimony when, in discussing credibility, she argued that [the defendant] benefitted from hearing the testimony of the other witnesses before he testified. Manifestly the prosecutor's remarks drew the jury's attention to [the defendant's] presence at trial and his resultant opportunity to tailor his testimony . . . ." (Internal quotation marks omitted.) Id., 286. The Supreme Court of Hawaii held in relevant part: "(1) in the criminal trial of a defendant, the prosecution's

[5] In *State* v. *Wallin*, supra, 166 Wn. App. 376–77, the Court of Appeals of Washington reversed the defendant's conviction because the prosecutor had made a generic tailoring argument. In doing so, the court noted that "*Mattson* (Hawaii), *Daniels* (New Jersey), and *Swanson* (Minnesota) are helpful." Id., 376. The court further noted that the *Mattson* decision was based on an analysis of the Hawaii constitution, whereas the courts in *Daniels* and *Swanson* relied "on their ability to fashion a trial practice rule, which is not something that we could do." Id. Thus, it appears that the court in *Wallin* relied on the Washington constitution in reaching its conclusion, although it did not engage in a substantive analysis of the relevant provisions of its state constitution.

statements that a testifying defendant benefitted from his trial presence and, thus, is less credible because he heard the testimony of other witnesses . . . constitute[s] prohibited generic tailoring arguments; (2) prohibited generic tailoring arguments are reviewable as plain error inasmuch as they affect a defendant's substantial constitutional rights; (3) standard jury instructions regarding witness testimony and counsel's arguments do not cure such improper arguments; (4) accordingly, whenever a defendant testifies, the jury must be instructed that the defendant has a right to be present during trial; and (5) in this case the error is not harmless beyond a reasonable doubt." (Internal quotation marks omitted.) Id., 274. The court explained: "[U]pholding a defendant's rights under the confrontation clause is essential to providing a defendant with a fair trial . . . and . . . a prosecutor's comments may not infringe on a defendant's constitutional rights . . . . The right of confrontation is a substantial right. . . . The confrontation right provides the criminal defendant with the opportunity to defend himself [or herself] through our adversary system by prohibiting ex parte trials, granting the defendant an opportunity to test the evidence in front of a jury, and guaranteeing the right to face-to-face confrontation. . . .

"Generic accusations of tailoring also discourage a defendant from exercising his constitutional right to testify[6] on his own behalf. . . . Additionally, [i]t is well

[6] "The right of a defendant to testify is guaranteed by sections 5, 14, and 10 of article I of the Hawaii Constitution. . . . The right is essential to due process of law as guaranteed under section 5 of article 1. . . . The right to testify is also guaranteed through the compulsory process clause of section 14, which states in pertinent part that the accused shall have compulsory process for obtaining witnesses in the accused's favor . . . . Logically included in the accused's right to call witnesses . . . is a right to testify himself, should he decide it is in his favor to do so . . . since the most important witness for the defense in many criminal cases is the defendant himself. . . . The opportunity to testify is a necessary corollary to the guarantee, under section 10, against compelled testimony since every criminal

settled that an accused has a fundamental right to be present at each critical stage of the criminal proceeding. . . . The right of a criminal defendant to be present at his trial is of no less than constitutional magnitude, and is founded upon the [c]onfrontation and [d]ue [p]rocess clauses of both the United States and Hawaii [c]onstitutions. . . . It is a right of fundamental importance." (Citations omitted; emphasis omitted; footnote in original; internal quotation marks omitted.) Id., 284–85.

Although all of these cases speak to constitutional issues and concerns, with the exception of *Walsh* and *Wallin*, none of them relies on a state constitution to support the prohibition of generic tailoring arguments or questions. Rather, they rely on the supervisory authority of those courts and on public policy grounds. Furthermore, as demonstrated by the cases discussed herein, *Walsh* and *Wallin* appear to represent a minority of states that have chosen to depart from *Portuondo* in some fashion. We conclude, therefore, that this factor favors the state.

4

The next *Geisler* factor that the defendant discusses is the persuasive relevant federal precedents. See *State* v. *McCleese*, supra, 333 Conn. 387. The defendant concedes that the United States Supreme Court in *Portuondo* held that "generic tailoring arguments do not violate the federal constitution" and that, therefore, this factor favors the state. See *Portuondo* v. *Agard*, supra, 529 U.S. 73. We agree.

5

The fifth factor briefed by the defendant concerns related Connecticut precedent. See *State* v. *McCleese*, supra, 333 Conn. 387. In her main appellate brief, the

defendant is privileged to testify in his or her defense." (Citations omitted; internal quotation marks omitted.) *State* v. *Walsh*, supra, 125 Hawaii 285 n.22.

defendant argues, in toto: "The first time this issue came up in Connecticut was in *Cassidy*, where this court strongly disapproved of generic tailoring arguments because [i]nviting the fact finder to draw an inference adverse to a defendant solely on account of the defendant's assertion of a constitutional right impermissibly burdens the free exercise of that right and, therefore, may not be tolerated. [*State* v. *Cassidy*, supra, 236 Conn. 127]. However, the court in [*State* v.] *Alexander*, [supra] 254 Conn. 290, overruled *Cassidy*. Subsequent attempts to revisit this issue were unsuccessful. *State* v. *Perez*, [78 Conn. App. 610, 629, 828 A.2d 626 (2003), cert. denied, 271 Conn. 901, 859 A.2d 565 (2004)]; *State* v. *Papantoniou*, [supra, 185 Conn. App. 93].[7] Recently, as discussed in more detail above, [our Supreme Court] readdressed this issue [in] *Weatherspoon*, where [the] court indicated that, should the practice of generic tailoring arguments persist, a rule prohibiting them may become necessary. [*State* v. *Weatherspoon*, supra] 332 Conn. 554. Based upon the decision in *Weatherspoon*, this factor favors the defendant." (Footnote added; internal quotation marks omitted.) The state concedes that this factor "appears to favor the defendant." We agree.

In *Weatherspoon*, our Supreme Court explained: "[We] first addressed the constitutionality of tailoring arguments in *State* v. *Cassidy*, [supra, 236 Conn. 120–29]. We held in *Cassidy* that generic tailoring arguments violate the sixth amendment's confrontation clause . . . but specific tailoring arguments are constitutionally permissible because they are linked solely to the

[7] In *State* v. *Papantoniou*, supra, 185 Conn. App. 100 n.14, this court did not address the defendant's claim that generic tailoring arguments violated the defendant's rights under the Connecticut constitution. Instead, we concluded that, even if we assumed that a constitutional violation had occurred, the defendant could not prevail on his unpreserved constitutional claim because the state had proved that the alleged constitutional violation was harmless beyond a reasonable doubt. Id., 103.

evidence and not, either directly or indirectly, to the defendant's presence at trial. . . . This court's reasoning was straightforward: Inviting the fact finder to draw an inference adverse to a defendant solely on account of the defendant's assertion of a constitutional right impermissibly burdens the free exercise of that right and, therefore, may not be tolerated. . . . *Cassidy*, however, reassured the state that the prohibition against generic tailoring arguments did not prevent the prosecution from aggressively attacking a testifying defendant's credibility. We stated that the prosecutor, in his closing argument . . . was not free to assert that the defendant's presence at trial had enabled him to tailor his testimony to that of other witnesses. Such argument exceeded the bounds of fair comment because it unfairly penalized the defendant for asserting his constitutionally protected right to confront his accusers at trial. . . .

"Four years later, the sixth amendment underpinning of *Cassidy* was removed when the United States Supreme Court held that generic tailoring arguments do not violate any federal constitutional rights. *Portuondo* v. *Agard*, supra, 529 U.S. 75–76. In *Portuondo* . . . [t]he court pointed out that generic tailoring arguments pertain to the defendant's credibility as a witness, and [are] therefore in accord with our [long-standing] rule that when a defendant takes the stand, his credibility may be impeached and his testimony assailed like that of any other witness. . . .

"The *Portuondo* majority emphasized that its ruling was limited to federal constitutional grounds and did not address whether generic tailoring arguments were always desirable as a matter of sound trial practice, which, the court explained, was an inquiry best left to trial courts, and to the appellate courts which routinely review their work. . . . This caveat also was noted in a concurrence by Justice Stevens, in which he expressed

the view that generic tailoring arguments should be discouraged rather than validated, and emphasized that the majority's holding does not, of course, deprive [s]tates or trial judges of the power . . . to prevent such argument[s] altogether. . . .

"Because *Cassidy* was decided under the federal constitution, *Portuondo* required us to overrule its holding, which we did in *State* v. *Alexander*, supra, 254 Conn. 296. We stated in *Alexander* that generic tailoring comments on the defendant's presence at trial and his accompanying opportunity to fabricate or tailor his testimony were permissible under the federal constitution. . . . Although the defendant in *Alexander* raised a state constitutional claim through supplemental briefing, this court was not persuaded by his argument." (Citations omitted; emphasis omitted; footnotes omitted; internal quotation marks omitted.) *State* v. *Weatherspoon*, supra, 332 Conn. 545–47.

The court further explained: "Although the present case does not require us to decide at this time whether to adopt a formal rule prohibiting generic tailoring arguments as an exercise of our supervisory authority, such a rule may become necessary if future cases reveal that tailoring arguments are being made indiscriminately and without an appropriate evidentiary basis. Likewise, the fact that generic tailoring arguments do not burden federal constitutional rights does not mean that they pass constitutional muster under our state constitution. We express no view on these issues, but observe that a number of our sister states have determined that generic tailoring arguments are impermissible as a matter of sound trial practice or state law." Id., 554.

Although this history indicates that it may be time for us to exercise our supervisory authority to prohibit generic tailoring arguments or cross-examination in criminal cases, we conclude that this history does not

necessarily demonstrate that our appellate courts, after *Portuondo*, consider this a matter of state constitutional law. Nevertheless, because it is obvious that we have recognized in our case law the possibility that such generic tailoring arguments and questions on cross-examination during a criminal trial potentially could impact a defendant's state constitutional rights, we conclude that this factor, on balance, slightly favors the defendant.

6

The final *Geisler* factor briefed by the defendant requires us to consider relevant public policies, including economical and sociological considerations. See *State* v. *McCleese*, supra, 333 Conn. 387. The defendant argues that generic tailoring comments violate Connecticut public policy, stating: "As [B.] Gershman's Prosecutorial Misconduct § 11.16 (2d Ed. 2015) warns, a generic tailoring insinuation may impinge on a defendant's right to take the stand and his right to confront witnesses because the comment implies that a truthful defendant would have stayed out of the courtroom before testifying. Furthermore, the argument violates the defendant's right to testify because the state can only make the argument when the defendant takes the stand." (Internal quotation marks omitted.) She also argues in her reply brief that "[t]elling the jury that it may . . . use the defendant's presence to find her less believable sends [a] . . . message . . . that her presence [at her criminal trial] means she is less believable. . . . [This] tie[s] the defendant's credibility to her presence at trial, burdening her rights to confront and testify. . . . Mentioning that the defendant was the only witness to watch the other witnesses exacerbates the problem because it implies that the other witnesses are automatically more believable because they were sequestered." (Citations omitted.)

Although we agree in part with the defendant's argument concerning the implications of generic tailoring on the jury's perception of the defendant during her criminal trial; see part IV of this opinion; we are not persuaded, in light of our analysis in parts I B 1 through 5 of this opinion, by the defendant's argument that public policy considerations compel a conclusion that generic tailoring violates our state constitution.

C

On the basis of our analysis of the *Geisler* factors, the defendant has not persuaded us that article first, § 8, of the Connecticut constitution affords greater protection than its federal counterparts, the fifth and sixth amendments, on the issue of generic tailoring as to the defendant's right of confrontation and her right to testify on her on own behalf. Consequently, her claim that the prosecutor's generic tailoring comments violated her rights under the article first, § 8, of our state constitution fails.

II

The defendant next claims that the prosecutor violated her federal and state constitutional rights to due process of law[8] when, during cross-examination, she asked the defendant whether she had a vested interest in the outcome of the trial, and when, during rebuttal, the prosecutor told the jury that it could consider the defendant's vested interest in the outcome of the trial. She argues that "[t]hese questions and comments improperly infringed upon the defendant's presumption

[8] The defendant does not brief separately a state constitutional due process claim or contend that the state constitution affords greater protections than its federal counterpart. Accordingly, we consider this claim only under the federal constitution. See, e.g., *State* v. *Scott*, 158 Conn. App. 809, 814 n.4, 121 A.3d 742 (when analysis of rights under Connecticut constitution is not briefed separately by appellant, we consider rights as coextensive with federal constitution), cert. denied, 319 Conn. 946, 125 A.3d 527 (2015).

of innocence. Furthermore, they are contrary to the rule of *State* v. *Medrano*, 308 Conn. 604, [629–31, 65 A.3d 503] (2013), in which the court, under its supervisory powers, instructed the trial courts not to instruct the jury as to the defendant's special interest in the outcome of the case. This error was not harmless and this court must overturn the defendant's convictions on that basis." Because this claim is unpreserved, the defendant requests *Golding* review. See footnote 3 of this opinion. The defendant's claim fails under the third prong of *Golding*.

The following additional facts are relevant to our discussion. During cross-examination of the defendant, the following colloquy occurred:

"[The Prosecutor]: And you have a lot riding on this case, don't you?

"[The Defendant]: Today?

"[The Prosecutor]: Sure.

"[The Defendant]: Well, yeah. I have my son, my apartment. I have a life. My son is everything to me." The defendant did not object.

During the prosecutor's summation, it argued to the jury, inter alia, that the defendant had a "vested interest in the outcome of this case. And that can also be taken into account when you're deliberating this case." The defendant did not object to this argument.

On appeal, the defendant claims that the prosecutor violated her right to due process of law and that such questions and comments violate the spirit of *Medrano*, which, she argues, should be read to include an implied prohibition on the prosecutor telling the jury that the defendant has a vested interest in the outcome of the case, in addition to its explicit prohibition on such statements in the context of the trial court's jury instructions.

In *Medrano*, our Supreme Court considered, in relevant part, whether the defendant had been deprived of his right to a fair trial and to present a defense when the trial court instructed the jury that it could consider whether the defendant had an interest in the outcome of the case when assessing the credibility of his trial testimony. *State* v. *Medrano*, supra, 308 Conn. 624–25. The court held that the instruction "was not unduly repetitive, nor did it transcend the bounds of evenhandedness." Id., 626. Nevertheless, because such an instruction "could give rise to a danger of juror misunderstanding," the court employed its supervisory authority over the administration of justice by directing the trial court, in the future, "to refrain from instructing jurors, when a defendant testifies, that they may specifically consider the defendant's interest in the outcome of the case and the importance to him of the outcome of the trial." Id., 630–31; see also *State* v. *Courtney G.*, Conn. , n.9, A.3d (2021) (explaining holding in *Medrano*).

In the present case, the defendant has not persuaded us that the questions and argument of the prosecutor implicated her right to due process of law. Our Supreme Court in *Medrano* held that the trial court's instructions, specifically telling the jury that it could consider the defendant's interest in the outcome of the case and the importance to him of the outcome of the trial, did not implicate the defendant's right to due process of law. *State* v. *Medrano*, supra, 308 Conn. 625. The defendant in the present case has failed to persuade us that a prosecutor's similar *argument* could have more of an implication on the defendant's right to due process of law than a court's jury instructions.

In the alternative, the defendant requests that we employ our supervisory authority to expand on our Supreme Court's decision in *Medrano* by making the prohibition set forth therein applicable to comments by

prosecutors. We will discuss the use of our supervisory authority over the administration of justice in part IV of this opinion.

III

The defendant also claims that the prosecutor committed improprieties that deprived her of a fair trial when she argued that the defendant had tailored her testimony, implied that she had a motive to lie, and infringed on her right to the presumption of innocence. Having concluded in parts I and II of this opinion that the questions and argument of the prosecutor did not infringe on the defendant's constitutional rights, we need not consider this claim further. See id., 610 ("[I]n analyzing claims of prosecutorial [impropriety], we engage in a two step analytical process. The two steps are separate and distinct: (1) whether [impropriety] occurred in the first instance; and (2) whether that [impropriety] deprived a defendant of his due process right to a fair trial." (Internal quotation marks omitted.)). The defendant has failed to establish her claim.

IV

We next consider the defendant's requests that we employ our supervisory authority over the administration of justice to prohibit the prosecutor from making generic tailoring arguments and comments and that we expand on our Supreme Court's decision in *Medrano* to prohibit the prosecutor from making "interest in the outcome" arguments about the defendant.[9] As for

[9] We note that the claims of error giving rise to these requests were not preserved and that our supervisory authority "is not intended to serve as a bypass to the bypass [doctrines], permitting the review of unpreserved claims of case specific error—constitutional or not—that are not otherwise amenable to relief under *Golding* or the plain error doctrine. . . . [A] defendant seeking review of an unpreserved claim under our supervisory authority must demonstrate that his claim is one that, as a matter of policy, is relevant to the perceived fairness of the judicial system as a whole, most typically in that it lends itself to the adoption of a procedural rule that will guide the lower courts in the administration of justice in all aspects of the criminal process." (Citation omitted; internal quotation marks omitted.) *State* v.

prosecutorial argument on the defendant's "interest in the outcome" of her criminal trial, the defendant has failed to persuade us that such argument merits the exercise of our supervisory authority. See *State* v. *Courtney G.*, supra, Conn. n.9. On the issue of generic tailoring, we agree to exercise our supervisory authority over the administration of justice to prohibit such questions and arguments because they are likely to implicate the perceived fairness of the judicial system and they could give rise to a danger of juror misunderstanding.

"It is well settled that [a]ppellate courts possess an inherent supervisory authority over the administration of justice. . . . Under our supervisory authority, we have adopted rules intended to guide the lower courts in the administration of justice in all aspects of the criminal process." (Internal quotation marks omitted.) *State* v. *Weatherspoon*, supra, 332 Conn. 552. "The exercise of our supervisory powers 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 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. . . .

"We recognize that this court's supervisory authority is not a form of free-floating justice, untethered to legal

Elson, 311 Conn. 726, 768, 91 A.3d 862 (2014); see also *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 155–61, 84 A.3d 840 (2014) (noting that "a reviewing court has the authority to review [unpreserved] claims under its supervisory power" and setting forth "general principles" of such review). We conclude that the record in the present case is adequate for review of the defendant's claims, both parties have had the opportunity to be heard on these claims, neither party will suffer unfair prejudice by our review of the claims, and the state, which responded to these claims in its brief, does not object to review pursuant to our supervisory authority. See *In re Yasiel R.*, supra, 317 Conn. 790. Furthermore, for the reasons that follow, we conclude that the defendant's claims implicate the perceived fairness of the judicial system as a whole and merit review under our supervisory authority.

principle. . . . Rather, the rule invoking our use of supervisory power is one that, as a matter of policy, is relevant to the perceived fairness of the judicial system as a whole, most typically in that it lends itself to the adoption of a procedural rule that will guide lower courts in the administration of justice in all aspects of the [adjudicatory] process. . . . Indeed, the integrity of the judicial system serves as a unifying principle behind the seemingly disparate use of [this court's] supervisory powers." (Citations omitted; internal quotation marks omitted.) *In re Yasiel R.*, supra, 317 Conn. 789–90.

"Generally, cases in which we have invoked our supervisory authority for rule making have fallen into two categories . . . . In the first category are cases wherein we have utilized our supervisory power to articulate a procedural rule as a matter of policy, either as [a] holding or dictum, but without reversing [the underlying judgment] or portions thereof. . . . In the second category are cases wherein we have utilized our supervisory powers to articulate a rule or otherwise take measures necessary to remedy a perceived injustice with respect to a preserved or unpreserved claim on appeal." (Internal quotation marks omitted.) *State* v. *Weatherspoon*, supra, 332 Conn. 552–53; id. (deciding it was unnecessary to consider defendant's request for exercise of supervisory authority because prosecutor's tailoring argument was specific rather than generic).

A

The defendant requests that we employ our supervisory authority over the administration of justice to expand on our Supreme Court's decision in *Medrano* to prohibit the prosecutor from employing "interest in the outcome" questions and arguments about a defendant who exercises her or his right to testify. She argues that " '[i]nterest in the outcome' arguments apply to

both guilty and innocent defendants and therefore are of minimal value in assessing the defendant's credibility. Furthermore, [the] court in *Medrano* banned jury instructions that emphasize the defendant's interest in the outcome of the case, and it significantly defeats the purpose of this rule to then allow the state to argue about the defendant's interest in the outcome and tell the jury that it may take that interest into consideration." We are not persuaded by the defendant's arguments in support of this request.

In *Medrano*, our Supreme Court held that the trial court's instructions, telling the jury that it could consider the defendant's interest in the outcome of the case and the importance to him of the outcome of the trial, did not implicate the defendant's right to due process of law but that they could give rise to a danger of juror misunderstanding. *State* v. *Medrano*, supra, 308 Conn. 629–31. In the present case, the defendant's attempts to equate the court's instructions with the argument of the prosecutor are not persuasive. In cases where a criminal defendant has taken the witness stand, the jury is well aware that the defendant is the one on trial and that he or she has an interest in the outcome of the case. The argument of the prosecutor, reminding the jury that the defendant has an interest does not carry the inherent danger of misunderstanding that a judge's instruction would have on the jury. As our Supreme Court recently noted: "Our holding in *Medrano* was predicated on the trial court's role as a neutral and detached arbiter of justice and its duty to instruct the jurors on the law in a fair, impartial, and dispassionate manner. Although a prosecutor is a minister of justice . . . she is not neutral, detached, impartial, or dispassionate. Instead, a prosecutor is an advocate with a professional obligation to argue zealously, albeit fairly, on behalf of the state." (Citation omitted.) *State* v. *Courtney G.*, supra, Conn. n.9. The jury

understands the difference between advocacy by the state on one hand and an instruction of law by the court on the other, which it is told it must follow. The argument of counsel is just that, argument, and the jury in the present case specifically was instructed as such. Accordingly, we are not persuaded by the defendant's argument.

B

The defendant also requests that, for policy reasons, we employ our supervisory authority over the administration of justice to prohibit the prosecutor from making generic tailoring arguments. She argues that if we were to prohibit such remarks, "[t]he prosecutor would still be free to challenge a defendant's overall credibility by making specific tailoring arguments. In closing, the prosecutor could comment on the defendant's testimony, and how it matched or conflicted with other evidence. The prosecutor [however] could not refer explicitly to the fact that the defendant was in the courtroom or that he [or she] heard the testimony of other witnesses, and was thus able to tailor his [or her] testimony. . . . This is a rule that can be readily fashioned and easily followed in a trial setting." (Citation omitted; internal quotation marks omitted.) We agree that there are important public policy reasons that make it necessary for us to employ our supervisory authority over the administration of justice to set forth a procedure to ensure that prosecutors make only specific and not generic tailoring remarks during a criminal trial.

In reaching this conclusion, we are guided by the rationale that our Supreme Court has set forth for the exercise of appellate supervisory authority. "We deem it appropriate, in light of concerns of fundamental fairness, to consider the substance of this issue pursuant to our supervisory authority for the purpose of providing guidance to trial courts in future cases. As an appellate

court, we possess an inherent supervisory authority over the administration of justice. . . . The standards that we set under this supervisory authority are not satisfied by observance of those minimal historic safeguards for securing trial by reason which are summarized as due process of law . . . . Rather, the standards are flexible and are to be determined in the interests of justice. . . . We previously have exercised our supervisory powers to direct trial courts to adopt judicial procedures that will address matters that are 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." (Citations omitted; internal quotation marks omitted.) *Duperry* v. *Solnit*, 261 Conn. 309, 326–27, 803 A.2d 287 (2002); id., 329–31 (employing supervisory authority to enact new rule mandating that trial court must canvass defendant who, with no contestation by prosecutor, pleads not guilty by reason of insanity, but declining to apply that rule to present case); see also *State* v. *Carrion*, 313 Conn. 823, 847–49, 100 A.3d 361 (2014) (although defendant failed to prove that jury charge deprived him of fair trial, our Supreme Court exercised its supervisory authority over administration of justice to direct trial court to refrain from giving that particular instruction in future).

In *Carrion*, our Supreme Court explained that "the cases in which this court has invoked its supervisory authority can be divided into two different categories. In the first category are cases [in which] we have utilized our supervisory power[s] to articulate a procedural rule as a matter of policy, either as holding or dictum, but without reversing convictions or portions thereof. In the second category are cases [in which] we have utilized our supervisory powers to articulate a rule or otherwise take measures necessary to remedy a perceived injustice with respect to a preserved or unpreserved claim on appeal. Although we . . . have noted

that [o]ur cases have not always been clear as to the reason for this distinction . . . a review of the cases in both categories demonstrates that, in contrast to the second category, the first category consists of cases [in which] there was no perceived or actual injustice apparent on the record, but the facts of the case lent themselves to the articulation of prophylactic procedural rules that might well avert such problems in the future. . . .

"For purposes of the second category of cases—cases in which we reverse a conviction—the defendant must establish that the invocation of our supervisory authority is truly necessary because [o]ur supervisory powers are not a last bastion of hope for every untenable appeal. . . . In such circumstances, the exercise of our supervisory powers 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 of [the] utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole. . . . Because [c]onstitutional, statutory and procedural limitations are generally adequate to protect the rights of the defendant and the integrity of the judicial system, this court will invoke its supervisory powers to reverse a conviction only in the rare circumstance [in which] these traditional protections are inadequate to ensure the fair and just administration of the courts. . . . This demanding standard is perfectly appropriate when we are asked to reverse a conviction under our supervisory powers.

"The first category of cases, however, presents an entirely different set of circumstances. We invoke our supervisory authority in such a case . . . not because the use of that authority is necessary to ensure that justice is achieved in the particular case. Rather, we have determined that the defendant in that case

received a fair trial and therefore is not entitled to the extraordinary remedy of a new trial. Nevertheless, it may be appropriate, in such circumstances, to direct our trial [judges] to conduct themselves in a particular manner so as to promote fairness, both perceived and actual, *in future cases*. As we tacitly have recognized by invoking our supervisory authority in such cases, because we are not imposing any remedy in the case [on appeal]—let alone the extraordinary remedy of a new trial—there is no need for this court to justify the use of extraordinary measures prior to exercising its supervisory authority. Rather . . . we are free to invoke our supervisory authority prospectively when prudence and good sense so dictate." (Citations omitted; emphasis altered; internal quotation marks omitted.) *State* v. *Carrion*, supra, 313 Conn. 850–52; see also *State* v. *Elson*, 311 Conn. 726, 768–70 n.30, 91 A.3d 862 (2014). This is such a case.

First, this case does not fit into the second category of cases requiring the extraordinary remedy of a retrial because the record reflects that the generic tailoring comments of the prosecutor did not affect the fairness of the defendant's trial. The defendant admitted to driving while her license was under suspension, and, as to the crimes of driving while under the influence of intoxicating drugs or alcohol and attempt to commit risk of injury to a child, the evidence demonstrates that the people with whom she had come into contact at the day care believed that her behavior and demeanor exhibited intoxication, that she failed the field sobriety tests that were administered, and that she was unsteady on her feet and confused. Furthermore, Divenere testified that the medication Xanax is used for anxiety and panic disorders and that the defendant told him that she was taking Xanax, although she did not admit to having taken it that day. Divenere also testified that "Xanax can impair one's ability to drive," and that, after

the defendant tested negative for alcohol, he asked her to provide a urine sample so that he could test for drugs, but she refused. The jury reasonably could infer from the defendant's refusal to provide the requested urine sample that she was concerned that such a sample would show the presence of Xanax in her system. Furthermore, the prosecutor's generic tailoring comments were limited in nature, compromising only a few questions and only three sentences of the prosecutor's rebuttal argument. Because we have concluded that generic tailoring does not implicate the defendant's constitutional rights, the burden to prove any harm from the prosecutor's use of generic tailoring is on the defendant, and she has failed to prove that the prosecutor's limited use of generic tailoring during her criminal trial was harmful.

Despite our conclusion that the prosecutor's generic tailoring comments did not prejudice the defendant, we are convinced that, to ensure the perceived and actual fairness of trials in the future, generic tailoring arguments should be avoided. Under our criminal justice system, a defendant has both federal and state constitutional rights, including the rights to be present at trial, to confront the state's witnesses, to call witnesses and present evidence, and to testify, or to not testify, on his or her own behalf. See U.S. Const., amends. V, VI and XIV; Conn. Const., art. I, § 8. "[A] criminal defendant is not simply another witness. Those who face criminal prosecution possess fundamental rights that are essential to a fair trial. *Pointer* v. *Texas*, 380 U.S. 400, 403, [85 S. Ct. 1065, 13 L. Ed. 2d 923] (1965) . . . . Indeed, a criminal defendant has the right to be present at trial, see *Illinois* v. *Allen*, 397 U.S. 337, 338, [90 S. Ct. 1057, 25 L. Ed. 2d 353] (1970), to be confronted with the witnesses against him and to hear the [s]tate's evidence, see *Pointer* [v. *Texas*], supra, [403], to present witnesses and evidence in his defense, see *Washington* v. *Texas*,

388 U.S. 14, 18–19, [87 S. Ct. 1920, 18 L. Ed. 2d 1019] (1967), and to testify on his own behalf, see *Rock* v. *Arkansas*, 483 U.S. 44, 49, [107 S. Ct. 2704, 97 L. Ed. 2d 37] (1987)." (Internal quotation marks omitted.) *State* v. *Daniels*, supra, 182 N.J. 97–98.

Under our rules of practice, a criminal defendant is required to be present at his or her criminal trial, unless excused under Practice Book § 44-8.[10] Additionally, the order of the presentation of evidence at a criminal trial, unless there is cause to permit otherwise, *must proceed* as follows: "(1) The prosecuting authority shall present the case-in-chief. (2) The defendant may present a case-in-chief. (3) The prosecuting authority and the defendant may present rebuttal evidence in successive rebuttals, as required. The judicial authority for cause may permit a party to present evidence not of a rebuttal nature, and if the prosecuting authority is permitted to present further evidence in chief, the defendant may respond with further evidence in chief. (4) The prosecuting authority shall be entitled to make the opening and final closing arguments. (5) The defendant may make a single closing argument following the opening argument of the prosecuting authority." Practice Book § 42-35; see also General Statutes § 54-88. Accordingly, for a defendant to exercise his or her rights to be present at trial and to confront that state's witnesses, he or she necessarily must sit through the state's case *before*

[10] Practice Book § 44-8 provides: "The defendant *must be present at the trial* and at the sentencing hearing, but, if the defendant will be represented by counsel at the trial or sentencing hearing, the judicial authority may: (1) Excuse the defendant from being present at the trial or a part thereof or the sentencing hearing if the defendant waives the right to be present; (2) Direct that the trial or a part thereof or the sentencing hearing be conducted in the defendant's absence if the judicial authority determines that the defendant waived the right to be present; or (3) Direct that the trial or a part thereof be conducted in the absence of the defendant if the judicial authority has justifiably excluded the defendant from the courtroom because of his or her disruptive conduct, pursuant to Section 42-46." (Emphasis added.)

exercising the right to testify. See Practice Book § 42-35. That is the way our system is designed.

Although the United States Supreme Court in *Portuondo* declined to recognize a federal constitutional prohibition against a prosecutor making comments concerning a testifying defendant's opportunity to tailor his or her testimony because of his or her mere presence in the courtroom during the state's case, the "*Portuondo* majority emphasized that its ruling was limited to federal constitutional grounds and did not address whether generic tailoring arguments were always desirable as a matter of sound trial practice, which, the court explained, was an inquiry best left to trial courts, and to the appellate courts which routinely review their work. *Portuondo* v. *Agard*, supra, 529 U.S. 73 n.4. This caveat also was noted in a concurrence by Justice Stevens, in which he expressed the view that generic tailoring arguments should be discouraged rather than validated, and emphasized that the majority's holding does not, of course, deprive [s]tates or trial judges of the power . . . to prevent such argument[s] altogether. Id., 76." (Internal quotation marks omitted.) *State* v. *Weatherspoon*, supra, 332 Conn. 546–47.

"Justice Ginsburg dissented in *Portuondo* on the basis of her belief that generic tailoring arguments in closing arguments unduly burden a defendant's sixth amendment right to be present at trial and to confront the accusers against him, and do not aid the jury in its truth-seeking function because a prosecutorial comment . . . tied only to the defendant's presence in the courtroom and not to his actual testimony does not assist the jury in sort[ing] those who tailor their testimony from those who do not, much less the guilty from the innocent. [*Portuondo* v. *Agard*, supra, 529 U.S. 77–78]." (Internal quotation marks omitted.) *State* v. *Weath-*

erspoon, supra, 332 Conn. 547 n.8. Justice Ginsburg contended, instead, that the majority was "transform[ing] a defendant's presence at trial from a [s]ixth [a]mendment right into an automatic burden on his credibility." *Portuondo* v. *Agard*, supra, 76 (Ginsburg, J., dissenting).

Our Supreme Court in *Weatherspoon* carefully explained that "a tailoring argument does not automatically become appropriate just because a defendant chooses to testify in his or her criminal trial, and *prosecutors and trial courts must take care to ensure that any such argument is tied expressly and specifically to evidence that actually supports the inference of tailoring*. It is true that the United States Supreme Court held in *Portuondo* that tailoring arguments do not violate the sixth amendment, but the court made equally clear, however, that state courts may prohibit or limit tailoring arguments by local decree as a matter of sound trial practice. See [id.] 73 n.4; id., 76 (Stevens, J., concurring)." (Emphasis added.) *State* v. *Weatherspoon*, supra, 332 Conn. 553–54.

Although the United States Supreme Court has determined that generic tailoring arguments are not violative of the federal constitution, and our appellate courts, since shortly after *Portuondo*; see *State* v. *Alexander*, supra, 254 Conn. 295–96 (overruling *State* v. *Cassidy*, supra, 236 Conn. 112); have not been persuaded that such arguments are violative of the Connecticut constitution, we, nonetheless, agree with the defendant that these remarks should be prohibited because they are likely to implicate the perceived fairness of the judicial system and they could give rise to a danger of juror misunderstanding.

In *State* v. *Cassidy*, supra, 236 Conn. 120, our Supreme Court determined that generic tailoring arguments, made by the prosecutor during closing argument to the

jury, "invited the jury to draw an inference adverse to the defendant solely because he asserted his constitutional right to be present at trial and, consequently, that those comments unreasonably interfered with the defendant's free exercise of that right." The court explained: "The right to confrontation is fundamental to a fair trial under both the federal and state constitutions. *Pointer* v. *Texas*, [supra, 380 U.S. 403]; *State* v. *Jarzbek*, 204 Conn. 683, 707, 529 A.2d 1245 (1987) [cert. denied, 484 U.S. 1061, 108 S. Ct. 1017, 98 L. Ed. 2d 982 (1988)]; *State* v. *Reardon*, 172 Conn. 593, 599–600, 376 A.2d 65 (1977). It is expressly protected by the sixth and fourteenth amendments to the United States constitution; *Davis* v. *Alaska*, 415 U.S. 308, 315, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); *Pointer* v. *Texas*, supra, [403]; and by article first, § 8, of the Connecticut constitution. *State* v. *Torello*, 103 Conn. 511, 513, 131 A. 429 (1925). *State* v. *Hufford*, 205 Conn. 386, 400–401, 533 A.2d 866 (1987). The right of physical confrontation is a . . . fundamental component of the [federal and state confrontation] clauses . . . *State* v. *Jarzbek*, supra, 692; and guarantees an accused the right to be present in the courtroom at every stage of his trial. *Illinois* v. *Allen*, 397 U.S. 337, 338, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970).

"Like cross-examination, face-to-face confrontation [at trial] . . . ensure[s] the integrity of the [fact-finding] process . . . *Coy* v. *Iowa*, 487 U.S. 1012, 1019–20, 108 S. Ct. 2798, 101 L. Ed. 2d 857 (1988); because [i]t is always more difficult to tell a lie about a person to his face than behind his back. Id., 1019. Thus, [i]t is widely recognized that physical confrontation contributes significantly, albeit intangibly, to the truth-seeking process . . . . In addition, physical confrontation furthers other goals of our criminal justice system, in that it reflects respect for the defendant's dignity and the presumption of innocence until proven guilty. *State*

v. *Jarzbek*, supra, 204 Conn. 695. Indeed, the literal right to confront one's accusers is so deeply rooted in human feelings of what is necessary for fairness [that] the right of confrontation contributes to the establishment of a system of criminal justice in which the perception as well as the reality of fairness prevails. *Coy* v. *Iowa*, supra, 1018–19, quoting *Lee* v. *Illinois*, 476 U.S. 530, 540, 106 S. Ct. 2056, 90 L. Ed. 2d 514 (1986). Because of the important goals furthered by an accused's right to encounter adverse witnesses face-to-face, the free exercise of that right may not be impaired absent a compelling justification for the infringement. See, e.g., *Maryland* v. *Craig*, 497 U.S. 836, 850, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990) (defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured); *State* v. *Jarzbek*, supra, 704–705 (exclusion of defendant during testimony of minor victim of sexual assault warranted only upon clear and convincing showing by state of compelling need to do so)." (Emphasis omitted; footnotes omitted; internal quotation marks omitted.) *State* v. *Cassidy*, supra, 236 Conn. 122–24.

Although our Supreme Court overruled *Cassidy* in *State* v. *Alexander*, supra, 254 Conn. 296, it did so in light of *Portuondo*; see id., 296, 299–300; and it was not asked to use its supervisory authority to ban generic tailoring arguments. Nevertheless, the concerns regarding the use of generic tailoring expressed by the court in *Cassidy* have not gone away since *Portuondo* and have led a number of state appellate courts to use their supervisory authority to prohibit such arguments. We join those courts today.

In particular, we agree with the New Jersey Supreme Court that "[p]rosecutorial comment suggesting that a

defendant tailored his testimony inverts [her rights to be present at trial, confront the witnesses presented against her and to hear the state's case], permitting the prosecutor to punish the defendant for exercising that which the [c]onstitution guarantees. Although, after *Portuondo*, prosecutorial accusations of tailoring are permissible under the [f]ederal [c]onstitution, we nonetheless find that they undermine the core principle of our criminal justice system—that a defendant is entitled to a fair trial." *State* v. *Daniels*, supra, 182 N.J. 98. We also are mindful that our Supreme Court in *Weatherspoon* noted the importance of tying a tailoring argument *specifically* to evidence that gives rise to an inference of tailoring. See *State* v. *Weatherspoon*, supra, 332 Conn. 544. When it did so, the court also stated: "Our approval of specific tailoring arguments should not be taken as a blanket approval of all tailoring arguments. . . . Although the present case does not require us to decide at this time whether to adopt a formal rule prohibiting generic tailoring arguments as an exercise of our supervisory authority, such a rule may become necessary if future cases reveal that tailoring arguments are being made indiscriminately and without an appropriate evidentiary basis." (Citation omitted.) Id., 553–54. Thus, although our Supreme Court did not address explicitly the propriety of generic tailoring arguments, it made clear that it remains concerned, even after *Alexander*, about the use of such arguments. We conclude that the present case, which does involve generic tailoring arguments by the prosecutor, requires us to decide whether to exercise our supervisory authority, and, for the reasons set forth in this part IV B, we do so to prohibit generic tailoring arguments at all future criminal trials.

In announcing this new rule of procedure, we recognize that the line between generic and specific tailoring arguments is not always clear. For this reason, we set

forth the following procedure to be used if the state wishes to make a tailoring argument. Prior to asking questions on cross-examination of the defendant that suggest that the defendant has tailored his or her testimony or before making such comments in closing arguments, the prosecutor shall alert the defendant and the court of the intention to do so. If the defendant objects to such cross-examination or comments, the court must rule on whether the proposed questions or comments constitute generic or specific tailoring. If the court concludes that the cross-examination or comments constitute specific tailoring because they are tied to specific evidence that gives rise to an inference that the defendant has tailored his or her testimony, the questions or comments, unless otherwise improper, should be permitted. If the court concludes that the questions or comments constitute generic tailoring, they shall be prohibited. In addition, to the extent that the court permits a specific tailoring argument to be made, the defendant may request that the court instruct the jury during its final charge that the defendant had an absolute right to be present throughout the entire trial and that the jury may not draw an inference that the defendant's testimony is not credible simply because the defendant was present during the trial. The trial court shall include such a charge in its final charge to the jury if it is requested. This procedure strikes the appropriate balance of ensuring that the state is not deprived of the opportunity to ask questions or make comments based on the evidence, while at the same time ensuring that the defendant's rights to be present at his or her criminal trial and to confront the state's witnesses are not burdened by a suggestion that he or she has taken unfair advantage by exercising those rights.

V

The defendant's final claim is that her conviction of attempt to commit risk of injury to a child should be

vacated because it is not a cognizable crime. The defendant, although requesting review pursuant to *State* v. *Golding*, supra, 213 Conn. 239–40; see footnote 3 of this opinion; concedes that "the Appellate Court cannot overrule a Supreme Court case and, therefore, [she] makes this argument for the sake of future review." We conclude, as recognized by the defendant, that we are bound by our Supreme Court's decision in *State* v. *Sorabella*, 277 Conn. 155, 172–74, 891 A.2d 897 (rejecting claim that "attempt to commit risk of injury to a child . . . is not a cognizable offense"), cert. denied, 549 U.S. 821, 127 S. Ct. 131, 166 L. Ed. 2d 36 (2006). Accordingly, the defendant has preserved this issue should our Supreme Court wish to revisit its decision. She, nonetheless, cannot prevail on that claim in this appeal.

The judgment is affirmed.

In this opinion the other judges concurred.

ROCKSTONE CAPITAL, LLC *v.* MORGAN J. CALDWELL, JR., ET AL.
(AC 43653)

Elgo, Cradle and DiPentima, Js.

Syllabus

The plaintiff sought to foreclose a mortgage on certain real property that was jointly owned by the defendants, C and D, who were domestic partners. The plaintiff purchased a line of credit that had been extended to C's business, W Co., and guaranteed by C. After the plaintiff brought a collections action against W Co. and C for nonpayment, the plaintiff, W Co., C and D entered into a settlement agreement in which, inter alia, the plaintiff agreed to forbear litigation and reduce the total amount of the indebtedness owed in exchange for W Co.'s and C's agreement to waive all defenses they had with respect to the agreement and to make regular payments on the debt. D guaranteed payment of the sums due under the settlement agreement on a nonrecourse basis, and C and D granted the plaintiff a mortgage against their respective interests in their residence to secure their obligations under the settlement agreement. After W Co. and C defaulted on their payment obligations, the plaintiff

declared the entire outstanding balance immediately due and payable and brought a foreclosure action against the real property. C and D each pleaded separate special defenses. D claimed that she did not read the settlement agreement prior to executing the document and that she was not represented by counsel in connection with the same. The trial court granted the plaintiff's motion to strike C's special defenses but denied the plaintiff's motion with respect to D's special defenses. Following a bench trial, the trial court rendered a judgment of strict foreclosure in favor of the plaintiff against C but determined that, with respect to D, the settlement agreement was unconscionable and unenforceable. The trial court explained that the settlement agreement was both procedurally and substantively unconscionable as to D due to, inter alia, the rushed nature of the closing, her lack of business acumen, her unawareness of the terms of the agreement, a lack of consideration, and the overly harsh terms of the agreement. On the plaintiff's appeal to this court, *held* that the trial court improperly concluded that the settlement agreement was procedurally and substantively unconscionable as to D; the court's findings with respect to the contract formation process failed to support a legal conclusion of procedural unconscionability because there was no language barrier between the parties, D had entered into a prior mortgage and, as a result, had some familiarity with mortgage documents, D's education level and business sophistication were immaterial, as she did not argue that the settlement agreement was ambiguous or exceedingly complicated and her surprise regarding the contract terms derived solely from her failure to read the agreement, and the court did not find that the plaintiff was responsible for any misconduct during the contract formation process, as it did not mislead or take advantage of D; moreover, the trial court's conclusion that the settlement agreement was substantively unconscionable because D did not receive any direct consideration in exchange for her agreement to mortgage her interest in her residence was clearly erroneous, as, even though D was not previously obligated to pay the debts of C or W Co., she received consideration for her guarantee because, if the settlement agreement had been honored, she would have avoided having to share title to her home with the plaintiff and she incurred the liability so that C could receive the direct benefit of forbearing litigation and reducing his total indebtedness; accordingly, the judgment with respect to D was reversed and the case was remanded with direction to render a judgment of strict foreclosure against D.

Argued May 17—officially released August 24, 2021

Procedural History

Action to foreclose a mortgage on certain real property owned by the defendants, and for other relief, brought to the Superior Court in the judicial district of

Stamford-Norwalk, where the court, *Lee*, *J.*, granted the plaintiff's motion to strike the named defendant's special defenses and denied the plaintiff's motion to strike the special defenses of the defendant Vicki A. Ditri; thereafter, the matter was tried to the court, *Lee*, *J.*; judgment of strict foreclosure against the named defendant, from which the plaintiff appealed to this court. *Reversed in part*; *judgment directed.*

Deborah L. Dorio, with whom, on the brief, was *Michael A. Pease*, for the appellant (plaintiff).

Sophie Laing, certified legal intern, with whom were *Jeffrey Gentes*, and, on the brief, *J. L. Pottenger*, *Jr.*, and *Chaarushena Deb* and *Zaria Noble*, certified legal interns, for the appellee (defendant Vicki A. Ditri).

Opinion

CRADLE, J. In this strict foreclosure action, we consider the enforceability of a settlement and forbearance agreement (settlement agreement) entered into by the plaintiff, Rockstone Capital, LLC, the defendants, Vicki A. Ditri and Morgan J. Caldwell, Jr., and Caldwell's business, Wesconn Automotive Center, LLC (Wesconn), that resulted from a collections action brought by the plaintiff against Caldwell and Wesconn.[1] The plaintiff appeals from the judgment of the trial court, rendered after a court trial, in favor of the defendant, on her special defense that the settlement agreement was unconscionable and, therefore, unenforceable. On appeal, the plaintiff contends that the trial court improperly concluded that the settlement agreement was both procedurally and substantively unconscionable as to

[1] The plaintiff's complaint originally named Caldwell and Ditri as defendants. Caldwell did not appeal from the trial court's judgment of strict foreclosure rendered against him in favor of the plaintiff and is not a party to this appeal. All references to the defendant in this opinion are to Ditri.

the defendant. We agree and, accordingly, reverse in part the judgment of the trial court.[2]

The following facts, as found by the trial court, and procedural history are relevant to this appeal. The defendant and Caldwell have been in an intimate relationship for more than twenty-eight years. Since the 1990s, they have jointly owned and lived in a residence located at 11 Devon Avenue in Norwalk (Devon Avenue property). In August, 2003, Wesconn[3] obtained a line of credit with Fleet National Bank, now Bank of America, N.A., in the initial amount of $27,000, which amount was later increased to $75,000.[4] Caldwell executed a personal guarantee of payment and performance of the credit line. On December 14, 2004, Fleet National Bank issued an additional $5400 to Wesconn, and Caldwell again executed a guarantee of payment and performance.

The plaintiff purchased Wesconn's line of credit and Caldwell's guarantees from Bank of America, N.A., in

[2] The defendant argues, as alternative grounds for affirmance, that the settlement agreement is invalid for (1) lack of consideration and (2) lack of mutual assent. She raised these issues for the first time in her brief to this court and did not file a preliminary statement of alternative grounds on which the judgment may be affirmed, in accordance with Practice Book § 63-4 (a) (1) (A). "[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. . . . This rule applies equally to [alternative] grounds for affirmance." (Internal quotation marks omitted.) *Li* v. *Yaggi*, 185 Conn. App. 691, 711, 198 A.3d 123 (2018). Because the trial court's determination of unconscionability depended largely on its finding that the settlement agreement contained "no direct consideration," we address that issue later in this opinion. The trial court did not, however, make specific factual findings regarding mutual assent or resolve the issue in its memorandum of decision. Accordingly, the record is inadequate on the issue of mutual assent and, therefore, we decline to review that claim.

[3] The defendant did not possess an ownership interest in Wesconn and was not involved in its business operations.

[4] At trial, Caldwell claimed that his secretary/bookkeeper fraudulently drew on the line of credit for her own benefit, increasing it from the initial amount to $75,000. The secretary was charged with fraud in 2008, and eventually pleaded guilty to that charge. The trial court repeatedly rejected this assertion as a valid special defense to the plaintiff's claim in this case.

2006, and was assigned all rights to the debts. In 2007, the plaintiff brought a collections action against Wesconn and Caldwell, alleging nonpayment of principal and interest. To resolve the action, the plaintiff, Wesconn, Caldwell, and the defendant[5] entered into the settlement agreement on August 31, 2010.[6] The settlement agreement provided generally that Caldwell and Wesconn would agree to waive all defenses with respect to the agreement and would make regular payments in exchange for the plaintiff's offer to forbear litigation and reduce the total amount of indebtedness. To secure the obligations under the settlement agreement, Caldwell and the defendant granted the plaintiff an open-end mortgage against their respective interests in the Devon Avenue property. The defendant has never had any personal liability for the debt, beyond her interest in the Devon Avenue property.[7]

On the day of closing, and at Caldwell's behest, the defendant traveled to the office of Caldwell's attorneys

[5] Although the defendant was not obligated on the note to Wesconn and Caldwell and, therefore, was not a party to the collections action, she nevertheless executed the settlement agreement and the mortgage.

[6] The settlement agreement identified Wesconn and Caldwell's indebtedness as $175,000, plus interest and costs of collections, including attorney's fees. The terms provided for a settlement sum of $119,000, payable by an initial payment of $8000, due within three days of signing, and monthly payments thereafter. The settlement agreement also set the interest rate at 10 percent, with a default rate of 18 percent. As of July 16, 2019, the date of trial, the total indebtedness had increased to $435,485.84, with a per diem interest charge of $83.63.

[7] Paragraph 14 of the settlement agreement provides, "[t]he undersigned, Vicki A. Ditri, hereby agrees to the terms and conditions of this Agreement, and hereby guarantees the payment of the sums due hereunder by [Wesconn] to ROCKSTONE on a non-recourse basis, meaning that, notwithstanding the foregoing, ROCKSTONE and Vicki A. Ditri hereby acknowledge and agree that Vicki A. Ditri's liability for the payment of the sums due and owing by [Wesconn] herein shall be limited to Vicki A. Ditri's interest in, and to that certain real property commonly known as 11 Devon Avenue, Norwalk, Connecticut, which interest shall be secured by and subject to the terms and conditions of a[n] Open-End Mortgage, attached hereto."

during her lunch break to execute the settlement agreement. Prior to signing, Caldwell had not informed the defendant of the nature of the agreement and had simply asked her to "sign some papers." The defendant had not spoken with Caldwell's attorneys before the closing date and was not provided an advance copy of the settlement agreement. At the signing, the defendant was unrepresented by counsel, and neither Caldwell nor his attorneys explained to the defendant what the settlement agreement or mortgage entailed. The settlement agreement was opened to the signature page when the defendant arrived, and she did not read the other pages before signing it. The plaintiff was not present at the closing.

Wesconn and Caldwell subsequently defaulted on the amounts owed under the settlement agreement and the plaintiff exercised its option to declare the entire balance immediately due and payable. The plaintiff then filed the present action on April 26, 2018, seeking to foreclose the mortgage on the Devon Avenue property. Caldwell and the defendant, each self-represented, filed individual appearances and pleaded separate special defenses.[8] In her answer, the defendant alleged the following special defense: "I Vicki Ditri was not involved in Wesconn Auto [and] Tire. Maria Janice Lawrence stole money from Wesconn Tire [and] Auto, she got arrested. Next thing I know I have to go to a lawyer's office (not my lawyer I was not [i]nvolved), to sign papers which I never read and was not represented by

[8] In his answer, Caldwell alleged the following special defense: "I had a [secretary] that embezzled a lot of money on opening lines of credit, cashing company checks made to my business, credit cards, cash, and was arrested. She was ordered restitution. She broke her probation and was rearrested after failing to pay 800 plus dollars a month back to me and Wesconn. She cried and told the judge she was on social security and disability and had no way of repaying me. The judge ordered her no restitution and she did not pay me back for approx[imately] $100,000.00. So sad."

a lawyer. I would never agree to [forbearance] (which I just learned what that means!)."

On June 14, 2018, the plaintiff filed motions to strike both Caldwell's and the defendant's special defenses on the ground that they were legally insufficient because they did not "relate to the making of the debt obligation . . . ." The trial court, *Lee*, *J.*, granted the motion to strike Caldwell's special defense but denied the motion as to the defendant's special defense.

A bench trial was held on July 16, 2019. On November 7, 2019, the trial court, *Lee*, *J.*, issued its memorandum of decision. The court determined that the plaintiff had established a prima facie case of mortgage foreclosure and rendered a judgment of strict foreclosure in favor of the plaintiff against Caldwell.[9] With regard to the defendant, however, the court held that the settlement agreement was unconscionable and, consequently, unenforceable. Specifically, the court explained, inter alia, that the rushed nature of the closing, the defendant's lack of business acumen, and the "overly harsh" terms of the settlement agreement rendered the agreement both procedurally and substantively unconscionable.

On December 27, 2019, the plaintiff filed a motion for articulation seeking articulation on five points.[10]

[9] The court also awarded the plaintiff (1) attorney's fees and costs in the amount of $104,289.11; (2) appraisal fees in the amount of $1300; and (3) title search fees in the amount of $225.

[10] Specifically, the plaintiff sought articulation on the following points: (1) "In ruling that the [defendant] had sustained the burden of proof as to her unconscionability defense, did the court consider its concomitant finding that 'there [was] no proof of any misconduct by [the plaintiff]?' " (2) "After finding that ordinarily the failure to read a document is not a defense to enforceability but that the handling of the closing here created the requisite 'surprise,' did the court consider the fact that there was no evidence adduced to show that the [defendant] ever asked any questions about the subject matter of the documents or sought additional time to review the documents?" (3) "Was the factual and legal basis for the court's determination that the [defendant] received no 'direct consideration' for agreeing to the mortgage limited to the fact [that] she had no legal obligation to pay the debts of

The trial court, *Lee*, *J.*, responded to the plaintiff's motion for articulation, explaining, inter alia, that the "conduct of the closing of the underlying settlement agreement and its provisions, pursuant to which [the defendant] agreed to a mortgage securing . . . Caldwell's obligations, despite having no liability herself, and being unaware of the contents or effect of the document she was signing" militated a determination of unconscionability. The plaintiff's motion for further articulation was denied. This appeal followed.

The plaintiff claims that the trial court erred in concluding that the settlement agreement was both procedurally and substantively unconscionable as to the defendant. We agree with the plaintiff.

The following legal principles guide our analysis of the plaintiff's claim on appeal. "We first note that the defense of unconscionability is a recognized defense to a foreclosure action. . . . The purpose of the doctrine of unconscionability is to prevent oppression and unfair surprise. . . . As applied to real estate mortgages, the doctrine of unconscionability draws heavily on its counterpart in the Uniform Commercial Code which, although formally limited to transactions involving personal property, furnishes a useful guide for real property transactions. . . . As Official Comment 1 to § 2-302 of the Uniform Commercial Code suggests, [t]he basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. . . .

Wesconn or . . . Caldwell?" (4) "Did the court consider the plain language of paragraph 1 (a) and paragraph [5] of the settlement agreement as set forth in the memorandum of decision in ruling for the [defendant]?" And (5) "[h]ow did the court's finding that the [defendant] was not a sophisticated business person excuse her failure to ask commonsense questions at the closing, or to seek more time to review and understand the documents?"

Unconscionability is determined on a case-by-case basis, taking into account all of the relevant facts and circumstances." (Citations omitted; internal quotation marks omitted.) *Hirsch* v. *Woermer*, 184 Conn. App. 583, 588–89, 195 A.3d 1182, cert. denied, 330 Conn. 938, 195 A.3d 384 (2018).

In practice, we have divided claims of unconscionability into two categories—one substantive and the other procedural. "Substantive unconscionability focuses on the content of the contract, as distinguished from procedural unconscionability, which focuses on the process by which the allegedly offensive terms found their way into the agreement." (Internal quotation marks omitted.) *Cheshire Mortgage Service, Inc.* v. *Montes*, 223 Conn. 80, 87 n.14, 612 A.2d 1130 (1992), quoting J. Calamari & J. Perillo, Contracts (3d Ed. 1987) § 9-37, p. 399. Procedural unconscionability is intended to prevent unfair surprise and substantive unconscionability is intended to prevent oppression. *Smith* v. *Mitsubishi Motors Credit of America, Inc.*, 247 Conn. 342, 349, 721 A.2d 1187 (1998).

"The doctrine of unconscionability, as a defense to contract enforcement, generally requires a showing that the contract was both procedurally and substantively unconscionable when made—i.e., some showing of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party . . . ." (Internal quotation marks omitted.) *Hirsch* v. *Woermer*, supra, 184 Conn. App. 589–90, quoting *R. F. Daddario & Sons, Inc.* v. *Shelansky*, 123 Conn. App. 725, 741, 3 A.3d 957 (2010); see also *Emeritus Senior Living* v. *Lepore*, 183 Conn. App. 23, 29, 191 A.3d 212 (2018).

"[T]he question of unconscionability is a matter of law to be decided by the court based on all the facts and circumstances of the case." *Iamartino* v. *Avallone*,

2 Conn. App. 119, 125, 477 A.2d 124, cert. denied, 194 Conn. 802, 478 A.2d 1025 (1984). "[O]ur review on appeal is unlimited by the clearly erroneous standard. . . . [T]he ultimate determination of whether a transaction is unconscionable is a question of law, not a question of fact, and . . . the trial court's determination on that issue is subject to a plenary review on appeal. It also means, however, that the factual findings of the trial court that underlie that determination are entitled to the same deference on appeal that other factual findings command. Thus, those findings must stand unless they are clearly erroneous." (Citations omitted; internal quotation marks omitted.) *Cheshire Mortgage Service, Inc.* v. *Montes*, supra, 223 Conn. 88. With the foregoing principles in mind, we turn to the plaintiff's claim on appeal.

The plaintiff first argues that the trial court improperly concluded that the settlement agreement was procedurally unconscionable as to the defendant. Specifically, the plaintiff claims that the trial court's findings pertaining to the contract formation process fail to support a legal conclusion of procedural unconscionability.[11] We agree.

Our Supreme Court has considered various factors in engaging in procedural unconscionability analyses, including the contracting party's business acumen, the party's awareness of material preconditions to the contract, whether the party was represented by counsel during the transaction period, and the existence of a language barrier between the contracting parties. See id., 89–91. In addition, this court has considered the contracting party's level of education, the party's ability to read and understand the agreement at issue, and the

[11] Because we conclude that the court's findings did not support its legal conclusion that the settlement agreement was procedurally unconscionable, we need not address the plaintiff's claim that those findings are not supported by the record.

reasonableness of the party's expectation to fulfill the contractual obligations. *Family Financial Services, Inc.* v. *Spencer*, 41 Conn. App. 754, 763–64, 677 A.2d 479 (1996). We have also assessed the conduct of the parties during the contract's formation, focusing on the process by which the allegedly unconscionable terms found their way into the agreement. Id. (concluding that loan agreement was procedurally unconscionable where plaintiff's attorneys rushed unrepresented defendant into signing, failed to disclose identities of true lenders, and withheld material term until closing).

In the present case, the trial court found that the defendant lacked business acumen; the closing was rushed because the defendant was on her lunch break; the defendant was unrepresented at the closing; neither Caldwell nor Caldwell's attorneys explained the settlement agreement or the mortgage to the defendant; and the documents for the defendant to sign were folded back so that only the signature page was exposed. We conclude that these findings are insufficient to render the settlement agreement procedurally unconscionable.

As an initial matter, the trial court did not find that either the defendant or Caldwell had an unreasonable expectation in fulfilling their obligations under the settlement agreement. Put another way, the court did not find that Caldwell's financial situation made it apparent that he could not reasonably expect to make the scheduled payments, or that the plaintiff entered the agreement simply to reap the equity in the Devon Avenue property. Likewise, the trial court did not find that the defendant experienced difficulty speaking or understanding English. Accordingly, there was no language barrier that prevented her from comprehending the settlement agreement. Although the trial court found that the defendant was an unsophisticated party, that finding is discounted due to the fact that she had entered into a prior mortgage agreement and, therefore, had some

familiarity with mortgage documents. See *Cheshire Mortgage Service, Inc.* v. *Montes*, supra, 223 Conn. 90–91 (trial court's finding that defendants had entered into prior mortgage transaction undermined defendants' argument that they lacked business acumen).

Additionally, the defendant's level of education or business sophistication is largely immaterial to the particular circumstances in the present case. The defendant does not argue that the settlement agreement was ambiguous or exceedingly complicated. Rather, her alleged surprise regarding the contractual terms derives from her failure to read the agreement. Where a party does not attempt to understand its contractual obligations before signing, considerations such as education level, business acumen, and complexity of the contractual language become less relevant to our analysis. Indeed, a contracting party's negligent failure to read and understand an agreement has consistently been rejected as an unconscionability defense to contract enforcement. *Smith* v. *Mitsubishi Motors Credit of America, Inc.*, supra, 247 Conn. 351–52 ("[w]e have never held that principles of unconscionability supersede, in toto, the duty of a contracting party to read the terms of an agreement or else be deemed to have notice of the terms"); *Emeritus Senior Living* v. *Lepore*, supra, 183 Conn. App. 30 n.5 ("The defendant's purported ignorance [with regard to understanding that signing an assisted living residency agreement as her mother's representative would make her personally liable to the plaintiff] . . . does not lead us to conclude that the formation of the agreement was procedurally unconscionable. The defendant had an obligation to read the agreement . . . and understand it before signing." (Citation omitted.)); see also *Ursini* v. *Goldman*, 118 Conn. 554, 562, 173 A. 789 (1934) ("where a person of mature years and who can read and write, signs or accepts a formal written contract affecting [her] . . .

interests, it is [her] duty to read it and notice of its contents will be imputed to [her] if [she] negligently fails to do so").

Moreover, our court has limited determinations of procedural unconscionability to cases where bargaining or contractual improprieties were committed by the plaintiff. *Shoreline Communications, Inc.* v. *Norwich Taxi, LLC*, 70 Conn. App. 60, 70, 797 A.2d 1165 (2002) ("we know of no case . . . in which a party may invoke unconscionability without a showing of some kind of relevant misconduct by the party seeking enforcement of a contract"); see also *Emeritus Senior Living* v. *Lepore*, supra, 183 Conn. App. 29–30 and n.5 (rejecting claim of procedural unconscionability where defendant had not presented any evidence that demonstrated that *plaintiff* had prevented her from reading or understanding agreement).

Where the claim of unconscionability is directed at the actions and representations of third parties, rather than the plaintiff, we have required that an agency relationship exist between the plaintiff and the third party.[12] *Bank of America, N.A.* v. *Gonzalez*, 187 Conn. App. 511, 522 n.9, 202 A.3d 1092 (2019) ("[b]ecause the defendant did not establish that [the third party] was an agent or employee of [the plaintiff's predecessor in interest], the court correctly concluded that the defendant could not prevail on his special defense of unconscionability"); *CitiMortgage, Inc.* v. *Coolbeth*, 147 Conn. App. 183, 192, 81 A.3d 1189 (2013) ("existence of an agency relationship is critical to the viability of the defendants' special [defense of unconscionability] . . . insofar as the special [defense] . . . [is] primarily directed toward the representations and actions of the [third

[12] In instances where the plaintiff is not an original party to the contract and, thus, played no part in the contract formation process, the defendant must demonstrate an agency relationship between the third party and the plaintiff's predecessor in interest. See *Bank of America, N.A.* v. *Gonzalez*, 187 Conn. App. 511, 515–16, 202 A.3d 1092 (2019).

party] . . . not the plaintiff''), cert. denied, 311 Conn. 925, 86 A.3d 469 (2014).

Here, the trial court did not find that the plaintiff was responsible for any misconduct in the contract formation process. There is no evidence that the plaintiff intended to mislead the defendant or sought to take advantage of her lack of counsel. Rather, the allegedly rushed nature of the signing, folded pages, and failure to explain the settlement agreement and mortgage each stem from Caldwell, his attorneys, or the defendant's own constraints. In fact, the plaintiff was not even present at the time the defendant signed the settlement agreement. Moreover, as the other party to the contract, Caldwell can in no way be characterized as the plaintiff's agent, and the defendant does not argue that he was acting in such capacity. Accordingly, we conclude that the trial court's findings fail to support a determination that the settlement agreement was procedurally unconscionable as to the defendant.

The plaintiff also challenges the trial court's determination that the settlement agreement was substantively unconscionable. In particular, the plaintiff argues that the factual basis underlying the court's legal conclusion that the settlement agreement was substantively unconscionable—that the defendant received "no direct consideration" for agreeing to the mortgage on her home—was clearly erroneous. We agree.[13]

[13] The trial court also determined that the "overly harsh" terms of the settlement agreement rendered the contract substantively unconscionable, but the court failed to identify the specific provisions it claimed to be oppressive. The trial court explained in its articulation that the consultation with counsel clause of the settlement agreement was "so contrary to the facts of the situation, that . . . it was consistent with the oppressive nature of the document . . . ." The clause states that, "[t]he parties hereto acknowledge each has had the opportunity to be advised by counsel and the parties agree that for all purposes (including the resolution of any ambiguities herein), this [a]greement shall be deemed to have been negotiated by the parties and strictly construed as if both parties shared equally in the drafting of [the] same." The trial court's conclusion, however, has little to do with the contract's substance and, instead, simply restates the

"[C]onsideration is [t]hat which is bargained-for by the promisor and given in exchange for the promise by the promisee . . . . [It] consists of a benefit to the party promising, or a loss or detriment to the party to whom the promise is made. . . . [U]nder the law of contract, a promise is generally not enforceable unless it is supported by consideration." (Citations omitted; internal quotation marks omitted.) *NSS Restaurant Services, Inc.* v. *West Main Pizza of Plainville, LLC*, 132 Conn. App. 736, 740–41, 35 A.3d 289 (2011).

It is axiomatic that the "doctrine of consideration does not require or imply an equal exchange between the contracting parties. . . . The general rule is that, in the absence of fraud or other unconscionable circumstances, a contract will not be rendered unenforceable at the behest of one of the contracting parties merely because of an inadequacy of consideration." (Internal quotation marks omitted.) *Christian* v. *Gouldin*, 72 Conn. App. 14, 23, 804 A.2d 865 (2002). "Whether an agreement is supported by consideration is a factual inquiry reserved for the trier of fact and subject to review under the clearly erroneous standard." (Internal quotation marks omitted.) *Viera* v. *Cohen*, 283 Conn. 412, 442, 927 A.2d 843 (2007).

The trial court's finding of "no direct consideration" is based on the fact that the defendant was not obligated to pay Wesconn's and Caldwell's business debts. In other words, the court held that the plaintiff's offer to forbear litigation and reduce Caldwell's indebtedness provided nothing of value in exchange for the defendant's interest in the Devon Avenue property. Consideration is not construed so narrowly.

As this court has repeatedly recognized, the intangible benefit of assisting one's family is sufficient to constitute valuable consideration. *Sullo Investments, LLC*

arguments that the defendant was (1) unrepresented at the closing and (2) received inadequate consideration.

v. *Moreau*, 151 Conn. App. 372, 383–84, 95 A.3d 1144 (2014) (holding that father's ability to help his son finance purchase of restaurant equipment, despite not personally receiving loan proceeds, established consideration); *Deutsche Bank National Trust Co.* v. *DelMastro*, 133 Conn. App. 669, 680–81, 38 A.3d 166 (finding mortgage supported by consideration where mother "received the benefit of trying to help her son" and "incurred a detriment by assuming the role of guarantor to the mortgage," but did not receive financial benefit (internal quotation marks omitted)), cert. denied, 304 Conn. 917, 40 A.3d 783 (2012).

The fact that consideration did not directly flow from the plaintiff to the defendant in the form of a financial or legal benefit does not render the settlement agreement unenforceable. See *Sullo Investments, LLC* v. *Moreau*, supra, 151 Conn. App. 382–84. The settlement agreement was entered into in order to reduce Caldwell's and Wesconn's debts and avoid a potential collections judgment. If the agreement had been honored, Caldwell would have been able to retain his interest in the family home and the defendant would not have had to share title with the plaintiff. This is sufficient to establish consideration.

Finally, our courts have upheld contractual agreements as enforceable where one party incurs personal liability for a third person's debts in exchange for the other party's offer to forgo pursuing legal action on those debts.[14] *Hofmann* v. *De Felice*, 136 Conn. 187,

[14] Although neither party raised the argument, we also note that the defendant's role in the settlement agreement is similar to that of an accommodation party. General Statutes § 42a-3-419 (a) provides in relevant part that where "an instrument is issued for value given for the benefit of a party to the instrument . . . and another party to the instrument . . . signs the instrument for the purpose of incurring liability on the instrument without being a direct beneficiary of the value given for the instrument, the instrument is signed by the accommodation party 'for accommodation.' " The accommodation party is obliged to pay the instrument in the capacity in which she signs, notwithstanding whether the accommodation party receives

190, 70 A.2d 129 (1949) (reversing trial court's finding of no consideration where defendant assumed responsibility for her parents' debts in exchange for plaintiff's promise to abstain from pursuing collections action against her parents); see also *Markel* v. *DiFrancesco*, 93 Conn. 355, 359–60, 105 A. 703 (1919) (finding adequate consideration for note that wife signed with husband for benefit of plaintiff in exchange for plaintiff's agreement to extend maturity date of husband's existing indebtedness). "An agreement to forbear to sue in consideration of a written promise by a third person to pay the debt of another constitutes a valid contract." *Hofmann* v. *De Felice*, supra, 190. In the present case, the record indicates that the defendant incurred a liability—her interest in the Devon Avenue property—so that Caldwell could receive the direct benefit of the plaintiff's forbearing litigation and reducing his total indebtedness. Accordingly, we conclude that the trial court erred in holding the settlement agreement substantively unconscionable and, therefore, unenforceable as to the defendant.

The judgment is reversed with respect to the trial court's determination that the settlement agreement was procedurally and substantively unconscionable as to the defendant and the case is remanded with direction to render a judgment of strict foreclosure against the defendant; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

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consideration for the accommodation. General Statutes § 42a-3-419 (b). "The want of consideration is the peculiar characteristic of accommodation paper" and, as such, lack of consideration is ineffective as a special defense. *Seaboard Finance Co. of Connecticut, Inc.* v. *Dorman*, 4 Conn. Cir. 154, 156, 227 A.2d 441 (1966).

JULIO GUTIERREZ *v.* DANIEL MOSOR
(AC 43881)

Alvord, Clark and Sullivan, Js.

Syllabus

The defendant appealed to this court from the judgment of the trial court rendered for the plaintiff after a trial to the jury on the issue of damages in which the defendant was precluded from offering evidence as a result of a prior default the court imposed against him as a sanction for failing to attend his scheduled deposition. The defendant claimed, inter alia, that the trial court abused its discretion by imposing and thereafter refusing to set aside the default. The plaintiff contractor had brought an action in negligence against the defendant as a result of injuries the plaintiff suffered after falling from a platform on property where the defendant allegedly was constructing a house. The self-represented defendant timely filed an answer and special defense to the plaintiff's complaint. More than two years later, the plaintiff filed a reply to the special defense and, about one year after that, issued to the defendant a renotice for his deposition at the law office of the plaintiff's counsel. Thereafter, the defendant, who had not filed an objection to the plaintiff's motion for default, then filed a motion, through counsel, to set aside the default, claiming that good cause existed to set aside the default because, as a then self-represented party, he had been confused about where to appear and what would happen on the date of the deposition. The trial court denied the motion to set aside the default, noting that the defendant had failed to file an objection to that motion and concluding that he failed to demonstrate good cause to set aside the default. *Held* that the trial court abused its discretion in granting the plaintiff's motion for default, as the sanction of default was not proportional to the defendant's single discovery violation when he failed to attend his deposition: there was an insufficient record from which the court could have determined that the defendant's conduct was wilful or in bad faith, as the motion for default simply alleged that he had notice of and was aware of the deposition but failed to attend, and the record was devoid of evidence regarding the cause of his noncompliance or whether his conduct demonstrated an egregious or continuing pattern of behavior, or contumacious or unwarranted disregard for the court's authority; moreover, the defendant's failure to object to the motion for default had no bearing on whether the court's sanction was proportional to his violation, the court made no finding of prejudice to the plaintiff, and nothing in the record showed that, for at least three years of the four and one-half year pendency of the plaintiff's action prior to trial, the delay argued by the plaintiff was in any way attributable to the defendant; furthermore, the court had available to it a variety of other sanctions

it could have imposed that would have reimbursed the plaintiff for fees he may have incurred with respect to the deposition and vindicated his interest in avoiding undue expense during discovery while ensuring that a trial on the merits of the case could take place; accordingly, the judgment was reversed and the case was remanded for further proceedings.

Argued May 13—officially released August 24, 2021

Procedural History

Action to recover damages for the defendant's alleged negligence, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Shapiro*, *J.*, defaulted the defendant; thereafter, the court, *Hon. Robert B. Shapiro*, judge trial referee, denied the defendant's motions to set aside the default and for permission to file notice as to a hearing in damages; subsequently, the issue of damages was tried to the jury before *Dubay*, *J.*; verdict for the plaintiff; thereafter, the court, *Dubay*, *J.*, denied the defendant's motion to set aside the verdict and rendered judgment for the plaintiff, from which the defendant appealed to this court. *Reversed*; *further proceedings*.

Joseph A. La Bella, for the appellant (defendant).

Deborah V. Jekot, with whom, on the brief, was *Jack G. Steigelfest*, for the appellee (plaintiff).

Opinion

SULLIVAN, J. The defendant, Daniel Mosor, appeals from the judgment of the trial court, rendered in favor of the plaintiff, Julio Gutierrez, after the defendant was defaulted for failing to appear at a deposition prior to a trial to a jury on the issue of damages. On appeal, the defendant claims that the court abused its discretion by (1) defaulting him for a single failure to attend the deposition, (2) refusing to set aside the default, and (3) sustaining the plaintiff's objection to the defendant's motion for permission to file a notice as to the hearing in damages, which precluded him from offering any

evidence contesting liability at the trial before the jury. We agree with the defendant's first claim and, accordingly, reverse the judgment of the trial court.

The following factual and procedural history is relevant to our resolution of the claims on appeal. The plaintiff commenced this action against the defendant on January 12, 2015. In his complaint, the plaintiff alleged that the defendant was the owner or party in possession and control of certain real property at 2010 Manchester Road in Glastonbury, on which the defendant was constructing a house. In connection therewith, the defendant hired various contractors, including the plaintiff, to perform work. The complaint further alleged that, "[o]n or about June 13, 2014, the plaintiff was standing on a metal staging platform attached to two ladders on each end that were leaning against the edge of the roof," and that "[o]ne or both of the ladders shifted because the legs of the ladders were located on a soft, wet and muddy surface, causing the staging to become unstable and causing the plaintiff to fall approximately [fifteen] to [twenty] feet to the ground." According to the complaint, the plaintiff's resulting injuries were caused by the "carelessness and negligence of the defendant . . . ."

On January 28, 2015, the self-represented defendant filed an answer and special defense, in which he denied that he was the owner or party in possession and control of the subject property, and asserted the following as a special defense: "I subcontracted [the] roof to a subcontractor by the name of Jose Flores, who was the employer of [the plaintiff]. Jose and [the plaintiff] went on the job site on a rainy day when they had no permission and should not have been staging a roof [in] that type of weather conditions. I don't know who [the plaintiff] is, and I don't know what he was doing on the job site." Just over two years later, on January 31, 2017, the plaintiff filed a reply denying the allegations of the

special defense, as well as a claim for a jury trial.[1] The next day, February 1, 2017, the plaintiff also filed a certificate of closed pleadings and a claim for the trial list.

Almost one year later, on January 29, 2018, the plaintiff's attorney issued to the defendant a "renotice" of his deposition, which was to take place on March 14, 2018, at 10 a.m. in the law office of the plaintiff's attorney. According to the plaintiff's attorney, the defendant called the attorney's office on Monday, March 12, 2018, to confirm the appointment, although he thought it was for a court appearance. The plaintiff's attorney responded in a call back to the defendant and left a message, stating that the renotice was not for a court appearance but for a deposition that was scheduled to take place at the attorney's office. The defendant never responded to that message. On March 14, 2018, the day of the deposition, the plaintiff's attorney, again, called the defendant to confirm his appearance and left another message for him, but he did not respond to that message, either.

Thereafter, on March 26, 2018, the plaintiff filed a motion for default for the defendant's failure to appear at his deposition. In support of his motion for default, the plaintiff attached the deposition notice, as well as a brief transcript of the deposition's preliminary proceeding on March 14, 2018, in which his attorney recounted the events leading up to the deposition. The motion simply asserted that the defendant had notice, and was aware of the scheduled deposition and failed to appear. In granting the plaintiff's motion for default, the court, *Shapiro*, *J.*, stated: "The defendant filed no objection in response to the motion for default. Since the defendant failed to attend his scheduled deposition,

[1] The reason for that two year delay is not clear from the record.

a default may enter against the defendant." Notice of the default was issued by the court on April 11, 2018.

On September 27, 2018, counsel filed an appearance on behalf of the defendant, who, until that point, had been acting as a self-represented party. The defendant's attorney also filed a motion for a continuance of a hearing in damages that was scheduled to take place on October 10, 2018. On November 29, 2018, the defendant's attorney, again, filed a motion for a continuance of the hearing in damages, which previously had been rescheduled to take place on December 5, 2018. Both motions for continuances were granted by the court.

Thereafter, on January 2, 2019, the defendant, through counsel, filed a motion to set aside the default, in which he claimed that good cause existed for setting aside the default. Specifically, he claimed that, as a self-represented party, he "was confused about where to appear and what was happening on the date of the scheduled deposition," and that he never spoke with anyone from the office of the plaintiff's attorney because they simply left him messages. On that same day, the defendant also filed a notice as to the hearing in damages, in which he sought to give notice of his defenses to the action pursuant to Practice Book § 17-34.[2] The plaintiff filed an objection to the motion to set aside the default, as well as an objection to the defendant's notice of defenses, claiming that the notice was not timely filed within the ten day period provided for in Practice Book § 17-35 (b).[3]

[2] Practice Book § 17-34 (a) provides in relevant part: "In any hearing in damages upon default, the defendant shall not be permitted to offer evidence to contradict any allegations in the plaintiff's complaint, except such as relate to the amount of damages, unless notice has been given to the plaintiff of the intention to contradict such allegations and of the subject matter which the defendant intends to contradict . . . ."

[3] Practice Book § 17-35 (b) provides: "In all actions in which there may be a hearing in damages, notice of defenses must be filed within ten days after notice from the clerk to the defendant that a default has been entered."

In a memorandum of decision dated January 17, 2019, the court, *Hon. Robert B. Shapiro*, judge trial referee, denied the defendant's motion to set aside the default, concluding that the defendant had failed to demonstrate good cause for setting aside the default. The court determined that the plaintiff had been "prejudiced by the defendant's delay in attending to this matter," finding that the defendant never provided an excuse for his delay in presenting the argument that he was confused by the notice of deposition, that the defendant's attorney waited more than three months after filing an appearance in this matter to file the motion to set aside the default, and that the defendant did not provide an affidavit in support of his motion to set aside the default. The court further stated that "the defendant's failure to respond to the plaintiff's motion for default may not be excused," and that, "[i]f the default were opened now, almost one year will have passed since the plaintiff's January 29, 2018 notice of deposition. The plaintiff has been prejudiced also by the defendant's delay in that [the plaintiff] consented to a motion to continue the previously scheduled hearing in damages, only to face the motion to open, which was filed shortly before the continuation date of that hearing."

Following the denial of his motion to set aside the default, the defendant filed a motion for permission to file a notice as to the hearing in damages pursuant to Practice Book § 17-34. In his motion, he alleged that, in light of the circumstances as set forth in his attached affidavit, it would be appropriate for the court to allow him to contest some of the allegations of the complaint. In his affidavit, the defendant attested to the following: he is not an attorney and lacks legal training; he was prepared to appear in court on March 14, 2018, and did, in fact appear at the courthouse in Middletown; he called the plaintiff's counsel to confirm that he would

be appearing in court on March 14, 2018; he, as a self-represented party, did not understand the significance of the notice of deposition at the time it was scheduled; he did not wilfully disobey the court; he has a good and valid defense to the plaintiff's action; and he was not familiar with a notice of defenses in March and April, 2018. The court also denied the defendant's motion for permission, noting, first, that the defendant did not file a notice of defenses within the ten day period required by Practice Book § 17-35 (b), and, second, that, even though it had discretion to permit a late filing of a notice of defenses, it "[was] not persuaded by the defendant's statements about his lack of familiarity with the court process." Specifically, the court found that "the defendant did not pay proper attention to this matter," that, even though he was self-represented through most of the proceedings, "the rules of practice [could not] be ignored to the detriment of other parties," that discovery would have to be opened if the court permitted the defendant's late filing, and that it did not credit the defendant's statement that he appeared at the courthouse in Middletown given that this matter had been filed in the Superior Court in Hartford. Accordingly, the defendant was precluded from offering any evidence as to liability at the hearing in damages.

On September 17, 2019, the case proceeded to a hearing in damages before a jury, which returned a verdict in favor of the plaintiff, awarding him damages in the amount of $181,201.81. On January 16, 2020, the court, *Dubay*, *J.*, denied the defendant's motion to set aside the verdict and rendered judgment in favor of the plaintiff, stating: "While this court may have decided the issue differently given our law's preference to have matters heard on their merits, this court cannot and will not overrule [Judge] Shapiro . . . by granting this motion." The defendant's timely appeal to this court

followed. Additional facts and procedural history will be set forth as necessary.

The defendant claims that the trial court abused its discretion in defaulting him as a sanction for his failure to attend the deposition. Specifically, the defendant claims that the court's imposition of the sanction of default was an abuse of discretion because (1) there was nothing in the record demonstrating that he acted in bad faith, that his failure to attend the deposition resulted from wilful misconduct, or that he engaged in a repeated pattern of misbehavior, (2) his conduct did not rise to the level of being contumacious, and (3) the sanction imposed was disproportionate to the conduct at issue. We agree.

We first set forth our standard of review and the legal principles applicable to this claim. "A trial court's power to sanction a litigant or counsel stems from two different sources of authority, its inherent powers and the rules of practice." *Lafferty* v. *Jones*, 336 Conn. 332, 373, 246 A.3d 429 (2020), cert. denied, U.S. , 141 S. Ct. 2467, 209 L. Ed. 2d 529 (2021). The court's "inherent authority permits sanctions for dilatory, bad faith and harassing litigation conduct"; (internal quotation marks omitted) id.; and, pursuant to "Practice Book § 13-14, for noncompliance with the court's discovery orders"; id.; or for the party's failure to appear and testify at a duly noticed deposition. See also Practice Book § 13-14 (a). One such permissible sanction under § 13-14 is "[t]he entry of a nonsuit or default against the party failing to comply . . . ." Practice Book § 13-14 (b) (1). "[T]he primary purpose of a sanction for violation of a discovery order is to ensure that the [party's] rights are protected, not to exact punishment on the [noncomplying party] for its allegedly improper conduct." (Internal quotation marks omitted.) *Usowski* v. *Jacobson*, 267 Conn. 73, 85, 836 A.2d 1167 (2003).

Our Supreme Court has stated that, "[i]n reviewing the portion of the sanctions based on the violation of discovery orders, we consider three factors. First, the order to be complied with must be reasonably clear. In this connection, however, we also state that even an order that does not meet this standard may form the basis of a sanction if the record establishes that, notwithstanding the lack of such clarity, the party sanctioned in fact understood the trial court's intended meaning. This requirement poses a legal question that we will review de novo. Second, the record must establish that the order was in fact violated. This requirement poses a question of fact that we will review using a clearly erroneous standard of review. Third, the sanction imposed must be proportional to the violation. This requirement poses a question of the discretion of the trial court that we will review for abuse of that discretion. *Millbrook Owners Assn., Inc.* v. *Hamilton Standard*, [257 Conn. 1, 17–18, 776 A.2d 1115 (2001)]. The determinative question for an appellate court is not whether it would have imposed a similar sanction but whether the trial court could reasonably conclude as it did *given the facts presented*. Never will the case on appeal look as it does to a [trial court] . . . faced with the need to impose reasonable bounds and order on discovery. . . . Trial court judges face great difficulties in controlling discovery procedures which all too often are abused by one side or the other and this court should support the trial judges' reasonable use of sanctions to control discovery." (Citation omitted; emphasis added; internal quotation marks omitted.) *Lafferty* v. *Jones*, supra, 336 Conn. 373–74.

In the present case, even though the defendant claims that he was confused and thought that he was supposed to be in court on March 14, 2018, the notice of deposition was reasonably clear and provided that his deposition was to take place at the law office of the plaintiff's

attorney in Hartford. Moreover, there is no dispute that the defendant failed to attend the scheduled deposition. The defendant's appellate brief focuses primarily on his claim that the sanction imposed was disproportionate to the conduct.

Our Supreme Court previously has set forth the factors that an appellate court must consider when reviewing the reasonableness of a sanction imposed by the trial court. See *Yeager* v. *Alvarez*, 302 Conn. 772, 787, 31 A.3d 794 (2011). Those factors include: "(1) the cause of the [sanctioned party's] failure to [comply with the discovery order], that is, whether it is due to inability rather than the [wilfulness], bad faith or fault of the [sanctioned party] . . . (2) the degree of prejudice suffered by the opposing party, which in turn may depend on the importance of the information requested to that party's case . . . and (3) which of the available sanctions would, under the particular circumstances, be an appropriate response to the disobedient party's conduct." (Internal quotation marks omitted.) Id.

"[I]n assessing proportionality, a trial court must consider the totality of the circumstances, including, most importantly, the nature of the conduct itself." *Ridgaway* v. *Mount Vernon Fire Ins. Co.*, 328 Conn. 60, 76, 176 A.3d 1167 (2018). In *Millbrook Owners Assn., Inc.* v. *Hamilton Standard*, supra, 257 Conn. 1, our Supreme Court cautioned that a trial "court's discretion should be exercised mindful of the policy preference to bring about a trial on the merits of a dispute whenever possible and to secure for the litigant his day in court. . . . Our practice does not favor the termination of proceedings without a determination of the merits of the controversy where that can be brought about with due regard to necessary rules of procedure. . . . Therefore, although dismissal of an action is not an abuse of discretion where a party shows *deliberate, contumacious or unwarranted disregard for the court's authority* . . .

the court should be reluctant to employ the sanction of dismissal except as a last resort. . . . [T]he sanction of dismissal should be imposed only as a last resort, and where it would be the only reasonable remedy available to vindicate the legitimate interests of the other party and the court." (Citations omitted; emphasis added; internal quotation marks omitted.) Id., 16–17. Like a dismissal, a default judgment is also one of the more severe sanctions that a court may impose; see *Forster* v. *Gianopoulos*, 105 Conn. App. 702, 711, 939 A.2d 1242 (2008) (sanction of default judgment imposed by court is "most severe a court may impose"); as "[a] default admits the material facts that constitute a cause of action . . . and entry of default, when appropriately made, conclusively determines the liability of a defendant." (Emphasis omitted; internal quotation marks omitted.) *Bank of New York* v. *National Funding*, 97 Conn. App. 133, 138, 902 A.2d 1073, cert. denied, 280 Conn. 925, 908 A.2d 1087 (2006), cert. denied sub nom. *Reyad* v. *Bank of New York*, 549 U.S. 1265, 127 S. Ct. 1493, 167 L. Ed. 2d 229 (2007).

In *Null* v. *Jacobs*, 165 Conn. App. 339, 341, 139 A.3d 709 (2016), after the plaintiff's counsel failed to appear for a court-ordered deposition, the trial court rendered a judgment of nonsuit as a sanction for the violation of the court's discovery order. On appeal, the plaintiff claimed, inter alia, that the sanction was not proportional to the violation. Id. The trial court in *Null* based its decision to grant the defendant's motion for a judgment of nonsuit on the fact that the failure of the plaintiff's attorney to appear for the deposition " 'was not an isolated event' "; id., 348; but, rather, "was part and parcel of a pattern of noncompliance spanning several years." Id. The trial court also found that the noncompliance was caused by a " 'lack of due diligence and deliberate and unwarranted disregard for the court's authority.' " Id., 348–49. Under those circumstances, this court

determined that the trial "court did not abuse its discretion in concluding that the sanction of nonsuit was proportional to the plaintiff's violation," which "was part of ongoing discovery misconduct" and demonstrated "[a] continuing pattern of violations [that warranted] dismissal of the action." Id., 349.

The appellate courts of this state consistently have upheld nonsuits, defaults or other sanctions imposed for discovery violations where the noncomplying party has exhibited a pattern of violations or discovery abuse demonstrating a disregard for the court's authority. See *Lafferty* v. *Jones*, supra, 336 Conn. 375, 379, 380 (trial court did not abuse its discretion in sanctioning defendants for discovery violations when defendants violated four reasonably clear discovery orders and exhibited pattern of wilfulness, and sanctions imposed were measured in relation to defendants' noncompliance with limited discovery, and were "well short of a default or dismissal, insofar as they [did] not preclude the defendants from having the merits of their cases adjudicated in a conventional manner, such as by summary judgment or trial"); *Alpha Beta Capital Partners, L.P.* v. *Pursuit Investment Management, LLC*, 198 Conn. App. 671, 699, 702, 234 A.3d 997 (2020) (trial court's order of sanctions did not constitute abuse of discretion when defendants habitually failed to comply with discovery orders and court found that "defendants' practice of disobeying its discovery orders was continuous," and "court's order of sanctions reimbursed the plaintiff for the attorney's fees and other litigation costs that it incurred in order to compel the defendants to provide it with certain documents that the court had ordered they disclose" (internal quotation marks omitted)); *Skyler Ltd. Partnership* v. *S.P. Douthett & Co.*, 18 Conn. App. 245, 248, 557 A.2d 927 (it was not abuse of discretion for trial court to default defendant for failure to appear for deposition when deposition was noticed to

defendant's counsel four times and it was clear from record that defendant and his counsel knew of scheduled deposition), cert. denied, 212 Conn. 802, 560 A.2d 984 (1989).

In contrast, in *Usowski* v. *Jacobson*, supra, 267 Conn. 93, our Supreme Court determined that the trial court had abused its discretion. In that case, the trial court had dismissed the action due to the plaintiff's failure to comply with three separate discovery orders, finding that the plaintiff "had engaged in a pattern of discovery abuse . . . ." Id., 92. Our Supreme Court disagreed, determining that the trial court "abused its discretion because the record [did] not establish that the failure to comply with the discovery orders constituted a continuing pattern of violations that warranted dismissal of the action." Id., 93. Specifically, our Supreme Court concluded "that the plaintiff's conduct, considered in its entirety, [did] not evince a contumacious or unwarranted disregard for the court's authority . . . that justified dismissal of the action. *Millbrook Owners Assn., Inc.* v. *Hamilton Standard*, supra, 257 Conn. 16. Dismissal was not the only reasonable remedy available to vindicate the legitimate interests of the defendants in avoiding undue expense during discovery. . . . Accordingly, the plaintiff's failure to comply with the three discovery orders did not constitute a pattern of abuse so egregious as to warrant dismissal, the remedy of last resort." (Internal quotation marks omitted.) *Usowski* v. *Jacobson*, supra, 95–96.

Similarly, in *Blinkoff* v. *O & G Industries, Inc.*, 89 Conn. App. 251, 256, 259, 873 A.2d 1009, cert. denied, 275 Conn. 907, 882 A.2d 668 (2005), this court found that the trial court abused its discretion by rendering a judgment of nonsuit as a result of the plaintiff's two month delay in complying with a discovery order. Specifically, this court found that the sanction of nonsuit was not proportional to the discovery violation, as "[t]he two

month delay [did] not demonstrate a contumacious or unwarranted disregard for the court's authority . . . ." (Internal quotation marks omitted.) Id., 259. In *Blinkoff*, there were no other discovery violations in the record; id., 259 n.7; and, although this court recognized that the plaintiff had "demonstrated a lack of diligence and adherence to court orders regarding discovery," the plaintiff did "in fact later [comply] with the defendant's discovery requests in a fashion that the defendant [did] not claim prejudiced its ability to prepare for trial . . . ." Id., 259.

Moreover, in *Tuccio* v. *Garamella*, 114 Conn. App. 205, 206, 969 A.2d 190 (2009), this court found that the trial court abused its discretion by rendering a judgment of nonsuit against the plaintiffs as a discovery sanction for their failure to respond to interrogatories and requests for production. We noted that "[t]here [was] an insufficient record from which to conclude either that counsel was unable to respond to the interrogatories before he did, or that failure to respond was wilful or in bad faith, and the [trial] court made neither finding. There was no evidence of prejudice to the defendant except for his claim that he was prejudiced by the lawsuit against him itself." Id., 208. This court concluded that, although "[t]here was a delay and lack of diligence on the part of the plaintiffs with no real explanation for the delay in responding to the interrogatories . . . under the circumstances of [that] case . . . the ultimate sanction of nonsuit was disproportionate to the violation of the discovery request and therefore an abuse of discretion." Id., 210; see also *D'Ascanio* v. *Toyota Industries Corp.*, 309 Conn. 663, 665, 681, 683, 72 A.3d 1019 (2013) (reversal of trial court's judgment directing verdict in defendants' favor was proper where court abused its discretion in imposing sanctions because "objectionable conduct at issue was an isolated event and was not one in a series of actions in disregard

of the court's authority"); *West Haven Lumber Co.* v. *Sentry Construction Corp.*, 117 Conn. App. 465, 474–75, 979 A.2d 591 (trial court did not abuse its discretion in denying motion for judgment of nonsuit for plaintiff's failure to appear for deposition when no evidence was presented showing that plaintiff wilfully disregarded discovery order or avoided deposition out of bad faith), cert. denied, 294 Conn. 919, 984 A.2d 70 (2009).

The present case involves a single violation of a discovery order resulting from the defendant's failure to attend a duly scheduled deposition. In *Ridgaway*, our Supreme Court explained that "[o]ur appellate courts have upheld the imposition of a sanction of nonsuit when there is evidence of *repeated* refusals to comply with a court order"; (emphasis added) *Ridgaway* v. *Mount Vernon Fire Ins. Co.*, supra, 328 Conn. 73; but acknowledged that it "has not considered whether a *single act* of misconduct could warrant the sanction of nonsuit . . . ." (Emphasis added.) Id., 73–74. The court further explained that "courts in other jurisdictions have concluded that a single act could warrant nonsuit or dismissal if the act is sufficiently egregious, particularly when the improper conduct involves the perpetration of a deception on the court." Id., 74. The present case does not involve any such deception on the court or egregious conduct by the defendant.

Here, the information before the court regarding the defendant's failure to attend the deposition was limited. The plaintiff's motion for default simply alleged that the defendant had notice and was aware of the scheduled deposition but failed to attend. The court also had before it the representations of the plaintiff's counsel at the outset of the deposition on March 14, 2018, in which the plaintiff's counsel discussed for the record the attempts made to notify the defendant of the location of the deposition and recounted confusion on the defendant's part whereby the defendant thought the

deposition notice was for a court appearance. There was nothing before the court demonstrating any kind of pattern of behavior by the defendant, a wilful disregard of the discovery order, the cause of the defendant's noncompliance, or any "deliberate, contumacious or unwarranted disregard for the court's authority . . . ." (Citations omitted; internal quotation marks omitted.) *Millbrook Owners Assn., Inc.* v. *Hamilton Standard*, supra, 257 Conn. 16–17.

In granting the motion for default, the court simply noted the defendant's failure to file an objection to the motion for default and his failure to attend the deposition as the grounds for its decision. The fact that the defendant did not file an objection to the motion for default, however, has no bearing on whether the sanction imposed was proportional to the violation. See, e.g., *Usowski* v. *Jacobson*, supra, 267 Conn. 87 ("argument that the plaintiff . . . did not object to the sanction . . . has no bearing on whether the sanction was proportional to the violation"). Moreover, although Practice Book § 13-14 permits the entry of a default against a party who fails to attend a duly scheduled deposition, our Supreme Court has cautioned that any sanction imposed for a discovery violation must be proportional to the violation. See *Lafferty* v. *Jones*, supra, 336 Conn. 374.

With respect to the issue of prejudice, the court made no finding of prejudice to the plaintiff in its order granting the motion for default. In his appellate brief, the plaintiff points out that the trial in this case commenced more than four and one-half years after the action was initiated. When the action was commenced, however, the defendant timely filed an answer and special defense. The plaintiff did not reply to the answer and special defense until *two years later* and has not provided any explanation for that delay. Moreover, approximately one year later, on January 29, 2018, the plaintiff

"renoticed" the defendant's deposition. Nothing in the "renotice" indicates how many times a notice of the deposition had been provided to the defendant or whether the deposition previously had to be rescheduled. Thus, with respect to at least three years of the four and one-half years since the commencement of this action to trial, there is nothing in the record to show that the delay argued by the plaintiff was in any way attributable to the defendant.

We note that our Supreme Court also "has refused to uphold a sanction of nonsuit when there were available alternatives to dismissal that would have allowed a case to be heard on the merits while ensuring future compliance with court orders." *Ridgaway* v. *Mount Vernon Fire Ins. Co.*, supra, 328 Conn. 75. A default "was not the only option available to vindicate the legitimate interests of the [plaintiff] and the court." *D'Ascanio* v. *Toyota Industries Corp.*, supra, 309 Conn. 683. In the present case, the trial court had available a variety of sanctions that it could have imposed on the defendant for his failure to attend the deposition, including a monetary sanction,[4] which would have reimbursed the plaintiff for any fees that he may have incurred with respect to the deposition that did not take place and vindicated the legitimate interests of the plaintiff in avoiding undue expense during discovery, while still ensuring that a trial on the merits of this action could take place. See *Alpha Beta Capital Partners, L.P.* v. *Pursuit Investment Management, LLC*, supra, 198 Conn. App. 685, 702.

Finally, we also must be mindful that the defendant was a self-represented party at the time that he failed

[4] Other sanctions that the trial court could have imposed include, inter alia, denying the motion for default without prejudice to the motion being renewed if the defendant failed to attend another properly noticed deposition within a certain period of time, or ordering the defendant to appear for a deposition within a certain period of time or a default would enter.

to appear for the deposition and when the court granted the plaintiff's motion for a default. Although self-represented parties are not excused from complying with relevant rules of procedural and substantive law, "[i]t is the established policy of the Connecticut courts to be solicitous of [self-represented] litigants and when it does not interfere with the rights of other parties to construe the rules of practice liberally in favor of the [self-represented] party." (Internal quotation marks omitted.) *Deutsche Bank National Trust Co.* v. *Pollard*, 182 Conn. App. 483, 487–88, 189 A.3d 1232 (2018). This court "has always been solicitous of the rights of [self-represented] litigants and, like the trial court, will endeavor to see that such a litigant shall have the opportunity to have his case fully and fairly heard so far as such latitude is consistent with the just rights of any adverse party." (Internal quotation marks omitted.) *Belica* v. *Administrator, Unemployment Compensation Act*, 126 Conn. App. 779, 787, 12 A.3d 1067 (2011).

Similar to *Usowski*, in which our Supreme Court found an abuse of discretion by the trial court "because the record [did] not establish that the failure to comply with the discovery orders constituted a continuing pattern of violations that warranted dismissal of the action"; *Usowski* v. *Jacobson*, supra, 267 Conn. 93; the record in the present case is devoid of any evidence regarding whether the defendant's conduct demonstrated an egregious or continuing pattern of behavior or "a contumacious or unwarranted disregard for the court's authority . . . ." (Internal quotation marks omitted.) Id., 95. Although "[t]rial courts should not countenance unnecessary delays in discovery"; *Osborne* v. *Osborne*, 2 Conn. App. 635, 639, 482 A.2d 77 (1984); any sanctions imposed must be "proportionate to the circumstances." Id.; see also *Millbrook Owners Assn., Inc.* v. *Hamilton Standard*, supra, 257 Conn. 18.

After examining the totality of the circumstances, as well as the factors that must be considered when reviewing the reasonableness of a sanction imposed by the trial court; see *Yeager* v. *Alvarez*, supra, 302 Conn. 787, we conclude that the sanction of default was not proportional to the defendant's single discovery violation of failing to attend the deposition. The determinative question before this court on appeal is not whether this court "would have imposed a similar sanction but whether the trial court . . . reasonably [could have] conclude[d] as it did *given the facts presented*." (Emphasis added; internal quotation marks omitted.) *Lafferty* v. *Jones*, supra, 336 Conn. 374. As in *Tuccio*, in the present case, there was an insufficient record from which the court could have determined that the defendant's conduct was wilful or in bad faith. See *Tuccio* v. *Garamella*, supra, 114 Conn. App. 208. Nor was there any evidence of prejudice before the court at the time it granted the plaintiff's motion for default. See id. Under these circumstances, the court abused its discretion in granting the plaintiff's motion for default. Because we agree with the defendant's first claim, that the court abused its discretion in granting the plaintiff's motion for default, we need not reach his other claims concerning the denial of his motions to set aside the default and for permission to file a notice as to the hearing in damages. See id., 207.

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

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* HUDEL CLIFTON GAMBLE
(AC 43117)

Prescott, Clark and DiPentima, Js.

Syllabus

Convicted of the crime of manslaughter in the first degree with a firearm, the defendant appealed from the trial court's dismissal of his motion to correct an illegal sentence. The defendant was charged with, inter alia, murder, and, at trial, the state presented evidence that the defendant and his accomplices each fired a gun at the victim. At the state's request, the judge charged the jury on all of the elements of the lesser included offense of manslaughter in the first degree with a firearm. At the hearing on the motion to correct, the defendant acknowledged that he was challenging his sentence solely on the basis of what he contended was an unconstitutional conviction of manslaughter in the first degree with a firearm. The court dismissed the motion for lack of jurisdiction on the ground that the defendant was attacking his conviction, not the sentence he received or the manner in which the sentence was imposed. On appeal, the defendant claimed that there was a colorable claim that his sentence on the underlying conviction of manslaughter in the first degree with a firearm was illegally enhanced on the basis of a fact not found by the jury. *Held* that the trial court did not err in dismissing the defendant's motion to correct for lack of jurisdiction, as the defendant challenged what transpired at trial, not at sentencing, and his claim presupposed an invalid conviction; the jury was instructed on all of the elements of the offense for which the defendant was convicted and sentenced, including the element of using a firearm, and the jury, not the judge, found the defendant guilty of that offense; moreover, to the extent that the defendant argued that the court misled the jury or incorrectly accepted its verdict, his arguments attacked his underlying conviction, not his sentence, and despite the defendant's claim that the firearm element that enhanced his manslaughter conviction was never proven to the jury, the record sufficiently demonstrated that the state presented evidence that the defendant used a gun to shoot at the victim.

Argued April 19—officially released August 24, 2021

Procedural History

Substitute information charging the defendant with the crimes of murder, conspiracy to commit murder, possession of an assault weapon and conspiracy to possess an assault weapon, brought to the Superior Court in the

judicial district of New Haven and tried to the jury before *Holden*, *J.*; verdict and judgment of guilty of the lesser included offense of manslaughter in the first degree with a firearm as an accessory; thereafter, the court, *Clifford*, *J.*, dismissed the defendant's motion to correct an illegal sentence, and the defendant appealed to this court. *Affirmed.*

Hudel Clifton Gamble, self-represented, the appellant (defendant).

Thai Chhay, deputy assistant state's attorney, with whom, on the brief, were *Ronald G. Weller*, senior assistant state's attorney, *Patrick Griffin*, state's attorney, and *Reed Durham*, assistant state's attorney, for the appellee (state).

Opinion

CLARK, J. For a trial court to have jurisdiction over a defendant's motion to correct an alleged illegal sentence, the defendant must raise "a colorable claim within the scope of Practice Book § 43-22[1] that would, if the merits of the claim were reached and decided in the defendant's favor, require correction of a sentence. . . . In the absence of a colorable claim requiring correction, the trial court has no jurisdiction to modify the sentence." (Footnote added; internal quotation marks omitted.) *State* v. *Evans*, 329 Conn. 770, 783, 189 A.3d 1184 (2018), cert. denied, U.S. , 139 S. Ct. 1304, 203 L. Ed. 2d 425 (2019). "A colorable claim is one that is superficially well founded but that may ultimately be deemed invalid. . . . For a claim to be colorable, the defendant need not convince the trial court that he necessarily will prevail, he must demonstrate simply

[1] Practice Book § 43-22 provides: "The judicial authority may at any time correct an illegal sentence or other illegal disposition, or it may correct a sentence imposed in an illegal manner or any disposition made in an illegal manner."

that he might prevail. . . . The jurisdictional and merits inquiries are separate, whether the defendant ultimately succeeds on the merits of his claim does not affect the trial court's jurisdiction to hear it." (Citations omitted; emphasis omitted; internal quotation marks omitted.) Id., 784.

In the present case, the self-represented defendant, Hudel Clifton Gamble, appeals from the judgment of the trial court dismissing his motion to correct an alleged illegal sentence (motion to correct) for lack of jurisdiction. On appeal, the defendant claims that the court improperly dismissed the motion to correct because it advanced a colorable claim that his sentence on the underlying conviction of manslaughter in the first degree with a firearm was illegally enhanced on the basis of a fact not found by the jury. The state counters that the court properly dismissed the defendant's motion to correct because it challenges his underlying conviction, not the legality of his sentence. We agree with the state and, therefore, affirm the judgment of the trial court.

The present appeal arises out of the defendant's conviction, following a jury trial, of manslaughter in the first degree with a firearm. *State* v. *Gamble*, 119 Conn. App. 287, 987 A.2d 1049, cert. denied, 295 Conn. 915, 990 A.2d 867 (2010). The relevant facts, which the jury reasonably could have found, and procedural history were set out in this court's opinion affirming the defendant's conviction on direct appeal.[2]

[2] On direct appeal, the defendant claimed that the court improperly "(1) accepted the jury's verdict finding him guilty of manslaughter in the first degree with a firearm under the theory of accessorial liability and not guilty of the same crime under the theory of principal liability, thereby (a) violating his right against double jeopardy, (b) resulting in his being convicted of the nonexistent crime of being an accessory, (c) resulting in a legally inconsistent verdict and (d) returning a verdict in violation of the principles of collateral estoppel, and (2) suggested in its jury instructions that defense counsel had made an improper closing argument, thereby improperly highlighting the defendant's decision not to testify." (Internal quotation marks omitted.)

On November 29, 2005, the then seventeen year old defendant gave his fifteen year old friend, Ricardo Ramos, a loaded .22 caliber gun. Id., 290. Later that day, Ramos and Daniel Smith were riding in a BMW in the "Hill" section of New Haven. Id. They picked up the defendant, who sat in the backseat while the three drove around smoking marijuana. Id. Smith was driving on Kensington Street when Ramos saw a woman with whom he was acquainted. Id. Smith stopped the vehicle, and the woman "informed Ramos that a person with whom Ramos had a 'beef' was in the area." Id. As the three men traveled down Kensington Street a second time, "Ramos observed a person, [whom] he believed had killed his cousin approximately one month earlier . . . . As Smith drove closer, the group on the sidewalk fired gunshots at the right side of the BMW. Ramos and Smith, who were both carrying weapons, returned fire through the open windows of the BMW. The *defendant fired an SKS semiautomatic assault rifle*, the barrel of which was resting on an open car window."[3] (Emphasis

State v. *Gamble*, supra, 119 Conn. App. 289. The defendant sought to prevail pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as he had failed to preserve those claims at trial. This court determined that the defendant could not prevail under *Golding* because the alleged constitutional violations did not exist and the defendant was not denied a fair trial. *State* v. *Gamble*, supra, 294–99.

The defendant also sought to prevail under the plain error doctrine. Id., 291 n.2; see Practice Book § 60-5. This court found that "[t]here is no error, plain or otherwise . . . ." *State* v. *Gamble*, supra, 119 Conn. App. 292 n.2.

[3] In August, 2016, the defendant filed a third amended petition for a writ of habeas corpus in which he alleged ineffective assistance of trial and appellate counsel. *Gamble* v. *Commissioner of Correction*, 179 Conn. App. 285, 289, 289 n.4, 179 A.3d 227, cert. denied, 328 Conn. 921, 181 A.3d 91 (2018). In his petition, the defendant alleged that his appellate counsel had rendered ineffective assistance on appeal by failing to raise a claim of insufficient evidence. Id., 289. This court found that there was sufficient evidence before the jury to support a finding that the defendant participated in the shooting of the victim. "[T]he victim's injuries indicated that shots had been fired from three different types of firearms. Ed Beaumon, a New Haven resident, testified that in the early evening of November 29, 2005, he was sitting on his neighbor's front porch on Kensington Street when he heard shots being fired, and he ran out to the victim and observed shots being fired from the front and rear passenger sides of a 'maroon' car. The

added.) Id. Ramos later learned that Marquis White (victim), whom he did not know and who did not shoot his cousin, had been shot and killed on Kensington Street. Id.

The defendant was arrested and charged with various crimes, including murder.[4] Id., 292. At trial, "[o]ver the defendant's objection, the court [*Holden*, *J.*] granted the state's request for a jury instruction on the lesser included offense of manslaughter in the first degree with a firearm under the theories of [both] principal and accessorial liability. The court so instructed the jury.[5]

[defendant] admitted in his statement to police that he was seated in the backseat of the BMW during the shooting. The jury reasonably could have inferred that the [defendant] fired one of the three weapons." Id., 297 n.9.

[4] The defendant was charged with murder, conspiracy to commit murder, possession of an assault weapon, and conspiracy to possess an assault weapon. *State* v. *Gamble*, supra, 119 Conn. App. 289 n.1. The jury found the defendant not guilty of those charges. Id.

[5] The court charged the jury in relevant part: "In order for you to find the defendant guilty of being [an] accessory to the crime of manslaughter in the first degree under [General Statutes] § 53a-55a (3) . . . you must find that the defendant . . . had the criminal intent required for the crime of manslaughter in the first degree; namely, [he] recklessly engaged in conduct which created a grave risk of death to another person, and the . . . defendant intentionally aided other persons under these circumstances. This means that the accessory as described to you in count one is applicable to this lesser included offense as well. My charge on accessory applies to . . . this lesser included offense as well.

"Now, *if you find that the state has proven all* [*of*] *the elements of manslaughter in the first degree then you must consider whether the state has proven beyond a reasonable doubt that at the time and in the commission of this crime* [*of*] *manslaughter*, the lesser included offense, the accused used, or was armed with or threatened the use or displayed or represented by his words or conduct that [he] possessed a pistol or revolver or other firearm capable of firing a shot, then you must find the defendant guilty of manslaughter . . . in the first degree with a firearm. *And if you find the state has not proven those elements of proof beyond a reasonable doubt then you would find the defendant not guilty.*

"Manslaughter, lesser included offense, a person acting with the mental state required for the commission of an offense which—in this instance that, one, 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 . . . and in the commission of the crime he used or represented by his words or

"Following deliberations, the jury reached a verdict. After the roll of jurors was called, the foreperson answered 'not guilty' as the court clerk read the following charges: murder, manslaughter in the first degree with a firearm, conspiracy to commit murder, possession of an assault weapon and conspiracy to possess an assault weapon. The court . . . accepted the verdict.

"Thereafter, the foreperson stated that '[s]omething is wrong.' The court sent the jury back to the deliberation room and informed counsel of the procedure that was to follow. The jury then returned to the courtroom, and the court asked the jury to articulate its concern in a note. The jury returned to the deliberation room and sent out a note that stated: '[W]e found [the defendant] guilty of "accessory to manslaughter" and [want] guidance. We were waiting for "accessory" to be read.' The court described the contents of the note on the record. The court stated that, as evidenced by the note, it was the jury's position that it had not been asked to provide its verdict as to manslaughter in the first degree with a firearm as an accessory. The court indicated that it would have to vacate its finding that the verdict was accepted and recorded, at least as to the manslaughter charge. The court then stated that, unless the parties had an objection, the jury would be asked to return its verdict again as to all the charges, including the lesser included offense of manslaughter in the first degree with

conduct that he possessed a pistol or revolver or a firearm . . . capable of discharging a shot, then you must find the defendant guilty of manslaughter with a firearm . . . . *If you find the state has not proven that, then you must find the defendant not guilty.* Also, applicable is the accessory as I've described to you in the charge of murder." (Emphasis added.)

The transcript of this portion of the court's jury instruction regarding the statutory citation for manslaughter in the first degree, which is an element of the offense of manslaughter in the first degree with a firearm, references "§ 53a-55a (3)." There is no § 53a-55a (3) in the General Statutes. Manslaughter in the first degree is codified at General Statutes § 53a-55 (a) (3). Manslaughter in the first degree with a firearm is codified at General Statutes § 53a-55a. See footnote 7 of this opinion.

a firearm. In an effort to ameliorate any misunderstanding, the court planned to separate the manslaughter charge into two subsets: manslaughter as previously read and manslaughter as an accessory. There was no objection.

"After the jury returned to the courtroom, the court clerk again called the jury roll and then asked for the jury's verdict as to each offense. This time, the court clerk inquired as to the offense of manslaughter in the first degree with a firearm twice: once as previously read and interpreted by the jury to encompass only liability as a principal and once as an accessory. The court clerk inquired: 'To the lesser included offense in count one, what say you to the lesser included offense of manslaughter in the first degree with a firearm in violation of [General Statutes] § 53a-55 (a) (3)[6] of the Connecticut General Statutes,' to which the foreperson responded: 'Not guilty.' The court clerk then inquired: '*For the lesser included offense in count one, what say you to the lesser included offense of manslaughter in the first degree with a firearm as an accessory in violation of the same section of the Connecticut General Statutes,' to which the foreperson responded*:

[6] The court clerk cited § 53a-55 (a) (3) for the offense of manslaughter in the first degree with a firearm. That statute governs manslaughter in the first degree. See footnotes 5 and 7 of this opinion. The defendant did not raise that error in his motion to correct or the present appeal. As a result, we deem any claims concerning the court clerk's error abandoned. Moreover, in light of this court's prior decisions in the defendant's direct appeal and petition for a writ of habeas corpus, Judge Holden's full instruction to the jury about the offense of manslaughter in the first degree with a firearm; see footnote 5 of this opinion; the court clerk's clear question to the jury about whether it found the defendant guilty "of manslaughter in the first degree with a firearm as an accessory"; and the judgment file itself, which states that the jury found the defendant guilty of manslaughter in the first degree with a firearm as an accessory, any such claim is immaterial for purposes of the present appeal because it does not give rise to a colorable claim that the defendant was convicted of anything other than manslaughter in the first degree with a firearm.

'Guilty.'[7] The jury returned a verdict of not guilty to the remaining charges. The court . . . accepted the verdict. The defendant did not object." (Emphasis added; footnotes added.) *State* v. *Gamble*, supra, 119 Conn. App. 292–94. The court sentenced the defendant to thirty-seven and one-half years of imprisonment.[8] This court affirmed the defendant's conviction on direct appeal.[9] Id., 304.

[7] General Statutes § 53a-55 (a) provides in relevant part: "A person is guilty of manslaughter in the first degree when . . . (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."

General Statutes § 53a-55a provides in relevant part: "(a) A person is guilty of manslaughter in the first degree with a firearm when he *commits manslaughter in the first degree as provided in section 53a-55*, and in the commission of such offense he uses or is armed with . . . a pistol, revolver, shotgun, machine gun, rifle or other firearm. . . . .

"(b) Manslaughter in the first degree with a firearm is a class B felony and any person found guilty under this section shall be sentenced to a term of imprisonment in accordance with subdivision (5) of section 53a-35a of which five years of the sentence imposed may not be suspended or reduced by the court."

[8] General Statutes § 53a-35a provides in relevant part: "For any felony committed on or after July 1, 1981, the sentence of imprisonment . . . shall be fixed by the court as follows . . . (5) For the class B felony of manslaughter in the first degree with a firearm under section 53a-55a, a term not less than five years nor more than forty years . . . ."

[9] In addition to a direct appeal, the record discloses that the defendant has filed several postconviction motions or petitions. In April, 2007, the defendant filed an application for sentence review, claiming that his sentence was inappropriate, disproportionate, and contradicted the jury's verdict. On January 25, 2011, the sentence review division, *Alexander*, *White* and *Dooley*, *Js.*, found that the sentence imposed was appropriate and was not disproportionate given the serious nature of the offense.

In August, 2011, the defendant filed a motion to correct an illegal sentence claiming that his sentence exceeded the relevant statutory maximum limits, violated his right against double jeopardy, was ambiguous and was internally contradictory. The court, *Fasano*, *J.*, denied the motion to correct stating that the defendant's double jeopardy and internally contradictory claims had been addressed in substance and depth by this court in the defendant's direct appeal. "The judgment, therefore, was final as to those specific issues and any other matters that might have been offered in connection with the same issues. *State* v. *Aillon*, 189 Conn. 416, 423–25, [456 A.2d 279, cert. denied, 464 U.S. 837, 104 S. Ct. 124, 78 L. Ed. 2d 122] (1983). Other legal issues raised by the [defendant] and not related to the claim of double

In January, 2019, the defendant, representing himself, filed the present motion to correct, alleging that "[p]ursuant to *State* v. *Abraham*, 152 Conn. App. 709 [99 A.3d 1258 (2014)] [the] court has jurisdiction to consider the sentencing court's decision to impose a sentence enhancement under General Statutes § 53a-55a, when the jury never intended to impose that finding. Because of that failure, the defendant's sentence exceeded the permissible statutory maximum and, thus, is illegal."

In response to the motion to correct, the court, *Clifford*, *J.*, pursuant to *State* v. *Casiano*, 282 Conn. 614, 620, 922 A.2d 1065 (2007), appointed Attorney Kelly Billings as counsel for the defendant for the limited purpose of determining whether there was a sound basis to the motion to correct. Billings subsequently moved to withdraw as counsel. At the May 15, 2019 hearing on that motion, Billings represented that the defendant was claiming that it was error for the jury to find him guilty of accessory to commit manslaughter in the first degree with a firearm, which concerns the defendant's conviction, not his sentence. Billings explained that, although the defendant contended that the court had enhanced his conviction of manslaughter in the first degree as an accessory, the defendant had never been charged "just" as an accessory to manslaughter. Rather, the defendant initially was charged with murder and, at the state's request, Judge Holden instructed the jury on the lesser included offense of manslaughter in the first degree with a firearm. The jury ultimately found the defendant guilty of manslaughter in the first degree with a firearm.

After hearing from Billings, the court explained to the defendant that it lacked jurisdiction over his motion to correct because courts generally lose jurisdiction

jeopardy fall outside the limited jurisdiction of the court with respect to motions to correct illegal sentences. *State* v. *Koslik*, 116 Conn. App. 693, 698–700, [977 A.2d 275, cert. denied, 293 Conn. 930, 980 A.2d 916] (2009)."

over a case once a defendant is sentenced and committed to the custody of the Commissioner of Correction.[10] The defendant argued that the court had jurisdiction because he was not attacking his conviction, only his thirty-seven year sentence.[11] Specifically, the defendant claimed that there was a mistake with the "sentence enhancement" and that the court had jurisdiction pursuant to *Apprendi* v. *New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). He also argued that the court "could modify the conviction if it's only challenging the sentence."

The following colloquy transpired between the court and the defendant:

"The Court: Well, you're challenging . . . the sentence of thirty-seven years because you're saying you never should have been convicted of manslaughter in the first degree with a firearm. Right?

"[The Defendant]: Absolutely.

"The Court: Well, that's attacking the conviction.

"[The Defendant]: Well, that's permissible. On the evidence, that's permissible."

After hearing argument, and over the defendant's objection, the court granted Billings' motion to withdraw on the ground that the motion to correct lacked a sound basis. The court, nevertheless, offered the defendant a continuance to prepare for a separate hearing on the merits of his motion to correct. The defendant declined the court's invitation because he felt that the court already had indicated how it likely would rule on the jurisdictional issue. Thereafter, the court dismissed

[10] See *State* v. *McCoy*, 331 Conn. 561, 586–87, 206 A.3d 725 (2019) (court loses jurisdiction upon execution of sentence).

[11] Throughout the hearing, the length of the defendant's sentence was characterized as thirty-seven years, not thirty-seven and one-half years. The difference is not relevant to the motion to correct.

the motion to correct on the grounds that it lacked jurisdiction because the defendant's claims were "attacking the conviction, not the sentence."

On appeal, the defendant claims that the court improperly dismissed his motion to correct because it raised a colorable claim that the firearm element of manslaughter in the first degree with a firearm was not proven beyond a reasonable doubt in violation of *Apprendi* v. *New Jersey*, supra, 530 U.S. 466, and *State* v. *Evans*, supra, 329 Conn. 778. The defendant's claim fails because its premise is factually flawed, and it bears no relation, factually or procedurally, to *Apprendi* or *Evans*.

We begin with the standard of review governing jurisdictional claims. "[B]ecause [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary." (Internal quotation marks omitted.) *State* v. *Alexander*, 269 Conn. 107, 112, 847 A.2d 970 (2004). "[J]urisdiction involves the authority of a court to adjudicate the type of controversy presented by the action before it." (Internal quotation marks omitted.) *State* v. *Kelley*, 164 Conn. App. 232, 237, 137 A.3d 822 (2016), aff'd, 326 Conn. 731, 167 A.3d 961 (2017).

"It is well established that under the common law a trial court has the discretionary power to modify or vacate a criminal judgment before the sentence has been executed. . . . This is so because the court loses jurisdiction over the case when the defendant is committed to the custody of the [C]ommissioner of [C]orrection and begins serving the sentence. . . . There are a limited number of circumstances in which the legislature has conferred on the trial courts continuing jurisdiction to act on their judgments after the commencement of sentence . . . . See, e.g., General Statutes §§ 53a-29 through 53a-34 (permitting trial court to mod-

ify terms of probation after sentence is imposed); General Statutes § 52-270 (granting jurisdiction to trial court to hear petition for a new trial after execution of original sentence has commenced); General Statutes § 53a-39 (allowing trial court to modify sentences of less than three years provided hearing is held and good cause shown). . . . Without a legislative or constitutional grant of continuing jurisdiction, however, the trial court lacks jurisdiction to modify its judgment." (Citations omitted; internal quotation marks omitted.) *State* v. *Lawrence*, 91 Conn. App. 765, 770–71, 882 A.2d 689 (2005), aff'd, 281 Conn. 147, 913 A.2d 428 (2007).

"Under the common law, the court has continuing jurisdiction to correct an illegal sentence. See, e.g., *Bozza* v. *United States*, 330 U.S. 160, 166, 67 S. Ct. 645, 91 L. Ed. 818 (1947) ('an excessive sentence should be corrected . . . by an appropriate amendment of the invalid sentence by the court of original jurisdiction'); *Murphy* v. *Massachusetts*, 177 U.S. 155, 157, 20 S. Ct. 639, 44 L. Ed. 714 (1900) ('in many jurisdictions it has been held that the appellate court has the power, when there has been an erroneous sentence, to remand the case to the trial court for sentence according to law'); *In re Bonner*, 151 U.S. 242, 259–60, 14 S. Ct. 323, 38 L. Ed. 149 (1894) ('where the conviction is correct . . . there does not seem to be any good reason why jurisdiction of the prisoner should not be reassumed by the court that imposed the sentence in order that its defect may be corrected')." *State* v. *Lawrence*, supra, 91 Conn. App. 772.

"In Connecticut, that grant of jurisdiction is recognized and the procedure by which it may be invoked is regulated by Practice Book § 43-22. . . . Rules of practice, however, merely regulate the procedure by which the court's jurisdiction may be invoked; they do not and cannot confer jurisdiction on the court to

consider matters otherwise outside the court's jurisdiction. For the court to have jurisdiction to consider the defendant's claim of an illegal sentence, the claim must fall into one of the categories of claims that, under the common law, the court has jurisdiction to review.

"Connecticut has recognized two types of circumstances in which the court has jurisdiction to review a claimed illegal sentence. The first of those is when the sentence itself is illegal, namely, when the sentence either exceeds the relevant statutory maximum limits, violates a defendant's right against double jeopardy, is ambiguous, or is internally contradictory. . . . The other circumstance in which a claimed illegal sentence may be reviewed is that in which the sentence is within the relevant statutory limits but was imposed in a way which violates [the] defendant's right . . . to be addressed personally at sentencing and to speak in mitigation of punishment . . . or his right to be sentenced by a judge relying on accurate information or considerations solely in the record, or his right that the government keep its plea agreement promises. . . . Both types of illegal sentence claims share the requirement that the sentencing proceeding, and not the trial leading to conviction, be the subject of the attack." (Citations omitted; footnotes omitted; internal quotation marks omitted.) Id., 773–75.

In the present case, the defendant was charged with murder and, at trial, the state presented evidence that the defendant and his accomplices each fired a gun at the victim. At the state's request, and over the defendant's objection, Judge Holden charged the jury on all of the elements of the lesser included offense of manslaughter in the first degree with a firearm. The jury found the defendant guilty of that crime beyond a reasonable doubt. At the hearing on the motion to correct before Judge Clifford, the issue was whether the defendant was attacking his conviction or his sentence. The

defendant acknowledged that he was challenging his sentence solely on the basis of what he contends was an unconstitutional conviction of manslaughter in the first degree with a firearm. Judge Clifford, therefore, properly dismissed the motion to correct for lack of jurisdiction because the defendant was attacking his conviction, not the sentence he received or the manner in which the sentence was imposed.

The defendant argues that the trial court had jurisdiction to consider his motion to correct because he raised a colorable claim under both *Apprendi* and *Evans*. We disagree because neither of those cases bears any relation to the claims the defendant raised in his motion to correct.

In *Apprendi*, the defendant was arrested for firing shots at the home of an African-American family and was charged by a grand jury with multiple crimes, including possession of a firearm for an unlawful purpose punishable by a term of imprisonment of between five and ten years. *Apprendi* v. *New Jersey*, supra, 530 U.S. 469–70. New Jersey had a hate crime statute that provided "for an extended term of imprisonment *if the trial judge finds*, by a preponderance of the evidence, that [t]he defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals" on a discriminatory basis. (Emphasis added; internal quotation marks omitted.) Id., 468–69. None of the charges lodged against the defendant referred to the hate crime statute and none alleged that he acted with a racially biased purpose. Id., 469. Pursuant to a plea agreement, the defendant agreed to plead "guilty to two counts . . . of second-degree possession of a firearm for an unlawful purpose" and a third-degree offense. Id., 469–70. Following a hearing, the judge found by a preponderance of the evidence that the defendant's actions were taken with a purpose to intimidate and that the hate crime statute applied. Id., 471. The judge

therefore enhanced the defendant's sentence on the possession of a firearm for an illegal purpose by several years. Id., 471. The United States Supreme Court reversed the defendant's conviction, holding that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id., 490.

In the present case, the defendant contends that, as in *Apprendi*, the firearm element that enhanced his manslaughter conviction was never proven to the jury. The record does not support his claim. At trial, the state presented evidence that the defendant used a gun to shoot at the victim. See footnote 4 of this opinion. Judge Holden charged the jury on the elements of manslaughter in the first degree with a firearm, which is a distinct and separate criminal offense under Connecticut law. See footnote 5 of this opinion. The jury returned a guilty verdict against the defendant for manslaughter in the first degree with a firearm. The court sentenced the defendant to thirty-seven and one-half years of incarceration, which is a permissible sentence for that offense. See footnote 8 of this opinion. To the extent that the defendant claims that there was insufficient evidence to convict him of manslaughter in the first degree with a firearm or that the court improperly instructed or accepted the jury's verdict, those claims attack his underlying conviction, not the sentence, and are beyond a court's jurisdiction on a motion to correct. Moreover, *Apprendi* does not apply because the defendant cannot make a colorable claim that the court, not the jury, found him guilty of any of the elements of the offense for which he was convicted and ultimately sentenced.

Because the defendant does not state a colorable claim under *Apprendi*, *State* v. *Evans*, supra, 329 Conn. 770, also is inapposite. In *Evans*, the defendant was charged with one count of possession of narcotics,

among other things. Id., 774. The defendant pleaded guilty under the *Alford* doctrine[12] to possession of narcotics. Id. During the plea negotiations, the defendant's drug dependency, if any, was not addressed and no fact finder determined whether he was drug-dependent. A finding of drug dependency would have favorably limited the defendant's sentence. Id. The defendant was sentenced to five years of imprisonment and five years of special parole, which sentence was permissible only if he was not drug-dependent at the time he committed the underlying drug possession offense. Id., 775. The defendant moved to correct an illegal sentence pursuant to Practice Book § 43-22, claiming that, under *Apprendi* and *Alleyne* v. *United States*, 570 U.S. 99, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013), his sentence was illegal because it "exceeded the statutory time limits and that the fact triggering the mandatory minimum [sentence] was not found by a proper [fact finder] or admitted by the defendant . . . ." *State* v. *Evans*, supra, 775.

The trial court denied the defendant's motion for lack of jurisdiction and the defendant appealed. Id., 773. In resolving the defendant's appeal, our Supreme Court concluded that the trial court had jurisdiction to consider the claim, and affirmed the judgment of the trial court. Id., 774. In concluding that the trial court had jurisdiction to consider the defendant's claim, our Supreme Court stated that "a claim is cognizable in a motion to correct an illegal sentence if it is a challenge specifically directed to the punishment imposed, even if relief for that illegal punishment requires the court to in some way modify the underlying conviction, such as for double jeopardy challenges." Id., 781.

In the present case, the jury was instructed on all of the elements of the offense for which the defendant

[12] See *North Carolina* v. *Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

was convicted and sentenced, including the element of using a firearm. The jury, not the judge, found the defendant guilty of that offense. To the extent that the defendant argues that the court misled the jury or incorrectly accepted its verdict, his arguments attack his underlying conviction, not his sentence. *Evans*, therefore, has no application.

We agree with the state that our Supreme Court's decision in *State* v. *Lawrence*, 281 Conn. 147, 913 A.2d 428 (2007), is controlling. In *Lawrence*, the defendant was charged with one count each of murder, carrying a pistol without a permit, and tampering with evidence. Id., 150. "The murder charge alleged that the defendant caused the death of a person by use of a firearm. At trial, the defendant presented a defense of extreme emotional disturbance with respect to the murder charge. The court instructed the jury regarding that defense with the following instruction as the defendant had requested: If you unanimously find that the state has proven each of said elements of the crime of murder beyond a reasonable doubt, and if you also unanimously find that the defendant has proven by the preponderance of the evidence each of the elements of the affirmative defense of extreme emotional disturbance, you shall find the defendant guilty of manslaughter in the first degree with a firearm by reason of extreme emotional disturbance and not guilty of murder." (Internal quotation marks omitted.) Id. The jury found the defendant guilty of manslaughter in the first degree with a firearm. Id. The court rendered judgment in accordance with the verdict and sentenced the defendant to thirty-five years of incarceration. Id.

The defendant in *Lawrence* filed a motion to correct an illegal sentence pursuant to Practice Book § 43-22. Id., 151. He claimed that his conviction for manslaughter in the first degree with a firearm was improper because the jury had acquitted him of murder on the basis of

the affirmative defense of extreme emotional disturbance and that the proper conviction was manslaughter in the first degree, which carries a maximum sentence of twenty years of imprisonment. Id. The trial court dismissed the motion to correct for lack of jurisdiction. Id. This court framed the question on appeal as "whether Practice Book § 43-22 is an appropriate procedural vehicle by which to challenge an allegedly improper conviction or whether the finality of the defendant's conviction, subject to any collateral challenges the defendant may raise via a petition for a writ of habeas corpus, has left the court without jurisdiction to entertain his claim." *State* v. *Lawrence*, supra, 91 Conn. App. 769. This court concluded that the "essence of [his] claim is that he was convicted of the wrong crime. He did not claim, nor could he, that the sentence he received exceeded the maximum statutory limits for the sentence prescribed for the crime for which he was convicted." Id., 775–76. "Because the defendant's claim falls outside that set of narrow circumstances in which the court retains jurisdiction over a defendant once that defendant has been transferred into the custody of the [C]ommissioner of [C]orrection to begin serving his sentence, the court cannot consider the claim pursuant to a motion to correct an illegal sentence under Practice Book § 43-22." Id., 776.

Upon the grant of certification, the defendant appealed to our Supreme Court, which concluded that this court "properly determined that, because the defendant's claim did not fall within the purview of [Practice Book] § 43-22, the trial court lacked jurisdiction." *State* v. *Lawrence*, supra, 281 Conn. 150. The Supreme Court reasoned that a "challenge to the legality of a sentence focuses not on what transpired during the trial or on the underlying conviction. In order for the [trial] court to have jurisdiction over the motion to correct an illegal

sentence after the sentence has been executed, the sentencing proceeding, and not the trial leading to the conviction must be the subject of the attack. . . . [T]he defendant's claim by its very nature, presupposes an invalid conviction." Id., 158–59.

The Supreme Court's decision in *State* v. *Lawrence*, supra, 281 Conn. 147, is directly on point, and compels us to affirm the trial court's judgment dismissing the defendant's motion to correct. The defendant in this case claims that the jury intended to find him guilty of manslaughter in the first degree, not manslaughter in the first degree with a firearm. Like the defendant in *Lawrence*; id.; he challenges what transpired at trial, not at sentencing, and his claim presupposes an invalid conviction. We therefore conclude that the court properly dismissed the motion to correct for lack of jurisdiction.

The judgment is affirmed.

In this opinion the other judges concurred.

LIFT-UP, INC., ET AL. *v.* COLONY INSURANCE COMPANY ET AL.
(AC 43755)

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

Syllabus

The substitute plaintiffs, D and A, sought a declaratory judgment to determine the rights and obligations of the parties under a certain insurance policy that had been issued to the plaintiff L Co., a wheelchair accessible van seller and van modifying company, by the defendant C Co. In an underlying personal injury action, D, a paraplegic confined to a motorized wheelchair, sought damages for injuries he sustained in connection with a confrontation with K, an employee of L Co. During an argument D had with K about modifications L Co. made to D and A's van, the confrontation turned physical when K slapped a baseball cap off D's head. When K saw that A, D's wife, had recorded the incident on her cell phone, he grabbed the phone from her and threatened in crude

terms to break it. As D moved his wheelchair toward K in order to retrieve the cell phone, K grabbed D's arm and the wheelchair and altered its path, which caused D to fall from his wheelchair and sustain serious injuries. D and A settled an underlying personal injury action against L Co. and K by means of a stipulation for judgment. L Co. and K commenced an action against C Co. seeking a legal declaration that, under their insurance policy, C Co. had a duty to defend and indemnify them for the claims alleged in the personal injury action. As part of the stipulated settlement of the personal injury action, L Co. assigned its rights under the policy to D and A, and D and A were substituted as party plaintiffs. The trial court granted a motion for summary judgment filed by C Co. as to D and A's complaint and its counterclaim, from which D and A appealed to this court. *Held*:

1. The trial court did not err in holding that the exclusion provisions under the insurance policy pertaining to an assault or battery applied to D's and A's claims and that there was no coverage under the policy because D's injuries were not caused by an accident that resulted from garage operations, and properly determined that C Co. had no duty to provide a defense to L Co. pursuant to the exclusion provisions: the policy excluded claims for injuries that arose out of an assault or battery or both, and K's slapping D's baseball cap and grabbing A's cell phone and threatening to break it constituted actual harmful or offensive contact and verbal abuse from which D's injuries arose because if K had not escalated the verbal argument into verbal abuse and engaged in offensive contact with both D and A, D would not have moved his wheelchair in K's direction and K would not have had the opportunity to grab D or his wheelchair to divert D's path; accordingly, D's injuries grew out of, flowed from, had their origins in, and were connected with K's intentional acts, which by themselves, constituted an assault, battery, or assault and battery within the meaning of the policy.
2. The trial court did not improperly confine its analysis to the operative complaint and refuse to consider certain pieces of extrinsic evidence that allegedly supported C Co.'s duty to defend: at the time the court heard oral arguments on the motion for summary judgment, it stated that it had reviewed "everything," and the documents at issue were attached to D and A's objection to the motion for summary judgment, and, without evidence to the contrary, this court concluded that the trial court reviewed those documents; moreover, even if the court had not reviewed the documents, they were insufficient to support D and A's claim that C Co. had a duty to defend, as there were no meaningful factual differences between the documents and the operative complaint.

Argued April 5—officially released August 24, 2021

Procedural History

Action seeking a declaratory judgment determining, inter alia, the rights of the parties under a certain insurance policy issued to the named plaintiff by the named

defendant concerning the underlying claims of the defendant Dennis Kinman brought against the plaintiffs, and for other relief, brought to the Superior Court in the judicial of Danbury, where the named defendant filed a counterclaim; thereafter, the defendant Dennis Kinman and Amy Kinman were substituted as the plaintiffs; subsequently, the court, *D'Andrea*, *J.*, granted the named defendant's motion for summary judgment on the complaint and on the counterclaim and rendered judgment thereon, from which the substitute plaintiffs appealed to this court. *Affirmed.*

Brian Kluberdanz, with whom was *David M. Cohen*, for the appellants (substitute plaintiffs).

Melicent B. Thompson, with whom, on the brief, was *Elizabeth O. Hoff*, for the appellee (named defendant).

Opinion

CLARK, J. In this declaratory judgment action, the substitute plaintiffs, Dennis Kinman (Kinman) and Amy Kinman (jointly, Kinmans), appeal from the summary judgment rendered by the trial court in favor of the defendant Colony Insurance Company (Colony)[1] on the Kinmans' amended complaint and Colony's counterclaim. The litigation centers on whether Colony had a duty to defend the original plaintiffs, Lift-Up, Inc. (Lift-Up) and its president, Bruce Kutner,[2] in a personal injury action that the Kinmans had brought against them.[3] On appeal, the Kinmans' principal claim is that in granting Colony's motion for summary judgment, the court improperly construed the allegations of the operative

[1] Dennis Kinman was originally named as a defendant in the declaratory judgment action.

[2] Lift-Up and Kutner were defendants in the personal injury action and plaintiffs in the declaratory judgment action, but they have not participated in the present appeal.

[3] See *Kinman* v. *Kutner*, Superior Court, judicial district of Danbury, Docket No. CV-17-6021988-S.

complaint and the terms of the garage liability policy that Colony had issued to Lift-Up. More to the point, the Kinmans claim that the court improperly concluded as a matter of law that their injuries were not caused by an accident that resulted from Lift-Up's garage operations but, rather, arose out of Kutner's assault, battery, or assault and battery, for which the policy provides no coverage.[4] The Kinmans also claim that the court improperly (1) ignored extrinsic evidence that they argue supported their claim that Colony had a duty to defend and (2) predicated its ruling on allegations of intentional and/or reckless conduct that were properly pleaded in the alternative. We affirm the judgment of the trial court.

The following facts underlie the appeal. Lift-Up is a business located in Bethel that rents and sells wheelchair accessible vans and specializes in modifying such vans to meet the needs of its customers. On or about March 4, 2016, Colony issued a garage liability insurance policy (policy) to Lift-Up, which provided coverage[5]

[4] The Kinmans listed the following issues in their appellate brief: whether the court erred in "(1) determining that the negligent conduct described in counts one and two of the operative complaint could not, even possibly, be considered an accident that arose out of Lift-Up's garage operations; (2) determining that all of the negligent conduct described in counts one and two of the operative complaint constitutes either an assault, a battery, or an assault and battery; (3) restricting its analysis to the allegations in the operative complaint and rejecting the evidentiary significance of two pieces of extrinsic evidence that support Colony's duty to defend Lift-Up; (4) determining that no allegation in the operative complaint falls even possibly within Colony's insurance coverage thus triggering its duty to defend Lift-Up; [and] (5) basing its ruling on allegations of intentional and/or reckless conduct—properly pleaded in the alternative in counts three through five of the operative complaint and irrelevant to Colony's duty to defend its insured—to determine that allegations in the negligence counts fall outside Colony's insurance coverage."

[5] The coverage provision of the policy is in Section II and states in relevant part:

"A. Coverage

"1. 'Garage Operations'—Other Than Covered 'Autos'

"a. We will pay all sums an 'insured' legally must pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies caused

from March 4, 2016, to March 4, 2017. The policy contains coverage and exclusion provisions that are at issue in this appeal.

The facts alleged in the underlying personal injury action may be summarized as follows. Kinman is a paraplegic confined to a motorized wheelchair. In October, 2016, he purchased a new van through Lift-Up and entered into a contract with Lift-Up and Kutner to modify the van for his use. Kinman was dissatisfied with the modifications Lift-Up made, and he returned the van several times for repair. On December 3, 2016, the Kinmans went to Lift-Up to retrieve the van. While they were there, Kinman and Kutner had an argument that turned physical when Kutner slapped the baseball cap Kinman was wearing from his head. When Kutner saw that Amy Kinman had recorded the dispute on her cell phone, he grabbed the cell phone from her and threatened in crude terms to break it. Kinman moved his wheelchair toward Kutner in order to retrieve the cell phone. As Kinman moved toward Kutner, Kutner grabbed Kinman's arm and the wheelchair and altered the path of the wheelchair, which caused Kinman to fall from his wheelchair and sustain serious injuries.[6]

In March, 2017, Kinman commenced the personal injury action against Lift-Up and Kutner seeking dam-

by an 'accident' and resulting from 'garage operations' other than the ownership, maintenance or use of covered 'autos.'

"We have the right and duty to defend any 'insured' against a 'suit' asking for these damages. However, we have no duty to defend any 'insured' against a 'suit' seeking damages for 'bodily injury' or 'property damage' to which this insurance does not apply. We may investigate and settle any claim or 'suit' as we consider appropriate. Our duty to defend or settle ends when the applicable Liability Coverage Limit of Insurance—'Garage Operations'—Other Than Covered 'Autos' has been exhausted by payment of judgment or settlements."

[6] The Kinmans do not allege a motive or reason for why Kutner grabbed Kinman to alter the path of the wheelchair. At oral argument in this appeal, counsel for both parties agreed that self-defense had not been alleged and that separate provisions of the policy pertaining to claims arising from the use of force in defense of persons or property do not apply.

ages for the injuries he had sustained.[7] See footnote 3 of this opinion. In May, 2017, he filed an application for a prejudgment remedy. That application was granted in the amount of $250,000 in August, 2017. On February 2, 2018, Kutner executed an affidavit in connection with a criminal proceeding related to the December 3, 2016 incident.[8] In his affidavit, Kutner attested that he did not expect or intend to harm Kinman when he diverted the path of Kinman's wheelchair. Amy Kinman subsequently intervened in the personal injury action, and, on March 5, 2018, the Kinmans filed an amended complaint (operative complaint in the personal injury action) [9] to conform to the "new" evidence in Kutner's affidavit.

[7] The March, 2017 complaint alleged negligence, intentional assault, reckless and wanton misconduct, intentional infliction of emotional distress, negligent infliction of emotional distress, and breach of warranty.

[8] In his affidavit, Kutner attested that he was a defendant in a criminal matter and in a civil matter that arose out of the same occurrence. He further attested to the verbal disagreement between him and Kinman that he escalated by slapping Kinman's baseball cap from his head. Amy Kinman was recording the incident on her cell phone, which he grabbed and threatened to " 'break this fucking thing right now.' " Kinman attempted to retrieve the cell phone from him and moved his wheelchair toward him. He attempted to alter the course of the wheelchair by grabbing Kinman and his wheelchair and moving them to the side. He further attested that he caused Kinman to fall from his wheelchair. More particularly Kutner attested:

"As someone who performs services for disabled customers on a regular basis, I knew or should have known of [Kinman's] limitations and susceptibility to injury, and I should have considered this factor when I pushed him and his wheelchair, but I did not do so. I *did not expect or intend any harm* to [Kinman] when I diverted his wheelchair, but I knew or should have known of a serious risk of injury resulting from [Kinman's] inability to stabilize or brace himself when I pushed his wheelchair. I regret the injuries suffered by [Kinman] and the distress to Amy Kinman.

"As a condition of my application for and completion of the Accelerated Pretrial Rehabilitation Program, I agree to make . . . restitution to [Kinman] for the injuries that resulted from my careless conduct." (Emphasis added.)

[9] The operative complaint sounded in eight counts: Kinman's claim of negligence as to Lift-Up; Kinman's claim of negligence as to Kutner; Kinman's claim of intentional assault as to Kutner; Kinman's claim of reckless and wanton misconduct as to Kutner; Kinman's claim of intentional infliction of emotional distress as to Kutner; Kinman's claim of negligent infliction of emotional distress as to Kutner and Lift-Up; Amy Kinman's claim of bystander emotional distress as to Kutner and Lift-Up; and Amy Kinman's claim of loss of consortium as to Kutner and Lift-Up.

On November 16, 2018, the Kinmans settled the personal injury action by means of a stipulation for judgment.[10] The stipulation for judgment provided that (1) the Kinmans were awarded $850,000 in compensatory damages against Lift-Up and $175,000 in exemplary damages against Kutner;[11] (2) Kutner was to pay the $175,000 judgment rendered against him "as partial consideration toward the satisfaction of the [s]tipulated [j]udgment"; (3) Lift-Up was to pay nothing toward the $850,000 judgment rendered against it, and instead assigned to the Kinmans its rights under the Colony policy; and (4) the Kinmans were only to pursue Colony, and not Lift-Up or Kutner, for payment of the $850,000 judgment for compensatory damages entered against Lift-Up.

The following facts are alleged in the declaratory judgment action. As previously stated, Colony had agreed to provide Lift-Up with liability insurance coverage for bodily injury caused by an accident resulting from garage operations. See footnote 5 of this opinion. In June, 2017, approximately six months after the December 3, 2016 incident and several months after Kinman had commenced the personal injury action, Lift-Up submitted Kinman's claim to Colony for a defense and indemnification under the policy. Colony informed Lift-Up that it was reserving its rights under the policy pending receipt of the "legal papers" and conducting an investigation. On June 22, 2017, Colony informed Lift-Up that, on the basis of the allegations in the personal injury action for intentional assault, intentional infliction of emotional distress and negligent assault and battery, specific exclusion provisions in

[10] The court, *Mintz, J.*, rendered judgment in accordance with the stipulation.

[11] We note that exemplary damages are not available for simple negligence claims. See *Berry* v. *Loiseau*, 223 Conn. 786, 811, 614 A.2d 414 (1992) (award of exemplary damages requires evidence of reckless indifference to rights of others or intentional and wanton violation of those rights).

the policy may preclude coverage and that Colony was handling the matter under a reservation of rights. On June 28, 2017, Colony informed Lift-Up that there was no coverage available under the policy.

In December, 2017, Lift-Up and Kutner commenced an action against Colony that sought a legal declaration that, under the policy, Colony had a duty to defend and indemnify them for the claims alleged in the personal injury action. As part of the November, 2018 stipulated settlement of the personal injury action, Lift-Up assigned its rights under the policy to the Kinmans. As a result of the assignment of Lift-Up's claim against Colony in the stipulated settlement in the personal injury action, in January, 2019, the Kinmans moved to be substituted as the plaintiffs in the declaratory judgment action and thereafter filed an amended complaint against Colony pursuant to the direct action statute, General Statutes § 38a-321.[12] The Kinmans sought from Colony satisfaction of their $850,000 compensatory damages stipulated judgment against Lift-Up.

In response, on March 29, 2019, Colony filed an answer, special defenses, and a counterclaim. The multicount counterclaim sought declarations that (1) Colony had no duty to defend or indemnify Lift-Up under the policy as to the underlying claims against Lift-Up because (a) the policy's assault and battery exclusion endorsement applied to bar coverage for such claims and (b) the damages for which coverage was sought were not

[12] General Statutes § 38a-321 provides in relevant part: "Upon the recovery of a final judgment against any person, firm or corporation by any person . . . for loss or damage on account of bodily injury . . . if the defendant in such action was insured against such loss or damage at the time when the right of action arose and if such judgment is not satisfied within thirty days after the date when it was rendered, such judgment creditor shall be subrogated to all the rights of the defendant and shall have a right of action against the insurer to the same extent that the defendant in such action could have enforced his claim against such insurer had such defendant paid such judgment."

caused by an "accident resulting from 'garage operations,' " and (2) because Colony had no duty to defend Lift-Up as to the underlying claims against Lift-Up, Colony was not liable for any portion of the $850,000 stipulated judgment entered against Lift-Up in the underlying action.[13] On April 1, 2019, Colony moved for summary judgment as to the Kinmans' complaint and its own counterclaim.

Following argument on the motion for summary judgment, the court, *D'Andrea*, *J.*, issued a memorandum of decision granting Colony's motion for summary judgment as to the Kinmans' complaint and Colony's counterclaim. In its memorandum of decision, the court reviewed all counts of the operative complaint in the personal injury action to determine whether "at least one allegation of the complaint falls even possibly within the coverage"; (internal quotation marks omitted) *Travelers Casualty & Surety Co. of America* v. *Netherlands Ins. Co.*, 312 Conn. 714, 739, 95 A.3d 1031 (2014); as the Kinmans claimed, or "the only causes reasonably construed from the [operative] complaint . . . that do not unreasonably contort the meaning of the language of the complaint, are for injury arising out of assault and battery"; *Clinch* v. *Generali-U.S. Branch*, 110 Conn. App. 29, 39, 954 A.2d 223 (2008), aff'd, 293 Conn. 774, 980 A.2d 313 (2009); as Colony contended. In doing so, the court noted that "an insurer's duty to defend, being much broader in scope and application than its duty to indemnify, is determined by reference to the allegations contained in the complaint." *Flint* v. *Universal Machine Co.*, 238 Conn. 637, 646, 679 A.2d 929 (1996).

Although the court parsed all counts of the operative complaint in the personal injury action, our resolution

[13] The March 29, 2019 counterclaim omitted any counts with respect to Kutner because, in accordance with the terms of the stipulated judgment, the Kinmans' amended complaint sought to recover from Colony only the $850,000 stipulated judgment entered against Lift-Up.

of the appeal focuses on the allegations in counts one and two of that complaint, each titled negligence.[14] Count one, which purports to assert a negligence claim against Lift-Up, alleges that Kinman attempted to pick up the vehicle at least five times between October 16 and December 3, 2016. Each time Kinman drove the vehicle, he discovered that several modifications had not been completed properly and that the vehicle was not safe for him to operate. When Kinman returned the vehicle to Lift-Up, Kutner "often became *enraged* with [Kinman] and threatened to cancel the modification contract." (Emphasis added.)

On December 3, 2016, the Kinmans attempted to pick up the vehicle. Shortly after they arrived, "a verbal *argument* between [Kutner] and [Kinman] began . . . . [Kutner] . . . *escalated* the verbal dispute *into a physical one by slapping* [*Kinman's*] *baseball cap off his head.* [Amy] Kinman was recording the altercation with her [cell] phone and . . . [Kutner] *grabbed the cell phone* away from her and *threatened to 'break this fucking thing* right now.' " (Emphasis added.) Kinman "attempted to retrieve [Amy Kinman's] cell phone . . . and . . . moved his wheelchair in [Kutner's] direction," and "[Kutner] . . . *grabb*[*ed*] Kinman] and his wheelchair and *mov*[*ed*] *it* to the side." (Emphasis added.) In "*moving* or *pushing* [*Kinman*] *and his wheelchair*," Kutner caused Kinman to fall from his wheelchair and sustain bodily injuries. (Emphasis added.)[15]

[14] In their appellate brief, the Kinmans state that counts three through five of the operative complaint in the personal injury action, which allege intentional and wanton acts, are not relevant to the issues on appeal. We consider any claims as to those counts abandoned.

[15] Count two of the operative complaint in the personal injury action, titled "Plaintiff Dennis Kinman's Claim of Negligence as to Bruce Kutner," is similar to count one, but omits the allegations concerning the events preceding the date on which the Kinmans sustained injuries. It also omits the allegation that Kutner slapped Kinman's baseball cap off his head.

The court found Kutner's conduct was "clearly aggressive and uncontrolled behavior [that] sounds more in intentional conduct than negligence. The starting point of 'slapping the baseball cap off [Kinman's] head' is, at best, an attempted assault if Kutner only struck the cap, and at worst, an assault and battery by the definitions in the . . . policy . . . ."

Applying the policy language to the facts of the operative complaint in the personal injury action, the court found that, notwithstanding the titles assigned to counts one and two, each count alleged facts amounting to an assault, a battery, or an assault and battery, and were therefore barred under the policy's unambiguous exclusions provision.[16] It also concluded that the injuries Kinman sustained on December 3, 2016, were not caused by an "accident" that resulted from "garage operations."[17] Colony, therefore, had no duty to defend, and thus no duty to indemnify. Thus, the court granted the motion for summary judgment as to the Kinmans'

[16] The exclusions provision of the policy is set forth in Section II of the policy and an endorsement. The endorsement states: "This endorsement modifies insurance provided under the following . . . GARAGE COVERAGE FORM . . . ."

"SECTION II—LIABILITY COVERAGE, B. Exclusions is amended and the following added . . .

"19. Assault, Battery, or Assault and Battery

" 'Bodily injury,' 'property damage' or 'personal and advertising injury' *arising out of*:

"a. 'Assault', 'Battery' or 'Assault and Battery' caused, directly or indirectly, by you, any 'insured', any person, any entity or by any means whatsoever . . . ." (Emphasis added.)

[17] Section II.A.1.a. of the policy provides in relevant part that Colony "will pay all sums an 'insured' legally must pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies caused by an 'accident' and resulting from 'garage operations' . . . ." Section VI.A. provides that " 'Accident' includes continuous or repeated exposure to the same conditions resulting in 'bodily injury' or 'property damage.' " Section VI.H. of the policy defines " 'Garage operations' " as "the ownership, maintenance or use of locations for garage business and that portion of the roads or other accesses that adjoin these locations. 'Garage operations' includes the ownership, maintenance or use of the 'autos' indicated in Section I of this

March 12, 2019 complaint and Colony's counterclaim. The Kinmans appealed that judgment to this court.

We first set forth the well established standard of review of a court's granting 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." (Internal quotation marks omitted.) *Dreher* v. *Joseph*, 60 Conn. App. 257, 259–60, 759 A.2d 114 (2000). "The facts at issue are those alleged in the pleadings." (Internal quotation marks omitted.) *Parnoff* v. *Aquarion Water Co. of Connecticut*, 188 Conn. App. 153, 164, 204 A.3d 717 (2019).

"The motion for summary judgment is designed to eliminate the delay and expense of litigating an issue when there is no real issue to be tried. . . . However, since litigants ordinarily have a constitutional right to have issues of fact decided by a jury . . . the moving party for summary judgment is held to a strict standard . . . of demonstrating his entitlement to summary judgment." (Citation omitted; footnote omitted; internal quotation marks omitted.) *Grenier* v. *Commissioner of Transportation*, 306 Conn. 523, 534–35, 51 A.3d 367 (2012).

Because there are no factual issues in dispute in the present case, the legal question is whether Colony had a duty to defend its insureds. "The question of whether an insurer has a duty to defend its insured is purely a question of law, which is to be determined by comparing the allegations of [the] complaint with the terms of the

coverage form as covered 'autos'. 'Garage operations' also include all operations necessary or incidental to a garage business."

insurance policy." (Internal quotation marks omitted.) *Wentland* v. *American Equity Ins. Co.*, 267 Conn. 592, 599 n.7, 840 A.2d 1158 (2004). "[O]ur review is plenary and we must decide whether [the trial court's] conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *Dreher* v. *Joseph*, supra, 60 Conn. App. 260.

"[T]he duty to defend means that the insurer will defend the suit, if the injured party states a claim, which, qua claim, is for an injury covered by the policy; it is the claim which determines the insurer's duty to defend . . . ." (Internal quotation marks omitted.) *Hartford Casualty Ins. Co.* v. *Litchfield Mutual Fire Ins. Co.*, 274 Conn. 457, 464, 876 A.2d 1139 (2005). Our Supreme Court repeatedly has stated that the duty to defend is considerably broader than the duty to indemnify. "[A]n insurer's duty to defend, being much broader in scope and application than its duty to indemnify, is determined by reference to the allegations contained in the [underlying] complaint. . . . The obligation of the insurer to defend does not depend on whether the injured party will successfully maintain a cause of action against the insured but on whether he has, in his complaint, stated facts which bring the injury within the coverage. If the latter situation prevails, the policy requires the insurer to defend, irrespective of the insured's ultimate liability. . . . It necessarily follows that the insurer's duty to defend is measured by the allegations of the complaint." (Internal quotation marks omitted.) *Security Ins. Co. of Hartford* v. *Lumbermens Mutual Casualty Co.*, 264 Conn. 688, 711–12, 826 A.2d 107 (2003).

"Where . . . an insured alleges that an insurer improperly has failed to defend and provide coverage for underlying claims that the insured has settled the insured has the burden of proving that the claims were

within the policy's coverage . . . ." *Metropolitan Life Ins. Co.* v. *Aetna Casualty & Surety Co.*, 249 Conn. 36, 55, 730 A.2d 51 (1999); see also *Griswold* v. *Union Labor Life Ins. Co.*, 186 Conn. 507, 517–18, 442 A.2d 920 (1982) (insured entitled to coverage under policy if it can demonstrate it qualifies under terms and conditions). Only after the insured has demonstrated that claims fall within a policy's coverage does the insurer then have "the burden of proving that the claim for which coverage is sought falls within a policy's exclusion." *Lancia* v. *State National Ins. Co.*, 134 Conn. App. 682, 690, 41 A.3d 308, cert. denied, 305 Conn. 904, 44 A.3d 181 (2012).

I

On appeal, the Kinmans claim that the court erred in holding that the policy's exclusions provision pertaining to an assault or battery apply to their claims and that there was no coverage under the policy because Kinman's injuries were not caused by an "accident" that resulted from "garage operations." They argue that the operative complaint in the personal injury action alleges that Kinman's injuries arose solely out of a business dispute between the parties and were the result of an "accident" within the meaning of the policy. They essentially argue that the court erroneously failed to focus exclusively on the very specific and discrete acts that were alleged to be the proximate cause of Kinman's injuries, i.e., Kutner's allegedly unintentional and "careless" use of force in diverting Kinman's wheelchair as it moved toward him. As a result, they claim that this case is distinguishable from cases Colony and the court relied on because in each of those cases the injuries sustained were alleged to have been proximately caused by intentional conduct. They further argue that the policy does not bar the claims because (a) the exclusion provisions are ambiguous insofar as they purport to exclude claims arising out of an "unintentional" assault

or battery,[18] and (b) the negligent conduct alleged in the complaint does not meet the definition of a negligent assault or battery under Connecticut law. We disagree and conclude that, even if we assume arguendo that coverage was triggered because Kinman's injuries were caused by an accident resulting from garage operations, the claims are nevertheless barred by the policy's exclusions provision because Kinman's injuries "*arose out of*" conduct constituting an *intentional* assault or battery as those terms are defined in the policy.

Resolution of the claims requires us to examine the allegations of the operative complaint in the personal injury action and the language of the policy to determine whether Colony is required to defend Lift-Up. See *Board of Education* v. *St. Paul Fire & Marine Ins. Co.*, 261 Conn. 37, 41, 801 A.2d 752 (2002). We look first at the language of the policy.

Construction of a contract of insurance is a question of law for the court to review de novo. *Hansen* v. *Ohio Casualty Ins. Co.*, 239 Conn. 537, 543, 687 A.2d 1262 (1996). "The [i]nterpretation of an insurance policy, like the interpretation of other written contracts, involves a determination of the intent of the parties as expressed by the language of the policy. . . . The determinative question is the intent of the parties, that is, what coverage the . . . [insured] expected to receive and what the [insurer] was to provide, as disclosed by the provisions of the policy. . . . It is axiomatic that a contract of insurance must be viewed in its entirety, and the intent of the parties for entering it derived from the

[18] In their brief, the Kinmans argue that because the policy defines a battery as " 'an intentional or unintentional act, including . . . any actual harmful or offensive contact between two or more persons' " but fails to define the terms " 'harmful or offensive contact,' " the entire definition of a battery is ambiguous "because no reasonable insured would believe that his taking steps to avoid a collision . . . could possibly constitute 'harmful or offensive contact.' "

four corners of the policy. . . . The policy words must be accorded their natural and ordinary meaning . . . [and] any ambiguity in the terms of an insurance policy must be construed in favor of the insured because the insurance company drafted the policy. . . . A necessary predicate to this rule of construction, however, is a determination that the terms of the insurance policy are indeed ambiguous. . . . The fact that the parties advocate different meanings of the [insurance policy] does not necessitate a conclusion that the language is ambiguous. . . . Moreover, [t]he provisions of the policy issued by the [insurer] cannot be construed in a vacuum. . . . They should be construed from the perspective of a reasonable layperson in the position of the purchaser of the policy." (Citation omitted; footnote omitted; internal quotation marks omitted.) *Community Action for Greater Middlesex County, Inc.* v. *American Alliance Ins. Co.*, 254 Conn. 387, 399–400, 757 A.2d 1074 (2000).

The original exclusions provision in the policy states in relevant part: "This insurance does not apply to any of the following . . . Bodily injury or property damage expected or intended from the standpoint of the insured. But for garage operations other than covered autos this exclusion does not apply to bodily injury resulting from the use of a reasonable force to protect persons or property."[19] (Internal quotation marks omitted.)

The policy's exclusions provision was modified by an endorsement that added an exclusion titled "Assault, Battery, or Assault and Battery." That provision excludes from coverage claims for " '[b]odily injury' . . . *arising out of* . . . 'Assault', 'Battery' or 'Assault and Bat-

[19] As set forth in footnote 6 of this opinion, counsel for both parties agreed that self-defense was not alleged as a motive for Kutner's act of grabbing Kinman and the wheelchair.

tery' caused, directly or indirectly, by you, any 'insured', any person, any entity or by any means whatsoever . . . ." (Emphasis added.) The endorsement contains the following definitions: "Assault means . . . an *intentional or unintentional act*, including . . . *intimidation* . . . *verbal abuse*, or any *threatened harmful or offensive contact* between two or more persons creating an *apprehension in another* of immediate harmful or offensive contact . . . . Battery means an *intentional or unintentional act*, including . . . any *actual harmful or offensive contact between two* . . . *persons which brings about harmful or offensive contact* to another or *anything connected to another*. Assault and [b]attery means the combination of an [a]ssault and a [b]attery." (Emphasis added; internal quotation marks omitted.) Thus, the policy excludes liability coverage for any bodily injury *arising out of* an assault, battery, or assault and battery caused directly or indirectly by anyone by any means whatsoever.

With respect to the complaint, "[t]he interpretation of pleadings is always a question of law for the court. . . . In addition, [t]he allegations of the complaint must be given such reasonable construction as will give effect to [it] in conformity with the general theory which it was intended to follow, and do substantial justice between the parties. . . . It is axiomatic that the parties are bound by their pleadings." (Citation omitted; internal quotation marks omitted.) *O'Halloran* v. *Charlotte Hungerford Hospital*, 63 Conn. App. 460, 463, 776 A.2d 514 (2001).

The operative complaint in the personal injury action alleges that on prior occasions Kutner became enraged with Kinman when he returned the van for repairs. During the December 3, 2016 incident resulting in Kinman's injuries, Kutner argued with Kinman, slapped the baseball cap from his head, grabbed Amy Kinman's cell

phone and threatened in crude terms to break it. As Kinman moved his wheelchair toward Kutner to retrieve Amy Kinman's cell phone, Kutner, for no alleged reason, grabbed Kinman's arm and wheelchair to divert its path, which caused Kinman to fall to the ground and sustain injuries. On the basis of those allegations, we conclude that the Kinmans' claim falls within the policy's exclusion for bodily injuries *arising out of* an assault or battery.

We agree with the trial court that Kutner's "slapping the baseball cap off [Kinman's] head is, at best, an attempted assault if Kutner only struck the cap, and at worst, an assault and battery by the definitions in the . . . policy . . . ." (Internal quotation marks omitted.) Kutner also committed an assault, battery and/or assault and battery when he intentionally grabbed Amy Kinman's cell phone from her and threatened in crude terms to break it. Those acts constituted "actual harmful or offensive contact" and "verbal abuse" between Kutner and Amy Kinman.

We also conclude that Kinman's injuries *arose out of* those acts. This is true even if we accept, *without deciding*, the Kinmans' claims that the complaint must be read to allege that (a) Kutner did not intend to harm Kinman when he engaged in the discrete act of grabbing Kinman and his wheelchair, (b) the policy's exclusions are ambiguous to the extent they purport to define unintentional acts as an "assault" or "battery," and (c) the discrete acts that proximately caused Kinman's injuries were unintentional and do not meet the elements of a common-law negligent assault or battery under Connecticut law.[20]

[20] The Kinmans also argue that the court did not properly consider in isolation their allegations of negligence, but rather focused on their alternative allegations of intentional or reckless conduct and, as a result, deprived them of their right to plead in the alternative and to have their negligence claim decided by a jury. These arguments warrant little further discussion. Pursuant to our plenary review, we have read the operative complaint broadly with attention to the general theory on which the Kinmans proceeded

The policy at issue does not exclude just those claims for injuries "caused" by an assault or battery. Rather, the policy excludes claims for injuries that *arise out of* such conduct. As the Kinmans themselves note in their brief, our courts have given an expansive meaning to the phrase "*arising out of*" when used in an insurance policy. (Emphasis added.) In *Hogle* v. *Hogle*, 167 Conn. 572, 577, 356 A.2d 172 (1975), our Supreme Court held that "it is generally understood that for liability for an accident or an injury to be said to '*arise out of*' the 'use' of an automobile for purpose of determining coverage under the appropriate provisions of a liability insurance policy, it is sufficient to show only that the accident or injury 'was connected with,' 'had its origins in,' 'grew out of,' 'flowed from,' or 'was incident to' the use of the automobile, in order to meet the requirement that there be a causal relationship between the accident or injury and the use of the automobile." (Emphasis added.) More recently in *Board of Education* v. *St. Paul Fire & Marine Ins. Co.*, supra, 261 Conn. 48, our Supreme Court held that an injury or accident may be said to arise out of the use of an automobile if the injury or accident " 'was connected with,' " " 'had its origins in,' " " 'grew out of,' " " 'flowed from,' " or " 'was incident to' " the use of the automobile. "*Under this standard of causation, it need not be shown that the incident in question was proximately caused by the vehicle for coverage to attach.*" (Emphasis added.) Id.

against Lift-Up and Kutner. We cannot say that the court "cherry-picked" the allegations of the operative complaint looking only for nonnegligent and/or assaultive types of behavior and ignored the claimed negligent acts. The theory and language of *each* count of the operative complaint broadly read demonstrates that Kinman's injuries *arose out of* Kutner's progressively more aggressive acts of hostility toward the Kinmans. Consequently, the court did not deny the Kinmans their right to plead alternative causes of action or the right to have the case decided by a jury. Our law provides that it is not the label affixed to the cause of action that controls an insurer's duty to defend. Rather, the duty to defend is predicated on the underlying facts alleged in the complaint. See *Smedley Co.* v. *Employers Mutual Liability Ins. Co. of Wisconsin*, 143 Conn. 510, 516, 123 A.2d 755 (1956). We conclude that there is no disputed material fact for a jury to resolve.

It is thus well settled that an injury need not be "proximately caused" by an act or occurrence in order to *arise out of* such an act or occurrence within the meaning of an insurance contract. It is sufficient to show more broadly that an accident or injury "was connected with," "had its origins in," "grew out of," "flowed from," or "was incident to" an incident or occurrence. (Internal quotation marks omitted.) Id. Applying that meaning to the phrase "*arising out of*" as it appears in the policy at issue in the present case, it is clear that Kinman's injuries *arose out of* an assault or battery or both. The operative complaint alleges that immediately preceding Kutner's contact that allegedly caused Kinman to fall and sustain bodily injuries, an argument had ensued during which Kutner slapped the baseball cap off Kinman's head. Upon observing Amy Kinman recording the incident on her cell phone, Kutner then grabbed Amy Kinman's cell phone and threatened in crude and offensive terms to break it. Kinman then moved his wheelchair in Kutner's direction in an effort to retrieve his wife's phone at which point Kutner grabbed Kinman and the wheelchair causing Kinman to fall to the ground and sustain injuries.

If not for Kutner escalating the verbal argument into verbal abuse and engaging in offensive contact with both of the Kinmans, Kinman would not have moved his wheelchair in Kutner's direction and Kutner would not have had the opportunity to grab Kinman or his wheelchair to divert Kinman's path. While the Kinmans claim that Kutner acted negligently when he grabbed Kinman and the wheelchair and that those negligent acts proximately caused Kinman's injuries, those acts and Kinman's injuries nevertheless *arose out of* Kutner's instigating intentional acts of slapping the baseball cap off Kinman's head and grabbing Amy Kinman's cell phone and threatening to break it. Kinman's injuries, therefore, "grew out of," "flowed from," "had [their]

origins in" and "[were] connected with" Kutner's intentional acts; (internal quotation marks omitted) id.; which by themselves, constituted an "[a]ssault," "[b]attery" or "[a]ssault and [b]attery" within the meaning of the policy. In this respect, the intentional conduct was "tied inextricably by the language of the complaint to assault and battery." *Clinch* v. *Generali-U.S. Branch*, supra, 110 Conn. App. 39.

As a result, we conclude that the trial court properly determined that Colony had no duty to provide a defense to Lift-Up pursuant to the exclusions provisions of the policy.

II

The Kinmans second claim is that when deciding Colony's motion for summary judgment, the court improperly restricted its analysis to the operative complaint and refused to consider two pieces of extrinsic evidence that support Colony's duty to defend. We do not agree.

The Kinmans' claim is premised on the rule that "the duty to defend must be determined by the allegations set forth in the underlying complaint itself, with reliance on extrinsic facts being permitted only if those facts support the duty to defend." *Misti, LLC* v. *Travelers Property Casualty Co. of America*, 308 Conn. 146, 161, 61 A.3d 485 (2013) (*Misti*).[21] The Kinmans argue that the court failed to consider the affidavit Kutner signed as part of his application for an accelerated pretrial rehabilitation program related to the criminal charges lodged against him as a result of the December 3, 2016 incident. In addition, they argue that the court did not

[21] The procedural posture in *Misti* is distinguishable from the present case. In *Misti*, the parties "stipulated to a number of undisputed facts regarding the circumstances surrounding [the victim's] injuries . . . ." *Misti, LLC* v. *Travelers Property Casualty Co. of America*, supra, 308 Conn. 162. In the present case, the parties have not stipulated to any facts underlying Kinman's injury.

consider the log Colony created during its investigation of the incident, which contains a statement Kutner gave to a claims investigator.

Colony disagrees with the Kinmans' factual representation that the court failed to consider the documents on the basis of the statement the court made at the time it heard oral arguments on the motion for summary judgment: "All right, so, I have reviewed everything." The affidavit and Colony's log were attached to the Kinmans' objection to the motion for summary judgment. We agree with Colony and conclude, without evidence to the contrary, that the court reviewed the documents.

Moreover, for the sake of argument only, even if the court had not reviewed the documents, they are insufficient to support the Kinmans' claim that Colony had a duty to defend. There are no meaningful factual differences among Kutner's affidavit, Colony's log, and the operative complaint. The log created on June 13, 2017, is written in the third person by a Colony claims examiner and states: "[A]s [Kinman] attempted to take the phone [Kutner] grabbed [Kinman's] wrist and he fell out of his wheelchair because he was not wearing a seatbelt." In his February 2, 2018 affidavit, Kutner attested in part: "I attempted to alter [Kinman's] wheelchair's course by grabbing [Kinman] and his wheelchair and moving them to the side." The essential conduct described in each of the documents is similar to that alleged in the complaint. As set forth in part I of this opinion, however, we have determined that the claims nevertheless fall within the policy's exclusions provision. As a result, we conclude that the court did not improperly confine its analysis to the operative complaint and that, even if it did, the documents at issue would not alter the outcome in this matter.

The judgment is affirmed.

In this opinion the other judges concurred.

KENMORE ROAD ASSOCIATION, INC. *v.* TOWN OF BLOOMFIELD (AC 43141)

Elgo, Cradle and Pellegrino, Js.

Syllabus

The plaintiff corporation, which had acquired title to a certain private road in 1966, sought, inter alia, a judgment declaring that the defendant town had accepted the road as a public road. Following a trial, the trial court rendered judgment in favor of the defendant, concluding that the road had not been dedicated to public use by the plaintiff or accepted by the defendant or the public for such use. On the plaintiff's appeal to this court, *held* that the trial court's findings that the plaintiff had not impliedly dedicated the road to public use nor had the defendant or the public impliedly accepted the road for such use were supported by the record and, therefore, were not clearly erroneous.

Argued May 25—officially released August 24, 2021

Procedural History

Action seeking a judgment declaring that the defendant has accepted a certain road as a public road, and for other relief, brought to the Superior Court in the judicial district of Hartford and tried to the court, *Hon. A. Susan Peck*, judge trial referee; judgment for the defendant, from which the plaintiff appealed to this court. *Affirmed.*

Mark S. Shipman, with whom was *C. Scott Schwefel*, for the appellant (plaintiff).

Thomas R. Gerarde, with whom were *Marc N. Needelman*, and, on the brief, *Adam J. DiFulvio*, for the appellee (defendant).

Opinion

PER CURIAM. In this declaratory judgment action, the plaintiff, Kenmore Road Association, Inc., appeals from the judgment of the trial court, rendered after a court trial, in favor of the defendant, the town of

Bloomfield. On appeal, the plaintiff claims that the trial court erred in concluding that Kenmore Road had neither been impliedly dedicated to public use nor impliedly accepted as a public road by the defendant or the public.[1] We affirm the judgment of the trial court.

The plaintiff is a Connecticut corporation, which took title to Kenmore Road, as a private road, in 1966. The plaintiff is not a common interest community. The members of the plaintiff are residents whose properties abut the road, which is the sole means of ingress and egress to those properties. On October 29, 2015, the plaintiff filed this action by way of a one count complaint seeking a declaratory judgment that the defendant has accepted Kenmore Road as a public road. Following a brief trial, the court issued a written memorandum of decision in which it concluded that Kenmore Road had been neither dedicated to the defendant, nor accepted by the defendant or the public, for public use. This appeal followed.

"[U]nder the common law, highways have been established in this state by dedication and acceptance by the public. . . . Dedication is an appropriation of land to some public use, made by the owner of the fee, and accepted for such use by and in behalf of the public. . . . Both the owner's intention to dedicate the way to public use and acceptance by the public must exist, but the intention to dedicate the way to public use may be implied from the acts and conduct of the owner, and public acceptance may be shown by proof of the actual use of the way by the public. . . . Thus, two elements are essential to a valid dedication: (1) a manifested intent by the owner to dedicate the land involved for the use of the public; and (2) an acceptance by the proper authorities or by the general public." (Internal

[1] The trial court also concluded that Kenmore Road had neither been expressly dedicated by the plaintiff, nor expressly accepted by the defendant, as a public road. The plaintiff does not challenge these aspects of the trial court's decision.

quotation marks omitted.) *Montanaro* v. *Aspetuck Land Trust, Inc.*, 137 Conn. App. 1, 11, 48 A.3d 107, cert. denied, 307 Conn. 932, 56 A.3d 715 (2012).

As noted, the plaintiff does not challenge on appeal the trial court's determinations that Kenmore Road was not expressly dedicated or accepted for public use. Our review is therefore limited to the trial court's rejection of the plaintiff's claims that Kenmore Road was impliedly dedicated by the plaintiff and impliedly accepted by the defendant and the public for public use.

"An implied dedication may arise . . . where the conduct of a property owner unequivocally manifests his intention to devote his property to a public use; but no presumption of an intent to dedicate arises unless it is clearly shown by the owner's acts and declarations, the only reasonable explanation of which is that a dedication was intended." *A & H Corp. v. Bridgeport*, 180 Conn. 435, 439–40, 430 A.2d 25 (1980).

"To determine whether the public has accepted a [road] through actual use, the use need not necessarily be constant or by large numbers of the public, but it must continue over a significant period of time . . . and be of such a character as to justify a conclusion that the way is of common convenience and necessity. . . . While the public's actual use of the property dedicated to a municipality can, under appropriate circumstances, constitute an implied acceptance on the part of the public, there are municipal actions that may also constitute acceptance of such property. . . . Where a municipality grades and paves a street, maintains and improves it, removes snow from it, or installs storm or sanitary sewers, lighting, curbs, or sidewalks upon it there exists a factual basis for finding an implied acceptance of the street by the municipality. . . . Such municipal acts are factors to be weighed in the ultimate factual determination of acceptance. Another factor is

the municipality's levy and collection of general and special taxes and assessments on the property." (Citation omitted; internal quotation marks omitted.) *Montanaro* v. *Aspetuck Land Trust, Inc.*, supra, 137 Conn. App. 18.

"The questions of whether there have been dedication [and] acceptance . . . generally are recognized as questions of fact. . . . Our review of the factual findings of the trial court is limited to a determination of whether they are clearly erroneous. . . . To the extent that the . . . claim regarding the acceptance of the [road] challenges the legal basis of the court's conclusions, however, our review is plenary. . . . The question of acceptance, therefore, is better understood as one of mixed law and fact. It is one of law [insofar] as it involves questions as to the nature of this acceptance, the source from which it must come, and the acts and things which may be indicative of it. It is one of fact [insofar] as it involves inquiries as to whether . . . the requisite acts and things have been done so that legal requirements have been met." (Citations omitted; internal quotation marks omitted.) Id., 8–9. Here, because the plaintiff challenges the trial court's determination that the requisite acts and things have not been done to constitute dedication and acceptance, this appeal involves questions of fact, which we review to determine whether they are clearly erroneous.

"A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . Because it is the trial court's function to weigh the evidence and [to] determine credibility, we give great deference to its findings." (Internal quotation marks omitted.) *Reserve Realty, LLC* v. *Windemere*

Reserve, LLC, 205 Conn. App. 299, 333, A.3d (2021).

In rejecting the plaintiff's claims that it had impliedly dedicated Kenmore Road for public use and that Kenmore Road had been impliedly accepted for such use by the public, the court reasoned, inter alia: "Kenmore Road has no access to any other road of the town other than Simsbury Road. Without question, it primarily exists to serve its residents. Thus, the public benefit to be derived from public use of the road is not readily apparent. At the top, of the road, it abuts the [Metropolitan District Commission (MDC)] reservoir property. At some point in time, the MDC constructed a fence, which served as a barrier to enter onto the MDC property. Residents of Kenmore Road testified that, at least in recent time, they have taken no action to bar the public's use and entry onto the road. Occasionally, members of the public have been spotted by witnesses walking on the road. In the past, however, residents have sought to restrict access by the general public. Members of the [plaintiff] prevailed upon the MDC to install a gate in the fence that had a combination lock, the combination for which was provided to [the plaintiff's] members.

"Significantly, there is no specific evidence as of what date, or period of time, the [plaintiff] claims the road may be deemed to have been impliedly dedicated by it to public use. The lack of evidence on this point makes it even more challenging for the court to find implied acceptance by the general public. To the extent there has been use by the public, it has been sparse and irregular. Also, there is scant evidence of continuity of use by the general public. Further, assuming there has been use of Kenmore Road by the unorganized public over time, it is not clear from the evidence how beneficial that use has been. As noted, there is only one access point to and from Kenmore Road. There is no public parking on Kenmore Road for folks seeking access to

the reservoir. The MDC reservoir property has a large public entrance with substantial public parking within a mile of Kenmore Road on Route 44 in Avon. . . .

"Essentially, the plaintiff has failed to establish that, at any time prior to the filing of this [action], it unequivocally manifested an intention to devote Kenmore Road to public use. . . . In fact, the weight of the evidence demonstrates that, until the present time, the [plaintiff] has consistently exhibited private control of the road. Thus, the court finds that the plaintiff has failed to prove by a preponderance of the evidence the dedication of Kenmore Road by implication. . . .

"Even assuming, however, implied dedication by the plaintiff, the evidence of use by the general public is scant, of unclear benefit to the public, and generally insufficient. Basically, there is little or no evidence that the use of Kenmore Road by the unorganized public . . . i.e., that the use by members of the public who are not residents of the road or their invitees, has continued over a significant period of time, and can be said to be of such a character as to justify a conclusion that the way is of common convenience and necessity. . . . In addition, as stated, implied acceptance by public use must occur within a reasonable time after dedication. . . . Because the timing of both the plaintiff's purported dedication and acceptance is unclear from the evidence, the court cannot justifiably make this determination. . . .

"[Moreover], [a]s illustrated by the testimony of the residents of Kenmore Road, evidence of the actual use of the road by the unorganized public is weak, uncertain and of unclear benefit. For these reasons, the use of Kenmore Road to the general public, as shown by the plaintiff, cannot be said to be of common convenience and necessity, and therefore beneficial to them." (Citations omitted; footnote omitted; internal quotation marks omitted.)

The trial court also disagreed with the plaintiff's contention that the provision of certain services by the defendant constituted an implied acceptance of Kenmore Road as a public road. The trial court found that the defendant had provided "trash pickup, snow removal, oiling, sanding and sweeping of sand off the road to be stored in an environmentally secure area, per order of the [Department of Energy and Environmental Protection], trimming tree limbs, clearing downed trees, which would interfere with the efforts of first responders from getting to residents in need of emergency assistance, and transportation services for schoolchildren and the elderly." The court nevertheless rejected the plaintiff's argument that, in providing those services, the defendant impliedly accepted Kenmore Road for public use. The court reasoned: "[T]he provision of these services alone to members of the [plaintiff] on a voluntary or contractual basis cannot reasonably be said to constitute an implied acceptance of the roadway by the [defendant] as a public [road] particularly in light of the substantial evidence indicating that the [defendant] has consistently and repeatedly rejected the residents' historical requests to accept the road for public use absent substantial improvements. Thus, the weight of the evidence is that the [defendant] cannot be said to have impliedly accepted Kenmore Road for public use."

The plaintiff argues on appeal that the trial court erred in finding that it had not impliedly dedicated Kenmore Road to public use, nor had Kenmore Road been impliedly accepted for such use by the defendant or the public. The trial court's findings are amply supported by the record and, therefore, are not clearly erroneous. The plaintiff asks this court to substitute its judgment for that of the trial court. It is not the role of this court to do so. See *Wolk* v. *Wolk*, 191 Conn. 328, 330, 464 A.2d 780 (1983) ("[u]nless there were no facts [on] which

the [trial] court could base its finding, we as an appellate body cannot retry the case or substitute our judgment for that of the trial court").

The judgment is affirmed.