DONALD LEFFINGWELL *v.* COMMISSIONER OF CORRECTION (AC 41663)

Alvord, Prescott and Elgo, Js.

Syllabus

The petitioner, who had been convicted, on a plea of guilty, of various crimes and other offenses, sought a writ of habeas corpus, claiming, inter alia, that certain legislative changes to a risk reduction earned credit program had been improperly applied to him by the respondent, the Commissioner of Correction. The habeas court, sua sponte and without providing the petitioner with prior notice or an opportunity to be heard, dismissed the petitioner's amended petition pursuant to the rule of practice (§ 23-29), concluding that it lacked subject matter jurisdiction over the petition and that the amended petition failed to state a claim on which habeas corpus relief could be granted. On the granting of certification, the petitioner appealed to this court. *Held*:

1. Contrary to the respondent's claims, the petitioner's appeal was not moot: although the petitioner was no longer incarcerated, he was serving a seven year period of special parole with an end date in 2027, and, if the petitioner were to prevail on his appellate claim, the benefit to the petitioner would be the retroactive modification of his definite sentence so as to incorporate his risk reduction earned credits, thereby advancing his effective release date and reducing the amount of time he is required to spend on special parole; moreover, the petitioner's opportunity to be heard regarding the dismissal of his claims by virtue of his appeal before this court did not constitute an adequate substitute to make an appropriate record before the habeas court; furthermore, read broadly, the petitioner's petition for habeas corpus did not address whether the petitioner had received all of the risk reduction earned credits to which he claimed to be entitled or only a portion thereof, thus, the respondent, without pointing to anything else in the factual record, could not prevail on his claim that the petitioner's appeal was moot as he had already received the benefits of the risk reduction earned credits underlying his petition.
2. In light of our Supreme Court's recent decisions in *Brown* v. *Commissioner of Correction* (345 Conn. 1), and *Boria* v. *Commissioner of Correction* (345 Conn. 39), this court concluded that, although the habeas court was not obligated to conduct a hearing before dismissing the amended petition, it was required to provide to the petitioner prior notice of its intention to dismiss, on its own motion, the amended petition and an opportunity to submit a brief or a written response addressing the proposed basis for dismissal, which it did not do; accordingly, on remand, should the habeas court again elect to exercise its

discretion to dismiss the amended petition on its own motion pursuant to Practice Book § 23-29, the court must comply with *Brown* and *Boria* by providing the petitioner with prior notice and an opportunity to submit a brief or written response addressing the proposed basis for dismissal.

Argued January 11—officially released March 21, 2023

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Hon. Edward J. Mullarkey*, judge trial referee, rendered judgment dismissing the petition, from which the petitioner, on the granting of certification, appealed to this court. *Reversed*; *further proceedings*.

Naomi T. Fetterman, assigned counsel, with whom, on the brief, was *Temmy Ann Miller*, assigned counsel, for the appellant (petitioner).

Zenobia G. Graham-Days, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Clare Kindall*, former solicitor general, for the appellee (respondent).

Opinion

PRESCOTT, J. The petitioner, Donald Leffingwell, appeals, following the granting of his petition for certification to appeal, from the judgment of the habeas court dismissing sua sponte, pursuant to Practice Book § 23-29,[1] his amended petition for a writ of habeas corpus. In that petition, he claimed, inter alia, that his federal and state constitutional rights were violated as a result of legislative changes pertaining to the administration

[1] Practice Book § 23-29 provides in relevant part: "The judicial authority may, at any time, upon its own motion or upon motion of the respondent, dismiss the petition, or any count thereof, if it determines that: (1) the court lacks jurisdiction; (2) the petition, or a count thereof, fails to state a claim upon which habeas corpus relief can be granted . . . (5) any other legally sufficient ground for dismissal of the petition exists."

and application of risk reduction earned credits (RREC).[2] On appeal, the petitioner claims that the court improperly dismissed his petition without first providing him with notice and an opportunity to be heard. In accordance with our Supreme Court's decisions in *Brown* v. *Commissioner of Correction*, 345 Conn. 1, 282 A.3d 959 (2022), and *Boria* v. *Commissioner of Correction*, 345 Conn. 39, 282 A.3d 433 (2022), we conclude that the habeas court should not have dismissed the habeas petition pursuant to § 23-29 without first providing the petitioner with notice and an opportunity to submit a brief or other written response addressing the proposed basis for dismissal. Accordingly, we reverse the judgment of the habeas court and remand for further proceedings in accordance with this decision.

The following procedural history is relevant to this appeal. The petitioner pleaded guilty to multiple robberies and other offenses that he committed in 2010. He received a total effective sentence of eleven and one-half years of incarceration followed by seven years of special parole. On August 18, 2014, the petitioner filed a petition for a writ of habeas corpus as a self-represented party. He simultaneously filed a request for the appointment of counsel and an application for waiver of fees, both of which the court granted on August 21, 2014. The court subsequently issued the writ. Appointed counsel filed an appearance on behalf of the petitioner on October 19, 2015. An amended petition for a writ of habeas corpus was filed on January 26, 2017. The petitioner filed a fourteen count revised amended petition on October 31, 2017, which constitutes the operative petition.

[2] On July 1, 2011, General Statutes § 18-98e became effective and authorized the Commissioner of Correction, in his discretion, to award a maximum of five days per month of RREC to reduce a sentence. In 2013, the legislature amended General Statutes § 54-125a (b) (2), to preclude RREC from being applied to advance certain incarcerated persons' parole eligibility dates. See Public Acts 2013, No. 13-3, § 59.

By order dated March 23, 2018, the court, *Hon. Edward J. Mullarkey*, judge trial referee, sua sponte dismissed the habeas action pursuant to Practice Book § 23-39 (1), (2) and (5). Prior to dismissing the action, the court did not provide the petitioner with an opportunity to be heard with respect to the dismissal.[3] The petitioner filed a petition for certification to appeal in accordance with General Statutes § 52-470 (g), which the court granted. This appeal followed.

On October 1, 2021, this court granted the parties' joint motion to stay the appeal pending a final resolution of the appeals in *Brown* v. *Commissioner of Correction*, supra, 345 Conn. 1, and *Boria* v. *Commissioner of Correction*, supra, 345 Conn. 39, which were then pending before our Supreme Court and involved similar claims. After our Supreme Court officially released its decisions in *Brown* and *Boria*, we ordered the parties to file supplemental briefs "addressing the effect, if any, of [*Brown* and *Boria*] on this appeal, including whether, if the judgment of dismissal is reversed, the habeas court should be directed on remand 'to first determine whether any grounds exist for it to decline to issue the writ pursuant to Practice Book § 23-24.' "[4] The parties complied with our supplemental briefing order.

[3] In its decision dismissing the action, the habeas court, citing to *Perez* v. *Commissioner of Correction*, 326 Conn. 357, 163 A.3d 597 (2017), and *Petaway* v. *Commissioner of Correction*, 160 Conn. App. 727, 125 A.3d 1053 (2015), cert. dismissed, 324 Conn. 912, 153 A.3d 1288 (2017), provided the following reasons for dismissing the petition: "[T]he present petitioner's offense date *precedes* the enactment of RREC and the effective date of § 18-98e. Because the petitioner has no right to earn and receive discretionary RREC, and any changes, alterations and even the total elimination of RREC at the most can only revert the petitioner to the precise measure of punishment in place at the time of the offense, the court concludes that it lacks subject matter jurisdiction over the habeas corpus petition and that the petition fails to state a claim for which habeas corpus relief can be granted." (Emphasis in original.)

[4] In *Brown*, our Supreme Court had directed this court to remand the case to the habeas court with direction to first consider whether any grounds existed for it to decline to issue the writ under Practice Book § 23-24. Furthermore, in footnote 11 of its opinion, the court in *Brown* also stated:

The petitioner argued in his supplemental brief that the record clearly demonstrates that the habeas court dismissed the underlying operative petition sua sponte without affording the petitioner proper notice and an opportunity to be heard. He further argued that, pursuant to the Supreme Court's holdings in *Brown* and *Boria*, he was entitled, at minimum, to an opportunity to submit a brief or a written response prior to the dismissal of his petition, and, therefore, the court's judgment of dismissal must be reversed. Regarding whether the habeas court should be instructed on remand to consider whether to decline to issue the writ pursuant to Practice Book § 23-24, the petitioner took the position that the habeas court should be permitted to screen the petition in accordance with § 23-24 because the judgment of dismissal occurred before our Supreme Court's decision in *Gilchrist* v. *Commissioner of Correction*, 334 Conn. 548, 223 A.3d 368 (2020), and, therefore, fell within the directive of our Supreme Court in *Brown*. See *Brown* v. *Commissioner of Correction*, supra, 345 Conn. 17 n.11.

The respondent argued in his supplemental brief that the decisions in *Brown* and *Boria* had no effect on the present appeal "because the court is deprived of subject matter jurisdiction." According to the respondent, the present appeal should be dismissed as moot because the petitioner had been "entirely discharged from custody, and the courts can no longer grant him any practical relief." Alternatively, the respondent argued that the appeal was moot because the petitioner already had

"We are aware that there are other cases pending before this court and the Appellate Court that were decided without the benefit of this court's decision in *Gilchrist* [v. *Commissioner of Correction*, 334 Conn. 548, 561, 223 A.3d 368 (2020) (analyzing interplay between Practice Book §§ 23-24 and 23-29)]. . . . In cases decided prior to *Gilchrist*, the most efficient process to resolve those cases is to remand them to the habeas court to determine first whether grounds exist to decline the issuance of the writ." (Citation omitted.) *Brown* v. *Commissioner of Correction*, supra, 345 Conn. 17 n.11.

been provided with the remedy mandated by *Brown* and *Boria* by virtue of the present appeal. The respondent explained: "[The] [p]etitioner here received the opportunity to be heard that [Practice Book] § 23-29 requires, albeit before [the Appellate Court] and not the habeas court. And he has seized that opportunity by fully presenting his arguments on the merits through a brief and a reply brief. Further, his claims involve pure questions of law that are controlled by established precedents that *Brown* and *Boria* neither questioned nor overruled: his claims relating to [RREC] and parole eligibility are foreclosed as a matter of law by *Perez* v. [*Commissioner of Correction*, 326 Conn. 357, 163 A.3d 597 (2017)] and *Petaway* v. [*Commissioner of Correction*, 160 Conn. App. 727, 125 A.3d 1053 (2015), cert. dismissed, 324 Conn. 912, 153 A.3d 1288 (2017)]." The respondent argued that any error was harmless and a remand in this matter is both unnecessary and a waste of judicial resources. Finally, the respondent took the position that, if we were to reverse and remand, it is clear in the present case that the habeas court accepted the initial petition and issued the writ, and, therefore, Practice Book § 23-24 no longer applies and "the habeas court will instead be required to dismiss the petition under [Practice Book] § 23-29."

Oral argument before this court was scheduled for January 11, 2023. On December 14, 2022, this court notified the parties "to be prepared to address [at oral argument] whether this appeal is moot because the petitioner has been released from custody but appears to be on special parole with an end date of April 16, 2027." At oral argument, in addition to the mootness arguments raised in his supplemental brief, the respondent asserted a new argument as to why the appeal was moot. Specifically, the respondent argued that the petitioner had in fact received all the RREC to which he claimed he was entitled.

Because they nominally implicate the subject matter jurisdiction of this court, we first address the respondent's arguments that the current appeal is moot. "Under our well established jurisprudence, [m]ootness presents a circumstance wherein the issue before the court has been resolved or had lost its significance because of a change in the condition of affairs between the parties. . . . In determining mootness, the dispositive question is whether a successful appeal would benefit the [appellant] in any way. . . . In other words, the ultimate question is whether the determination of the controversy will result in practical relief to the complainant. . . . Mootness implicates [this] court's subject matter jurisdiction and is thus a threshold matter for us to resolve." (Internal quotation marks omitted.) *Richards* v. *Commissioner of Correction*, 164 Conn. App. 862, 865, 138 A.3d 440 (2016).

The respondent first argues that the appeal is moot because the petitioner has been "entirely discharged from custody, and the courts can no longer grant him any practical relief." The respondent's argument is wholly without merit. In *Dennis* v. *Commissioner of Correction*, 189 Conn. App. 608, 614–17, 208 A.3d 282 (2019), this court explained that a petitioner's claim pertaining to presentence confinement credits was not rendered moot by the petitioner's release from incarceration to a period of special parole because, if the petitioner were to prevail on his appellate claim, an order modifying the original sentence to include the credits sought likely would "lead to the advancement of his release from special parole by approximately that same amount of time." Similarly, here, although the petitioner is no longer incarcerated, he is serving his seven years of special parole, which has a current end date of April 16, 2027. The petitioner could still benefit from any retroactive modification of his definite sentence due to RREC because it would advance his effective release

date from prison and reduce the amount of time he is required to spend on special parole. The respondent's arguments to the contrary are unavailing.[5]

The respondent next argues that the appeal is moot because the petitioner already has received the remedy mandated by *Brown* and *Boria* by virtue of the present appeal. Although not cloaked in the guise of mootness, this court rejected a similar argument in *Hodge* v. *Commissioner of Correction*, 216 Conn. App. 616, 621 n.7, 285 A.3d 1194 (2022), in which the respondent argued "that *Brown* and *Boria* do not require this court to reverse the judgment of dismissal and to remand the case to the habeas court because the petitioner has received an opportunity to be heard regarding the dismissal of his claims, which involve pure questions of law, by virtue of this appeal, and this court is best positioned to address the merits of the petitioner's claims." As this court explained in *Hodge*, however, "we construe *Brown* and *Boria* to *mandate* a reversal of the judgment of dismissal and a remand to the habeas court. Indeed, in *Boria*, one of the claims raised by the petitioner was [an RREC] challenge claim, which the habeas court dismissed for lack of subject matter jurisdiction pursuant to Practice Book § 23-29 (1)." (Emphasis added.) Id. In other words, the Supreme Court certainly did not construe the opportunity for appellate argument as an adequate substitute for an opportunity to make an appropriate record before the habeas court.

[5] We note that, in response to an earlier order from this court requesting simultaneous memoranda addressing why this appeal should not be dismissed as moot because the petitioner no longer was incarcerated, the respondent and the petitioner submitted a joint response arguing that this case was not moot in light of *Dennis* v. *Commissioner of Correction*, supra, 189 Conn. App. 615–16, stating: "The parties agree that if the petitioner were to successfully prevail on his claim, the benefit to the petitioner would be the retroactive modification of his definite sentence so as to incorporate RREC . . . thereby advancing his effective release date from prison and reducing the amount of time he is required to spend on special parole." It is unclear why the respondent elected to change his prior position.

The final mootness claim of the respondent, made for the first time at oral argument, is that the petitioner has already received the benefits of the RREC underlying his petition, and, accordingly, he can be afforded no additional practical relief. In support of this argument, the respondent directs us to allegations in the operative petition that the respondent would have us construe as admissions by the petitioner that he had received the credits sought. Reading the petition broadly, however, we do not construe it as addressing whether the petitioner has received *all* of the credits he claims he is entitled to or only a portion thereof. Because the respondent has not pointed to anything else in the factual record before us that supports his argument, we reject it without prejudice to the respondent raising it on remand to the habeas court along with the necessary evidentiary support for his position.

Turning finally to the merits of the present appeal, we agree with the petitioner that our Supreme Court's decisions in *Brown* and *Boria* govern our resolution of the present appeal and require a reversal of the habeas court's judgment of dismissal. In *Brown*, our Supreme Court held "that [Practice Book] § 23-29 requires the habeas court to provide prior notice of the court's intention to dismiss, on its own motion, a petition that it deems legally deficient and an opportunity to be heard on the papers by filing a written response. The habeas court may, in its discretion, grant oral argument or a hearing, but one is not mandated." *Brown* v. *Commissioner of Correction*, supra, 345 Conn. 4; see also *Boria* v. *Commissioner of Correction*, supra, 345 Conn. 43 (adopting reasoning and conclusions set forth in *Brown*). Here, the court dismissed the petitioner's amended appeal without providing him with an opportunity to submit either a brief or a written response. Accordingly, the proper remedy is for us to reverse the court's dismissal of the operative petition and to remand

the case to the habeas court for further proceedings. If the habeas court on remand again chooses to consider dismissal of the operative petition on its own motion pursuant to Practice Book § 23-29, the court must comply with the procedures set forth in *Brown* and *Boria* by providing the petitioner with prior notice of its proposed basis for dismissal and affording the petitioner an opportunity to provide a written response.

With respect to whether we should permit the court another opportunity to consider declining to issue the writ pursuant to Practice Book § 23-24, we decline to include this as part of our remand order. The court's dismissal in the present case occurred prior to our Supreme Court's decision in *Gilchrist*. In the present case, however, counsel had been appointed and filed a revised amended petition on behalf of the petitioner prior to the habeas court's dismissal. As this court previously has clarified in declining to apply footnote 11 of *Brown* in similar cases, "[i]t would strain logic to construe footnote 11 of *Brown* as advising that we should direct the habeas court on remand to consider declining to issue the writ under § 23-24 vis-à-vis the amended petition, which was filed after the writ had been issued. Moreover, affording the habeas court on remand another opportunity to consider declining to issue the writ under § 23-24 vis-à-vis the original habeas petition, in effect, would vitiate the filing of the amended petition, which is not an outcome that we believe our Supreme Court in *Brown* intended." (Emphasis omitted.) *Hodge* v. *Commissioner of Correction*, supra, 216 Conn. App. 623–24; see also *Villafane* v. *Commissioner of Correction*, 216 Conn. App. 839, 850–51, 287 A.3d 138 (2022).[6] "Although the present

[6] In *Howard* v. *Commissioner of Correction*, 217 Conn. App. 119, 287 A.3d 602 (2022), we expanded upon our reasoning in *Hodge* and *Villafane*. In *Howard*, although counsel had been appointed for the petitioner, no amended petition was filed prior to the habeas court dismissing the petition sua sponte pursuant to Practice Book § 23-29 without providing notice and an opportunity to be heard. Id., 132. This court concluded that the appoint-

dismissal occurred prior to *Gilchrist*, we are not persuaded that we should apply the rationale in footnote 11 of *Brown* to the present case. Unlike in *Brown* and *Boria*, the dismissal in the present case occurred not merely after the writ had issued but after counsel had appeared on the petitioner's behalf and an amended petition was filed. . . . The fact that an amended petition had been filed at the time of the court's dismissal in this case leads us to conclude that the proper course on remand is not for the court to first consider whether declining to issue the writ under . . . § 23-24 is warranted." (Footnote omitted.) *Villafane* v. *Commissioner of Correction*, supra, 216 Conn. App. 849–50.

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

In this opinion the other judges concurred.

JEFFREY STEWART ET AL. *v.* OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY (AC 44925)

Bright, C. J., and Alvord and Seeley, Js

Syllabus

The defendant title insurance company denied coverage with respect to the respective title insurance policies it had issued to the plaintiffs, N Co.,

ment of counsel alone provided a compelling reason not to apply footnote 11 of *Brown*, explaining: "Our Supreme Court has explained that the purpose of appointing counsel in habeas actions, following the issuance of the writ, is so that any potential deficiencies can be addressed in the regular course after the proceeding has commenced. . . . In the present case, the habeas court appointed counsel to represent the petitioner, and counsel will have an opportunity to address any potential deficiencies in the original petition that he filed in a self-represented capacity. In light of this fact, and the length of time in which the habeas action has been pending on the court's docket, we conclude that permitting the court on remand to decline to issue the writ pursuant to Practice Book § 23-24 could lead to an unjust outcome that our Supreme Court would not have intended." (Citation omitted; internal quotation marks omitted.) Id., 133.

and J and A, involving their properties. J and A purchased a property in the town of Greenwich on B Street and, thereafter, N Co., whose sole member was J, purchased an adjacent property. Neighbors who also owned property on B Street brought an action against N Co., which alleged that N Co. had obstructed an easement, which granted rights to other homeowners to pass over a private portion of B Street. N Co. allegedly obstructed the easement by, inter alia, extending the lawn, installing a raised drainage system, and removing a pillar which demarcated the private and public portion of the street. The defendant denied N Co. coverage for defending the neighbors' action on the basis that the policy insured N Co.'s title to the land, which did not convey to N Co. exclusive rights and ownership of the easement at issue, and thus the policy did not insure N Co.'s exclusive rights to ownership of the easement. The action against N Co. was settled by an agreement and subsequently withdrawn, and the defendant refused to pay N Co.'s expenses in defending it. In a separate incident, J and A thereafter sought indemnification coverage from the defendant after the town began proceedings to acquire an abandoned cemetery, pursuant to statute (§ 19a-308a), which allegedly was on or adjacent to J and A's property. The defendant noted that its policy with J and A excluded actions resulting from governmental police power and condemnation. Without notifying the defendant, J and A then brought an action against the town, seeking a declaratory judgment to quiet title to the driveway portion of their property that allegedly passed over the cemetery. After the town acquired the cemetery and quitclaimed the driveway back to J and A, J and A sought to recover their litigation expenses from the defendant. The defendant disclaimed coverage, noting, inter alia, that it did not approve their litigation expenses as required by the policy. Subsequently, the plaintiffs collectively filed the present action against the defendant, claiming that it had breached its policies in failing to provide funds for the costs of defending the actions involving the plaintiffs and sought indemnification for costs and attorney's fees. The defendant thereafter filed a motion for summary judgment, which the trial court granted, finding that there were no genuine issues of material fact and that the defendant had not breached its duty to defend. On the plaintiffs' appeal to this court, *held*:

1. The trial court properly granted the defendant's motion for summary judgment with respect to the claim brought by N Co., as there was no genuine issue of material fact that the claim for which N Co. sought coverage was not covered under its title insurance policy, the defendant had no duty to defend N Co. in the neighbors' action, and, thus, the defendant had no duty to indemnify N Co. for losses it incurred in defending the action: the allegations within the complaint brought against N Co. clearly and unambiguously established the applicability of the relevant policy exclusions to any claim for which there might otherwise be coverage under the defendant's policy, as the allegations

did not dispute that N Co. had exclusive ownership of the private portion of the street or challenge N Co.'s title to that property, but, instead, alleged claims that N Co.'s various actions had obstructed the use and enjoyment of the easement, and the relief requested in the complaint sought to guarantee the neighbors' ability to exercise their rights to use the easement, thus, the allegations were properly understood as disputing N Co.'s exclusive interest in the easement and alleging that N Co. had prevented the full use and enjoyment of others' rights to the easement; moreover, N Co.'s reliance on facts beyond the complaint to establish that title was, in fact, at issue in the neighbors' action was without merit, the determination of an insurer's duty to defend is limited to the provisions of the insurance policy and the allegations of the underlying complaint, and, accordingly, this court declined to consider what actions the parties took during the pendency of the action to determine whether the complaint disputed the ownership of the private portion of the street; furthermore, even if the allegations of the complaint contested N Co.'s ownership of the private portion of the street, the title insurance policy clearly and unambiguously excluded N Co.'s claim from coverage, as the allegations arose from N Co.'s own actions in obstructing the easement and were alleged to have occurred after the purchase of the property, allegations that clearly and unambiguously were excluded from coverage.

2. The trial court properly granted the defendant's motion for summary judgment with respect to J and A, as there was no genuine issue of material fact that the claims for which J and A sought coverage were excluded under their title insurance policy, and, therefore, the defendant had no duty to defend: contrary to J and A's assertion that the town was attempting to take title to real property owned by J and A, their complaint against the town sought a declaratory judgment for the purpose of having a court decide whether their property contained a cemetery, such that the town could acquire it, and the determination as to whether there was a cemetery on the property was a condition of the property and not a matter of title; moreover, a municipality's acquisition of property pursuant to § 19a-308a is an exercise of governmental police power and constitutes an acquisition by condemnation, and, thus, the exclusions in the title policy pertaining to governmental police power and the condemning of property clearly and unambiguously applied to J and A's claims and established that the defendant did not have a duty to defend J and A's action against the town; furthermore, any action taken by the town with respect to the property would have occurred after the date the policy was issued and thus be excluded from coverage, which exclusion was plain and unambiguous.

Argued November 15, 2022—officially released March 21, 2023

Procedural History

Action to recover damages for, inter alia, breach of contract in connection with a title insurance policy

issued by the defendant to the plaintiffs, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Hon. Edward T. Krumeich II*, judge trial referee, granted the defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiffs appealed to this court. *Affirmed.*

David S. Doyle, for the appellants (plaintiffs).

Marc J. Herman, with whom, on the brief, were *Jason A. Buchsbaum* and *Jonathan S. Bowman*, for the appellee (defendant).

Opinion

BRIGHT, C. J. The plaintiffs, 9 Byram Dock, LLC (company),[1] and Jeffrey Stewart and Andrea Stewart (Stewarts), appeal from the summary judgment rendered in favor of the defendant, Old Republic National Title Insurance Company. On appeal, the plaintiffs claim that the court improperly concluded that, pursuant to the plaintiffs' title insurance policies, the defendant had no duty to defend the plaintiffs in two actions involving the plaintiffs' properties. We disagree and, accordingly, affirm the judgment of the trial court.

The following facts, which are undisputed, and procedural history are relevant to our resolution of this appeal. The plaintiffs' complaint set forth two counts. Count one was asserted on behalf of the company. The company alleged that on October 31, 2014, it purchased real property located at 9 Byram Dock Street in Greenwich. On that date, the company also purchased an owner's policy of title insurance from the defendant for that property (company policy). In December, 2016, Robert M. Kennedy, James R. Kennedy, Peter J. Kennedy and Barbara M. Kennedy (Kennedys), owners of 14 Byram Dock Street—a house on the opposite side

[1] Jeffrey Stewart is the sole member of 9 Byram Dock, LLC.

of the street from 9 Byram Dock Street—sued the company, alleging that they "have a right of way appurtenant to their land, to pass and repass over the land owned by and in the possession of the owners of a parcel of land known as Shore Island (the '[e]asement'). . . . The [e]asement grants the rights to pass and repass motor vehicles over Byram Dock Street to access the various homes along said street." There are two sections of Byram Dock Street, a public portion and a private portion. The easement provides access to Shore Island over the private portion of Byram Dock Street. The Kennedys further alleged that the company had obstructed the easement (Kennedy action).

Without notifying the defendant about the lawsuit, the company retained counsel to defend it in the Kennedy action. In May, 2017, the Kennedys filed a revised complaint to provide greater detail of the company's alleged obstruction. According to the revised complaint, the company had obstructed the easement by extending a lawn over part of the private portion of Byram Dock Street, installing a raised drainage system, and removing a stone pillar which had "demarcate[d] the entrance to the private portion of Byram Dock Street." In June, 2017, the company sent a notice of claim letter to the defendant informing it of the pending action and seeking representation and indemnification. Therein the company provided the defendant with the Kennedys' original and revised complaints and described the Kennedys' allegations as "[challenging] the [company's] right to make . . . changes [to the private portion of Byram Dock Street] by questioning the [company's] ownership of the private portion of Byram Dock Street."

On July 13, 2017, the defendant denied the company coverage of the Kennedy action, concluding that the allegations within the revised complaint did not create the potential for coverage under the company policy,

and, thus, the defendant had no obligation to defend the company in the action. In particular, the defendant maintained that the company policy insures title to the land described in Schedule A, which does not convey to the company exclusive rights and ownership of the subject easement, and thus the company policy does not insure the company's exclusive rights to ownership of the easement. The defendant further stated that, in addition to several exceptions in Schedule B of the policy, "which clearly apply to remove coverage for this claim, there is also the applicable exclusions 3 (a) and 3 (d), which exclude post policy acts of the [company]. Exclusion 3 (a) excludes matters the [company] has caused ('created'), permitted ('suffered'), taken subject to ('assumed'), or to which it has consented to be bound ('agreed to'). This exclusion applies to remove coverage for [the Kennedys'] allegations in the revised complaint which relate to actions of the [company] in obstructing the easement. In addition, exclusion 3 (d) applies to remove coverage for matters arising after the date of policy. The date of [the policy] is October 31, 2014. The allegations of [the Kennedys] relate to acts . . . 'starting in 2016. . . .' See Revised Complaint ¶¶ 5, 6. Therefore this matter falls within the matters excluded by exclusions 3 (a) and (d)."[2]

[2] The defendant's letter declining coverage also relied on certain exclusions to coverage set forth in Schedule B to the company policy, which provides in relevant part that it "does not insure against loss or damage, and [the defendant] will not pay costs, attorneys' fees, or expenses that arise by reason of . . . .

"12. [The] Agreement dated January 24, 1963 and recorded in Volume 681 at Page 450 of the Greenwich Land Records.

"13. Terms and conditions as set forth in a deed dated January 25, 1963 and recorded in Volume 681 at Page 445 of the Greenwich Land Records. . . .

"16. Rights of others in and to Gaertner's Island, so-called."

As the defendant noted in its declination of coverage, the property at issue in the Kennedy action, the private portion of Byram Dock Street, was included in the January 25, 1963 deed. Further, the complaint in the Kennedy action specifically alleged that it was brought pursuant to the Kennedys' alleged rights in Shore Island, otherwise known as Gaertner's Island. Thus, the defendant asserted that "the [exclusions] from [c]overage in Schedule

The Kennedys again amended their complaint on October 10, 2017.[3] Thereafter, "[t]he Kennedy [action] was settled by withdrawal of the [action] and an agreement by [the Kennedys] to pay for certain restorative work on the easement together with payment of $10,000 to the [company], which settlement did not require any payment by the [company] or the Stewarts." The defendant later declined to pay the company's expenses for defending the Kennedy action, reaffirming its previous declination of coverage. Thus, in count one of the complaint in the present action, the company alleged that the defendant breached the terms of the company policy by refusing to reimburse it for such expenses.

Count two of the plaintiffs' complaint in the present action alleged a claim on behalf of the Stewarts. The Stewarts alleged that they purchased 11 Byram Dock Street, adjacent to 9 Byram Dock Street, on August 5, 2013. In connection with that purchase, the Stewarts obtained an owner's title insurance policy from the defendant for the property that provides coverage from August 6, 2013 (Stewart policy). In April, 2016, the Town of Greenwich Conservation Commission (commission) recommended to the town of Greenwich (town) that it acquire, pursuant to General Statutes § 19a-308a,[4] an

B . . . clearly apply to remove coverage for this claim." Because the defendant did not rely on the exclusions when it moved for summary judgment as to the company's claims, the court did not address the exclusions, and the defendant has not relied on them as an alternative ground for affirmance, we do not discuss their applicability.

[3] The defendant did not receive notice of, or information pertaining to, the amended complaint until discovery for the present action began.

[4] General Statutes § 19a-308a provides in relevant part: "(a) As used in this section, 'abandoned cemetery' means a cemetery (1) in which no burial has occurred during the previous forty years and in which the lots or graves have not been maintained during the previous ten years except for maintenance rendered by the municipality in which such cemetery is located, (2) in which one burial has occurred in the past forty years, for which a permit was issued under section 7-65 after such burial, or (3) in which no lots have been sold in the previous forty years and in which most lots and graves have not been maintained during the previous ten years except for maintenance

abandoned African American cemetery, believed to be on or adjacent to 11 Byram Dock Street.

On September 22, 2016, a public forum was held before the town's Board of Selectmen regarding the acquisition of the cemetery parcel. The Stewarts' attorneys appeared at the hearing and expressed their concern over the lack of evidence as to whether the property at issue constituted a cemetery and requested time to conduct further study, including radar imaging to detect possible remains. That day, the Stewarts' attorneys also sent a formal letter to the commission and the town stating that the driveway to 11 Byram Dock Street, included in the Stewarts' deeded rights, crossed over the purported cemetery site and, "if the parcel is more definitively established to be an actual burial ground, [the Stewarts] object to any efforts made by the [town] . . . to seek to take away or diminish [the Stewarts'] property rights in the driveway. We further note that we are speaking of the deeded rights that as a matter of law cannot be simply extinguished or diminished through the statutory process being undertaken by the [t]own at this time." In January, 2016, the commission submitted a proposal and report to the town recommending that the town acquire the abandoned cemetery. The Stewarts thereafter submitted two additional formal objection letters to the town.

On May 19, 2017, the Stewarts sent a letter to the defendant notifying the defendant that their "ownership of the [d]riveway [e]asement has recently been called into question by the [town]. It is expected that the [town] will, at some point in the near future, formally challenge the validity of the [d]riveway [e]asement." In its response on June 29, 2017, the defendant noted that,

rendered by the municipality in which such cemetery is located.

"(b) Any municipality may acquire an abandoned cemetery, including ownership of any occupied or unoccupied lots or grave sites in such cemetery. . . ."

although the commission had made a proposal to the town recommending the town acquire the abandoned cemetery pursuant to § 19a-308a, the town had not yet made a ruling or determination to do so. The defendant declined coverage stating that "the alleged cemetery would be a condition of the property and not affect title to the property." Further, it pointed to language in the Stewart policy stating that the Stewarts "are not insured against loss, costs, attorneys' fees, and expenses resulting from: 1. Governmental police power, and the existence or violation of those portions of any law or government regulation concerning: a. building; b. zoning; c. land use; d. improvements on the [l]and; e. land division; and f. environmental protection," "3. [t]he right to take the [l]and by condemning it," and "4. [r]isks . . . d. that first occur after the [p]olicy [d]ate . . . ." The defendant maintained that "[a]ny action taken by the [t]own and . . . [c]ommission with respect to the [p]roperty would certainly occur after the date of [the] [p]olicy and would [be] excluded from coverage by [e]xclusion 4d. Additionally, should the [t]own acquire the [p]roperty pursuant to [§ 19a-308a], it would operate as a [g]overnmental [t]aking pursuant to [p]ublic [h]ealth and [w]ell-[b]eing and thereby be excluded from coverage from [e]xclusion 1 and/or [e]xclusion 3." Because no final determination had been made by the town with respect to the property, the defendant left open the possibility that it might revisit its decision to decline coverage on the basis of subsequent events.

On October 2, 2017, "[w]ithout notifying [the defendant], the Stewarts sued the town seeking a declaratory judgment concerning the application of . . . § 19a-308a to the African American cemetery and to quiet title to the driveway or to acquire title thereto by prescriptive easement or adverse possession ('the Greenwich [action]'). The Greenwich [action] was later settled by the town acquiring the cemetery and quitclaiming the

driveway back to the Stewarts. The Stewarts made a claim to recover their litigation expenses on the Greenwich [action] and [the defendant] again disclaimed coverage, noting that it did not approve the expenses and attorney's fees incurred in initiating and defending the Greenwich [action] as required under the Stewarts' policy." (Footnote omitted.) Specifically, the defendant stated that it "was first notified of litigation concerning 11 Byram Dock Street via email from [the Stewarts' attorney] on [March 26, 2019]. . . . The pleadings . . . provided that the [c]emetery access issue had been litigated by [the Stewarts] filing a [c]omplaint against the town on [October 2, 2017], and resolving the litigation via [o]rder dated August 9, 2018. . . . [I]t is indisputable that [the defendant] was not made aware of the litigation until [March 26, 2019], at the earliest. . . . Condition 9c [of the Stewart policy] unambiguously provides that [the defendant] is only required to repay those attorneys' fees and expenses that [it] approve[s] in advance. [The defendant] did not approve these fees as [it was] never made aware of the litigation until nearly a year after it was resolved and roughly [seventeen] months after it was initiated."

On January 3, 2020, the plaintiffs instituted the underlying action against the defendant, alleging that the defendant breached the company policy and the Stewart policy because it (1) "failed to provide any funds for the costs of defense of the [Kennedy action]" and (2) "failed to provide any funds for the costs of defense of [the Greenwich action]." In count one, the plaintiffs claimed that when the Kennedys revised their complaint to raise an issue as to the "ownership" of the private portion of Byram Dock Street subject to the alleged easement, that raised a title issue within the coverage of the company policy that triggered the defendant's duty to defend. In count two, the plaintiffs claimed that, in the Greenwich action, the town made claims that

implicated the Stewarts' title to the property and thereby triggered the defendant's duty to defend under the Stewart policy. The plaintiffs sought indemnification for costs and attorney's fees in the amount of $205,843.97 in connection with the Kennedy action and $205,845.38 in connection with the Greenwich action.

The defendant filed an answer and alleged several special defenses, including, inter alia, as to count one, that the Kennedy action constituted a cause of action that alleged matters not insured under the company policy. As to count two, the defendant alleged that (1) the plaintiffs' claims were barred by exclusions in the Stewart policy precluding coverage for governmental action taking place after the issuance of the policy, governmental police power, and/or condemnation, and (2) the Stewarts failed to provide it with notice about their commencement of the Greenwich action until almost one full year after the Stewarts had settled it. The defendant then moved for summary judgment on both counts.

The court, *Hon. Edward T. Krumeich II*, judge trial referee, rendered summary judgment in favor of the defendant. As to count one, the court found that the Kennedy action did not challenge the company's title to the private portion of Byram Dock Street but, rather, its right to exclusive use of the easement. Consequently, the court concluded that, "[o]n its face, the complaint in the Kennedy [action] did not concern matters on which [the defendant] had a duty to defend under the [company policy]." The court further concluded that "the gravamen of the Kennedy [action] was the affirmative conduct of the [company] that occurred after the policy was issued and therefore was excluded from coverage under the policy." For these two reasons, the court concluded that the defendant "has borne its burden to prove there is no genuine issue of fact to be

tried and it is entitled to summary judgment that [it] did not breach its duty to defend the Kennedy [action]."

With respect to the Greenwich action, the trial court found that (1) because the Stewarts brought the action themselves, they could not be said to have incurred costs in defending title to the property, (2) the possible presence of the cemetery was a condition of the property, not a matter of title, (3) the town would have to acquire the property by eminent domain, a governmental police power, which would subject the claim to exclusions from coverage for postissuance events and governmental takings, and (4) the Stewarts breached the policy by depriving the defendant of its right to control the defense by failing to provide timely notice of the action. The court, accordingly, found that the defendant met its burden to prove that there were no genuine issues of material fact and that it was entitled to summary judgment because the defendant did not breach its duty to defend the Stewarts in the Greenwich action. This appeal followed.

Our standard of review as to a trial court's decision to grant a motion for summary judgment is well settled. "Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party moving for summary judgment has the burden of showing the absence of any genuine issue of material fact . . . . [T]he party moving for summary judgment is held to a strict standard. [The moving party] must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. . . . A material fact is a fact that will make a difference in the result of the

case. . . . Because the court's decision on a motion for summary judgment is a legal determination, our review on appeal is plenary. . . . [W]e must [therefore] decide whether [the trial court's] conclusions are legally and logically correct and find support in the facts that appear in the record." (Citation omitted; internal quotation marks omitted.) *10 Marietta Street, LLC* v. *Melnick Properties, LLC*, 216 Conn. App. 262, 270–71, 285 A.3d 82 (2022).

On appeal, the plaintiffs claim that the court improperly determined that the defendant had no duty to defend (1) the company in the Kennedy action pursuant to the company policy and (2) the Stewarts in the Greenwich action pursuant to the Stewart policy. We conclude, on the basis of the submissions presented to the court in connection with the motion for summary judgment, that there is no genuine issue of material fact that the claims for which the plaintiffs sought coverage were not covered under the pertinent title insurance policies. We therefore hold that the defendant had no duty to defend or indemnify the plaintiffs in connection with the Kennedy and Greenwich actions.[5]

[5] The defendant also raises two alternative grounds for affirmance in which it claims that it is "unclear on whose behalf [each count of the plaintiffs' complaint] is asserted. Given that count one does not specify otherwise, it is conceivable that the [company] and/or the Stewarts assert it. If the Stewarts assert it, [the defendant] is entitled to summary judgment against them because they lack standing to assert a claim for an alleged injury to the [company]." Similarly, the defendant claims that, "[g]iven that count two does not specify otherwise, it is conceivable that the [company] and/or the Stewarts assert it. If the [company] asserts it, [the defendant] is entitled to summary judgment against it because it lacks standing to assert a claim for an alleged injury to the Stewarts." Because standing implicates the court's subject matter jurisdiction, we address the defendant's arguments briefly. It is clear to us that the parties and the court treated the company as the only plaintiff in count one and the Stewarts as the only plaintiffs in count two. In particular, the trial court rendered judgment for the defendant and against the company on count one and for the defendant and against the Stewarts on count two.

Moreover, construing the complaint to allege that the company and the Stewarts were asserting claims in both counts would be unreasonable. "[W]e

"Our standard of review for interpreting insurance policies is well settled. The construction of an insurance policy presents a question of law that we review de novo. . . . When construing an insurance policy, we look at the [policy] as a whole, consider all relevant portions together and, if possible, give operative effect to every provision in order to reach a reasonable overall result. . . . Insurance policies are interpreted based on the same rules that govern the interpretation of contracts. . . . In accordance with those rules, [t]he determinative question is the intent of the parties . . . . If the terms of the policy are clear and unambiguous, then the language, from which the intention of the parties is to be deduced, must be accorded its natural and ordinary meaning. . . . In determining whether the terms of an insurance policy are clear and unambiguous, [a] court will not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity . . . . Similarly, any ambiguity in a contract must

long have eschewed the notion that pleadings should be read in a hypertechnical manner. Rather, [t]he modern trend, which is followed in Connecticut, is to construe pleadings broadly and realistically, rather than narrowly and technically. . . . [T]he complaint must be read in its entirety in such a way as to give effect to the pleading with reference to the general theory upon which it proceeded, and do substantial justice between the parties. . . . Our reading of pleadings in a manner that advances substantial justice means that a pleading must be construed reasonably, to contain all that it fairly means, but carries with it the related proposition that it must not be contorted in such a way so as to strain the bounds of rational comprehension." (Internal quotation marks omitted.) *Grenier* v. *Commissioner of Transportation*, 306 Conn. 523, 536, 51 A.3d 367 (2012).

The operative revised complaint, filed on March 12, 2020, did identify both the company and the Stewarts as plaintiffs. Nevertheless, count one contains explicit language that refers to the company as the plaintiff seeking indemnification under the company policy. Count two contains similar language referring to the Stewarts as asserting that count in connection with the Stewart policy. Given that each count addresses a different policy with different insureds, to read either count as being asserted by a plaintiff other than the insured would "strain the bounds of rational comprehension." Id. Accordingly, we conclude that there is no standing issue that needs to be resolved.

emanate from the language used in the contract rather than from one party's subjective perception of the terms. . . . As with contracts generally, a provision in an insurance policy is ambiguous when it is reasonably susceptible to more than one reading. . . . Under those circumstances, any ambiguity in the terms of an insurance policy must be construed in favor of the insured . . . ." (Citations omitted; internal quotation marks omitted.) *Kling* v. *Hartford Casualty Ins. Co.*, 211 Conn. App. 708, 712–13, 273 A.3d 717, cert. denied, 343 Conn. 926, 275 A.3d 627 (2022).

"The question of whether an insurer has a duty to defend its insured is purely a question of law . . . ." (Internal quotation marks omitted.) *Lancia* v. *State National Ins. Co.*, 134 Conn. App. 682, 689, 41 A.3d 308, cert. denied, 305 Conn. 904, 44 A.3d 181 (2012). "An insurer's duty to defend 'is determined by reference to the allegations contained in the [underlying] complaint.' . . . The duty to defend 'does not depend on whether the injured party will successfully maintain a cause of action against the insured but on whether [the complaint] stated facts which bring the injury within the coverage.' . . . 'If an allegation of the complaint falls even possibly within the coverage, then the insurance company must defend the insured.' . . . That being said, an insurer 'has a duty to defend only if the underlying complaint *reasonably* alleges an injury that is covered by the policy.' . . . '[W]e will not predicate the duty to defend on a reading of the complaint that is . . . conceivable but tortured and unreasonable.' . . . There is also no duty to defend 'if the complaint alleges a liability which the policy does not cover . . . .' " (Citations omitted; emphasis in original.) *Kling* v. *Hartford Casualty Ins. Co.*, supra, 211 Conn. App. 713–14. Because the duty to defend is broader in scope than the duty to indemnify, an insurer that "does not have a duty to defend" likewise "will not have a duty to

indemnify." *Warzecha* v. *USAA Casualty Ins. Co.*, 206 Conn. App. 188, 192, 259 A.3d 1251 (2021).

To prevail on a motion for summary judgment on a claim for breach of the duty to defend, an "insurer must establish that there is no genuine issue of material fact either that no allegation of the underlying complaint falls even possibly within the scope of the insuring agreement or, even if it might, that any claim based on such an allegation is excluded from coverage under an applicable policy exclusion. In presenting countervailing proof, the insurer, no less than the insured, is necessarily limited to the provisions of the subject insurance policy and the allegations of the underlying complaint. Therefore, it is only entitled to prevail under a policy exclusion if the allegations of the complaint clearly and unambiguously establish the applicability of the exclusion to each and every claim for which there might otherwise be coverage under the policy.

"An insured, in turn, may rebut an insurer's claim that it has no duty to defend him in the light of an applicable policy exclusion by showing that at least one of his allegations, as pleaded states a claim that falls even possibly outside the scope of the exclusion or within an exception to that exclusion. Unless the allegations of any such underlying claim fall so clearly and unambiguously within a policy exclusion as to eliminate any possible coverage, the insurer must provide a defense to its insured." *Lancia* v. *State National Ins. Co.*, supra, 134 Conn. App. 691.[6] We now address each of the plaintiffs' claims in turn.

[6] We note that the defendant argues that we should apply the clearly erroneous standard of review to the court's determination on summary judgment that neither of the plaintiffs' claims was covered by the policies. This is incorrect. The comparison of the allegations of the complaint to the policy, at the summary judgment stage, to determine if there is a reasonable possibility of coverage involves no fact-finding whatsoever. It is a pure question of law to which we apply plenary review.

I

The plaintiffs first claim that the court improperly determined that the defendant had no duty to defend the company in the Kennedy action. In particular, the plaintiffs claim that the court erred in interpreting the Kennedys' May, 2017 complaint as not challenging the company's ownership of the private portion of Byram Dock Street. On the basis of our review of the policy language and the Kennedys' complaint, we disagree.

"The interpretation of pleadings is always a question of law for the court . . . . Our review of the trial court's interpretation of the pleadings therefore is plenary. . . . Furthermore, we long have eschewed the notion that pleadings should be read in a hypertechnical manner. *Rather*, [*t*]*he modern trend, which is followed in Connecticut, is to construe pleadings broadly and realistically, rather than narrowly and technically.* . . . [T]he complaint must be read in its entirety in such a way as to give effect to the pleading with reference to the general theory [on] which it proceeded, and do substantial justice between the parties. . . . Our reading of pleadings in a manner that advances substantial justice means that a pleading must be construed reasonably, to contain all that it fairly means, but carries with it the related proposition that it must not be contorted in such a way so as to strain the bounds of rational comprehension." (Emphasis in original; internal quotation marks omitted.) *Carpenter* v. *Daar*, 346 Conn. 80, 128, 287 A.3d 1027 (2023).

We begin with the relevant language in the operative Kennedy complaint—the May, 2017 revised complaint on which the company relies for its claim of coverage:[7]

[7] Despite the fact that the Kennedys amended their complaint in October, 2017, throughout their appellate briefs, the plaintiffs refer to and rely on the Kennedys' May 22, 2017 revised complaint because that complaint is the one that the company relied on in its June, 2017 notice of claim letter to the defendant. In addition, the defendant referenced the May, 2017 complaint in its declination of coverage letter. Accordingly, our discussion cen-

"1. . . . Robert M. Kennedy, James R. Kennedy, Peter J. Kennedy, and Barbara M. Kennedy . . . own real property located at 14 Byram Dock Street, Greenwich, CT 06830 ('14 Byram Dock Street').

"2. [The company] is a Connecticut limited liability company with its principal place of business located at 11 Byram Dock Street, Greenwich, Connecticut ('11 Byram Dock Street'). [The company], whose sole managing member is Jeffrey M. Stewart ('Stewart'), is the owner of the real property located at 9 Byram Dock Street, Greenwich, Connecticut ('9 Byram Dock Street'). . . .

"4. [The Kennedys] have a right of way appurtenant to their land, to pass and repass over the land owned by and in the possession of the owners of a parcel of land known as Shore Island (the 'easement').

"5. The easement grants the rights to pass and repass motor vehicles over Byram Dock Street to access the various homes along said street.

"6. The easement is recorded on the Greenwich, Connecticut land records. . . .

"7. Starting in 2016, [the company], without cause or other proper justification, and despite actual notice of the easement, intentionally, wilfully, and wrongfully obstructed, and continues to obstruct, the easement in a manner that prevents [the Kennedys] from enjoying and using it. Specifically, among other things, [the company] extended the front lawn of 9 Byram Dock Street by planting grass and other landscaping over a portion of the easement, which is the private portion of the road known as 'Byram Dock Street,' and also installed

ters on allegations made within that document. Nevertheless, the two complaints are largely the same and our analysis of the October, 2017 amended complaint would not differ from our analysis of the May, 2017 revised complaint.

a raised drainage system on a portion of the easement (collectively, the 'landscaping'). In addition, [the company] removed a stone pillar that was located on the easement—which, for decades, has served to demarcate the entrance to the private portion of Byram Dock Street, and to provide a measure of privacy and security to homeowners with residences on the private portion of that street, including [the Kennedys] and their predecessors—and moved it and an adjoining stone wall to a location that does not separate the public and private portions of the street. [The company] took such unilateral action notwithstanding the fact that the [company] does not have exclusive ownership or easement rights to the real property where the stone pillar was previously situated, and took such action without the consent or approval of [the Kennedys].

"8. As a result of the foregoing, [the Kennedys] are directly and substantially damaged with regard to their use and enjoyment of the easement on the [private portion of] Byram Dock Street. Specifically, the landscaping has narrowed the easement in such a way as to substantially restrict the ability of [the Kennedys] and/or fire or safety vehicles to access the easement, and the passage of two-way traffic on the easement. Further, [the company], by removing and relocating the pillar and adjoining stone wall, has removed the demarcation between the public and private portions of Byram Dock Street, thereby interfering with the safety and security of [the Kennedys] and their property. Both the landscaping and the relocation of the stone pillar and adjoining stone wall have adversely affected the value of 14 Byram Dock Street. . . .

"9. As a result of the foregoing, [the Kennedys] seek a declaratory judgment finding: (i) the existence of the easement over the [private portion of] Byram Dock Street; and (ii) the acts of [the company] have

obstructed the easement preventing [the Kennedys] from fully exercising their rights thereto. . . ."

The plaintiffs characterize the complaint as alleging that the company did not have exclusive ownership of the private portion of Byram Dock Street, and thus challenged the company's title to that property. In particular, they argue that the allegation in paragraph 7 "that the [company] does not have exclusive ownership or easement rights to the real property where the stone pillar was previously situated" called into question its ownership of a portion of 9 Byram Dock Street.[8] The plaintiffs accordingly claim that the Kennedy action falls within the coverage of the company policy, which provides insurance against a loss "by reason of . . . [t]itle being vested other than as stated in Schedule A [to the company policy]." In particular, they contend that "Schedule A [to the company policy] identified deeds in the chain of title that defined the real property it was insuring; those deeds identify the property at issue [in the Kennedy action] as part of the property set out in Schedule A. [The defendant] had a duty to defend against the allegation that the [company] did not have title to property that was within the metes and bounds of 9 Byram Dock [Street] as delineated in the policy in [Schedule A]." We are not persuaded.

Construing the complaint broadly and realistically, it is clear that the complaint alleged claims contending that the company's actions obstructed the Kennedys' *use and enjoyment* of the easement rather than in any

[8] In their principal appellate brief, the plaintiffs also refer to paragraph 4 of the May, 2017 complaint, which alleges: "[The Kennedys] have a right of way appurtenant to their land, to pass and repass over the land owned by and in the possession of the owners of a parcel of land known as Shore Island (the 'easement')." They fail to explain how this allegation in anyway implicates the company's ownership of the private portion of Byram Dock Street. In the absence of any cogent argument by the plaintiffs to the contrary, we conclude that this language is immaterial to our analysis.

way disputing the *ownership* of the private portion of Byram Dock Street. For example, paragraph seven of the complaint specifically alleges that the company "without cause or other proper justification . . . obstructed, and continues to obstruct, the easement in a manner that prevents [the Kennedys] from *enjoying and using it*." (Emphasis added.) Similarly, in paragraph eight, the Kennedys allege that, as a result of the company's obstruction, they were "directly and substantially damaged with regard to *their use and enjoyment* of the easement on the roadway known as Byram Dock." (Emphasis added.) Notably, they do not claim that they or anyone else has an ownership interest in the land underlying the easement. Aside from the reference to ownership in paragraph 7, which the plaintiffs take out of context, ownership of the private portion of Byram Dock Street is not discussed in the complaint.

In addition, the relief requested by the Kennedys sought to guarantee their ability to exercise rights to use the easement. In particular, the Kennedys sought "[e]ntry of a declaratory judgment that the easement exists and [the Kennedys] have been prevented from *using the easement*, or a portion thereof" and "[a] temporary and permanent injunction against [the company] with regard to the continuing violative conduct by it in interfering, disturbing or obstructing in any manner directly or indirectly, with regard to *full access and use of the easement*" by the Kennedys. (Emphasis added.) Thus, a plain reading of the allegations in paragraph seven, in the context of their entire revised complaint, leads us to conclude that the allegations are properly understood as disputing the company's exclusive interest in the easement and asserting a claim that, due to the company's landscaping changes to the private portion of Byram Dock Street, the Kennedys have been prevented from the full use and enjoyment of their alleged right to the easement. Accordingly, reading the

complaint in its entirety, as we must; see *Grenier* v. *Commissioner of Transportation*, 306 Conn. 523, 536–37, 51 A.3d 367 (2012); it is clear that the Kennedy complaint did not dispute *ownership* of the private portion of Byram Dock Street to which the easement is attached.

Consequently, we conclude that the revised complaint did not involve a challenge to the company's title as set forth in Schedule A of the company policy. Accordingly, the Kennedy complaint, on its face, did not set forth allegations which possibly fell within the coverage of the company policy, and, therefore, the defendant had no duty to defend the company in the action. See *Kling* v. *Hartford Casualty Ins. Co.*, supra, 211 Conn. App. 714 ("an insurer has a duty to defend only if the underlying complaint *reasonably* alleges an injury that is covered by the policy" (emphasis in original; internal quotation marks omitted)).

Moreover, the plaintiffs' reliance on facts beyond the four corners of the complaint is without merit. The plaintiffs point our attention to certain expert witnesses separately engaged by the company and the Kennedys in the pendency of the Kennedy action who opined on the fee ownership of the private portion of Byram Dock Street. The plaintiffs accordingly claim that, because "title to real property remained an issue throughout the Kennedy [action]," "[t]hese facts cannot be ignored when determining when an allegation falls 'even possibly' within the coverage [of the policy]. [See *Lancia* v. *State National Ins. Co.*, supra, 134 Conn. App. 691.]" In essence, the plaintiffs argue that, because ownership of the land was actually litigated in the Kennedy action, the Kennedy complaint necessarily raised the issue of ownership over the private portion of Byram Dock Street and therefore fell within coverage of the company policy. We disagree.

As acknowledged by the plaintiffs' counsel at oral argument before this court, the determination of an insurer's duty to defend is "*limited to* the provisions of the subject insurance policy and the allegations of the underlying complaint." (Emphasis added.) *Lancia* v. *State National Ins. Co.*, supra, 691; see also *Allstate Ins. Co.* v. *Jussaume*, 35 F. Supp. 3d 231, 238 (D. Conn. 2014) (citing *Lancia* to reject insured's attempt to look beyond underlying complaint in duty to defend dispute). Moreover, our Supreme Court has stated that "[t]he 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*." (Emphasis added; internal quotation marks omitted.) *Security Ins. Co. of Hartford* v. *Lumbermens Mutual Casualty Co.*, 264 Conn. 688, 711–12, 826 A.2d 107 (2003). Therefore, we reject the plaintiffs' invitation to consider what actions the parties took during the pendency of the Kennedy action to determine whether the May, 2017 complaint disputed the company's ownership of the private portion of Byram Dock Street and, accordingly, whether the defendant had a duty to defend the company in that action.

Furthermore, we conclude that, even if the Kennedy complaint contested the company's exclusive ownership of the private portion of Byram Dock Street, the company policy clearly and unambiguously excluded the company's claim from coverage. Paragraph 3 of the "Exclusions From Coverage" in the company policy specifically excludes from coverage: "Defects, liens, encumbrances, adverse claims, or other matters . . .

(a) created, suffered, assumed, or agreed to by the [company] . . . [and] (d) attaching or created subsequent to [October 31, 2014] . . . ."

The Kennedy complaint alleges that the action was brought due to actions taken by the company including extending the lawn of 9 Byram Dock Street, installing a raised drainage system, installing Belgian block, and installing an elevated manhole cover on the private portion of Byram Dock Street. Accordingly, the Kennedys' adverse claims arose from the company's own actions and, therefore, were "created . . . by the [company]." Therefore, exclusion 3 (a) clearly and unambiguously precludes coverage for the Kennedys' claims. Moreover, exclusion 3 (d) excludes from coverage matters arising after October 31, 2014. Because it is undisputed that the company first made changes to the private portion of Byram Dock Street after its purchase of the property on October 31, 2014, the allegations necessarily relate to matters arising after that date. Thus, exclusion 3 (d) also clearly and unambiguously precludes coverage for the Kennedys' claims. In short, we conclude that each of the Kennedys' claims was based on allegations clearly and unambiguously excluded from coverage under the company policy.

The plaintiffs, however, urge us to ignore the clear language of the exclusions. According to the plaintiffs, because the Kennedy complaint disputed their exclusive ownership of the private portion of Byram Dock Street, "[a]ll of the other defenses put forth in [the defendant's] motion for summary judgment disappear after a finding is made that any allegation, even possibly, could fall within the scope of coverage; [the defendant] pointing to claims to which it has no duty to indemnify is immaterial to any analysis of [the defendant's] duty to defend." This claim is without merit.

In support of this claim, the plaintiffs rely on the following statement by our Supreme Court in *Imperial*

Casualty & Indemnity Co. v. *State*, 246 Conn. 313, 332, 714 A.2d 1230 (1998): "The fact that the complaint alleges a claim that is excluded by the policy does not excuse [the] insurer from defending [the] insured where other counts of the claim fall within the provisions of the policy." (Internal quotation marks omitted.). See also *Capstone Building Corp.* v. *American Motorists Ins. Co.*, 308 Conn. 760, 805 n.47, 67 A.3d 961 (2005) (same). The plaintiffs, however, misconstrue this statement. To be sure, "[a]n insurer's duty to defend is triggered if at least one allegation of the complaint 'falls even possibly within the coverage' " of the pertinent policy. (Emphasis omitted; internal quotation marks omitted.) Id., 805. Nevertheless, the statement on which the plaintiffs rely simply stands for the proposition that an insurer may not rely on an exclusion to disclaim its duty to defend its insured with respect to an entire complaint if the complaint *also* contains allegations that fall outside the exclusion. Ultimately though, when an allegation of the underlying complaint "falls even possibly within the scope of the insuring agreement," an insurer is entitled to summary judgment if "any claim based on such an allegation is excluded from coverage under an applicable policy exclusion." *Lancia* v. *State National Ins. Co.*, supra, 134 Conn. App. 691; *New London County Mutual Ins. Co.* v. *Bialobrodec*, 137 Conn. App. 474, 479, 48 A.3d 742 (2012) (insurer may rely on policy exclusions to rebut charge it had duty to defend).

In the present case, the allegations within the Kennedy complaint clearly and unambiguously establish the applicability of the relevant exclusions to any claim for which there might otherwise be coverage under the company policy. Furthermore, as discussed previously in this opinion, the Kennedy complaint did not dispute the company's ownership of the private portion of Byram Dock Street and therefore did not allege a claim covered by the company policy. Consequently, the

defendant had no duty to defend the company in the Kennedy action and, thus, the defendant has no duty to indemnify the company for losses incurred in defending the Kennedy action. Accordingly, the court properly granted the defendant's motion for summary judgment as to count one.

II

The plaintiffs next claim that the court improperly concluded that the defendant did not have a duty to defend the Stewarts in connection with the Greenwich action. On the basis of our review of the policy language and the circumstances of the Greenwich action, we disagree.

The following additional facts are relevant to our resolution of this claim. On or around April 12, 2016, the commission passed a resolution recommending that the town acquire, pursuant to § 19a-308a, the abandoned cemetery, which included a portion of the Stewarts' northern driveway area. In May, 2016, the acquisition of the cemetery was approved by the town's Board of Selectmen and, thereafter, the commission submitted a municipal improvement request to the town's Planning and Zoning Commission which was approved in July, 2016. The town then published notices relating to the proposed acquisition of the abandoned cemetery, advising the public that a hearing would be held on September 22, 2016. At the public hearing, the Stewarts "objected to the acquisition of the [cemetery] parcel and northern driveway area based on the absence of any physical evidence that this area was ever used as a cemetery . . . ." The Stewarts also submitted a formal written objection "to the [t]own's acquisition on behalf of [themselves as] deeded property owners of a portion of the cemetery parcel." The Stewarts reiterated their objection in writing on October 20, 2016, and November 11, 2016.

On May 19, 2017, the Stewarts sent a notice of claim letter to the defendant claiming that the Stewarts' "ownership of the driveway easement has recently been called into question by the [town]. It is expected that the [town] will, at some point in the near future, formally challenge the validity of the [d]riveway [e]asement." In its response on June 29, 2017, the defendant denied coverage of the claim, noting that, although the commission had made a proposal to the town recommending the town acquire the abandoned cemetery subject to § 19a-308a, the town had not yet made a ruling or determination.

On October 2, 2017, without notifying the defendant, the Stewarts commenced an action against the town pursuant to General Statutes § 47-31, seeking a declaratory judgment as to the application of § 19a-308a to the abandoned cemetery believed to be on or adjacent to 11 Byram Dock Street and to quiet title to the Stewarts' driveway which crossed over a portion of the cemetery or to acquire title thereto by prescriptive easement or adverse possession. Therein, the Stewarts alleged that:

"22. In or around April, 2016, [the town] formally commenced the process of acquiring the Lyon Cemetery and Byram Cemetery, including the [African American Cemetery parcel (AAC parcel)] and [the Stewarts'] northern driveway area, pursuant to . . . § 19a-308a, which grants municipalities the authority to acquire 'abandoned cemeteries' and further provides the process for such acquisitions.

"23. [Section] 19a-308a does not define 'cemetery.' . . .

"26. Starting in late 2014, the [town], through . . . the town's [commission], made it known that the town would seek to acquire the Lyon Cemetery, Byram Cemetery, and the Byram African American Cemetery—

including the northern driveway area—pursuant to . . . § 19a-308a.

"27. On or around April 12, 2016, the [commission] passed a resolution recommending that the town acquire the Lyon Cemetery, the Byram Cemetery and the subset Byram African American Cemetery parcel, which includes the northern driveway area.

"28. On or around May 12, 2016, the acquisition of the cemetery parcels was approved by the [town's] Board of Selectmen.

"29. On or around May 16, 2016, the [commission] submitted a Municipal Improvement Request to the [town's] Planning and Zoning Commission (hereinafter 'P&Z'), with said application being assigned File No. PLPZ-2016-00281.

"30. On or around July 6, 2016, P&Z approved the Municipal Improvement Request. . . .

"33. A public hearing was held on September 22, 2016, wherein [the commission] and members of the community spoke in favor of the town's proposed acquisition of the Lyon Cemetery, the Byram Cemetery, and the subset AAC parcel and northern driveway area. . . .

"45. Upon information and belief, the acquisition has not yet been heard [or acted upon] by the [town's Representative Town Meeting] pursuant to [article 9, § 100, of the Greenwich Town Charter]. . . .

"46. [The town] intends to acquire the AAC parcel and [the Stewarts'] northern driveway area pursuant to . . . § 19a-308a.

"47. [The town's] proposed acquisition of the AAC parcel and northern driveway area is not supported by sufficient evidence to conclude that the parcels constitute a "cemetery" such that the town has the authority

to acquire them as an "abandoned cemetery" pursuant to . . . § 19a-308a.

"48. If the acquisition proceeds, [the Stewarts] are in danger of losing certain property rights, including but not limited to, deeded ownership of the northern driveway area, use of a driveway extending north from their property, which sits on the northern driveway area . . . diminution of the value of [the Stewarts'] property, and impaired marketability of title to [the Stewarts'] property, which is located immediately adjacent to the AAC parcel. . . .

"56. Accordingly, [the Stewarts] seek the following relief:

"1. Declaratory judgment as to whether the AAC parcel constitutes a 'cemetery';

"2. Declaratory judgment as to whether the northern driveway area constitutes a 'cemetery';

"3. Declaratory judgment as to whether the AAC parcel or the northern driveway area can be acquired by the town . . . pursuant to . . . § 19a-308a;

"4. If it is declared that the AAC parcel is not a 'cemetery' subject to acquisition by [the town] pursuant to . . . § 19a-308a, declaratory judgment as to the true owner of the AAC parcel, and the rights and responsibilities of that party or parties;

"5. Declaratory judgment as to the boundaries and location of the AAC parcel;

"6. Declaratory judgment whether [the Stewarts] are the owners of the northern driveway area as conveyed in their warranty deed;

"7. If it is determined that [the Stewarts] are not the owners of the northern driveway area, declaratory judgment as to who owns the northern driveway area

and whether [they] have a right of way over the northern driveway area;

"8. If [the Stewarts] have such right of way, the extent of permissible use over the northern driveway area, including whether and to what extent [they] may maintain a driveway; and

"9. If it is determined that [the Stewarts] hold actual title to the northern driveway area or alternatively have a right of way over the parcel, declaratory judgment fixing and determining the location of the northern driveway area. . . .

"59. [The town] intends to acquire the AAC parcel and the northern driveway area pursuant to the statutory authority granted to municipalities by . . . § 19a-308a.

"60. By virtue of this proposed acquisition, [the town] claims an interest in the northern driveway area which is adverse to the title of [the Stewarts]."

The Greenwich action was resolved by a stipulated judgment dated August 9, 2018, in which the town acquired the abandoned cemetery and quitclaimed the driveway back to the Stewarts. The defendant was never notified of any discussions between the Stewarts and the town before the stipulated judgment was rendered.

On appeal, the plaintiffs argue that the Greenwich action fell within the coverage of the Stewart policy because "[t]he [town] was trying to take title to real property owned by the Stewarts" and, accordingly, the defendant had a duty to defend that challenge to the Stewarts' title.[9] The plaintiffs further claim that policy

[9] We observe that this case comes to us in the unusual posture of the insured instituting an action that it claims its insurer had a "duty to defend." Our well established precedent indicates that, when determining an insurer's duty to defend, we must look to the allegations within the complaint made *by a third party against the insured.* See *Lift-Up, Inc.* v. *Colony Ins. Co.*, 206 Conn. App. 855, 863, 867, 251 A.3d 825 (2021) ("an insurer's duty to defend, being much broader in scope and application than its duty to indem-

exclusions within the Stewart policy do not apply because (1) the town's acquisition of an abandoned cemetery pursuant to § 19a-308a is not an exercise of eminent domain and, even so, speculation that the town would take the property pursuant to § 19a-308a did not relieve the defendant of its duty to defend as it could result in the Stewarts losing title to a portion of their property, and (2) the Greenwich action concerned title to, not the condition of, the Stewarts' property.

The defendant argues that certain policy exclusions within the Stewart policy are plain and unambiguous as applied to the allegations within the Stewarts' complaint. Specifically, it argues that (1) the central issue of the complaint, as alleged, arose out of the town's possible use of its governmental police power and eminent domain to acquire a portion of the Stewarts' land via § 19a-308a, which is excluded from coverage, and (2) the town's purported planned acquisition of the cemetery would be conduct occurring after August 6, 2013, which is excluded from coverage. Consequently, the defendant argues that the claim is clearly excluded from coverage and that the defendant owed no duty to defend the Stewarts in the Greenwich action. We agree with the defendant.

The Stewart policy insures against "actual loss from any risk described under [c]overed [r]isks if the event creating the risk exists on [August 6, 2013], or, to the

nify, is determined by reference to the allegations contained in the [underlying] complaint," and, further, "[t]he 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*" (emphasis added; internal quotation marks omitted)).

In the present case, there was no complaint made by a third party against the Stewarts. Rather, the Stewarts were the complaining party in the Greenwich action. Nevertheless, because we conclude that policy exclusions within the Stewart policy are plain and unambiguous as applied to the allegations within the Stewarts' complaint, we need not address this issue.

extent expressly stated in [c]overed [r]isks, after [August 6, 2013].'' The covered risks include: ''Someone else owns an interest in [the Stewarts'] [t]itle. . . . Someone else has a right to limit [the Stewarts'] use of the [l]and. . . . [Or, the Stewarts'] [t]itle is defective.'' The Stewart policy expressly excludes from coverage the ''loss, costs, attorneys' fees, and expenses resulting from: 1. [g]overnmental police power, and the existence or violation of those portions of any law or government regulation concerning: a. building; b. zoning; c. land use; d. improvements on the [l]and; e. land division; and f. environmental protection,'' ''3. [t]he right to take the [l]and by condemning it,'' and ''4. [r]isks . . . d. that first occur after [August 6, 2013] . . . .''

We first note that § 19a-308a allows a municipality to ''acquire an abandoned cemetery, including ownership of any occupied or unoccupied lots or grave sites in such cemetery.'' General Statutes § 19a-308a (b). The Stewarts' complaint clearly alleges that they brought the action against the town with the purpose of having a court decide whether the parcel at issue contained a ''cemetery'' such that the town *could* acquire it via § 19a-308a (b). We conclude that whether an abandoned cemetery is situated on a piece of property has nothing to do with the current title to that property. Put simply, the determination of whether a property contains an ''abandoned cemetery'' does not impact who at that point in time owns title to the property containing the abandoned cemetery. The determination that an abandoned cemetery is present simply triggers a municipality's right to acquire title to the property in the future via § 19a-308a. Accordingly, the Stewarts' complaint concerned a potential physical condition of the Stewarts' property that could result in the town having authority to acquire said property under § 19a-308a. Thus, we agree with the court's determination that the

presence of a cemetery on the property is a condition of the property, not a matter of title.

Moreover, the Stewarts' complaint focused squarely on the town's potential acquisition of a portion of 11 Byram Dock Street via § 19a-308a. Despite the plaintiffs' contention to the contrary, a town's acquisition of property pursuant to § 19a-308a is both an exercise of governmental police power and would constitute an acquisition by condemnation. First, although the town had not yet acted on the commission's recommendation to acquire the abandoned cemetery, such an act would have been pursuant to the public health and well-being of the town by "protecting and commemorating" the cemetery. See, e.g., *Smith* v. *Pulaski County*, 269 Ga. 688, 688, 501 S.E.2d 213 (1998) (Georgia Abandoned Cemeteries Act authorized counties to preserve and protect abandoned cemeteries pursuant to their governmental police powers); *Wunderlin* v. *Lutheran Cemetery*, 49 Misc. 2d 836, 837, 268 N.Y.S.2d 514 (1966) (police power promotes public welfare to "prevent cemeteries from falling into disrepair and dilapidation and thereby becoming a burden on the entire community"), modified, 27 App. Div. 2d 861, 278 N.Y.S.2d 544 (1967); *Powell Grove Cemetery Assn.* v. *Multnomah*, 228 Or. 597, 600, 365 P.2d 1058 (1961) (legislature has power, in promotion of public health, safety, and welfare, to cause abandonment of cemetery and removal of bodies therein); see also *Fairlawns Cemetery Assn.* v. *Zoning Commission*, 138 Conn. 434, 441, 86 A.2d 74 (1952) ("it is generally held that the public welfare reasonably demands the regulation and, at times, even the prohibition of cemeteries").

Second, if the town had acquired a portion of 11 Byram Dock Street pursuant to § 19a-308a, it would have done so by using the power of eminent domain. "Eminent domain refers to a legal proceeding in which a government asserts its authority to condemn property."

(Internal quotation marks omitted.) *Bauer* v. *Waste Management of Connecticut, Inc.*, 234 Conn. 221, 249 n.15, 662 A.2d 1179 (1995). Furthermore, property acquired through eminent domain is typically referred to as the condemned property. See, e.g., *Hall* v. *Weston*, 167 Conn. 49, 63, 355 A.2d 79 (1974). Similarly, Black's Law Dictionary defines "condemnation" as "[t]he determination and declaration that certain property (esp. land) is assigned to public use, subject to reasonable compensation; the exercise of eminent domain by a government entity." Black's Law Dictionary (11th Ed. 2019) p. 364. Thus, if the town acquired any part of 11 Byram Dock Street pursuant to § 19a-308a it would be taking the land through condemnation. Such takings are expressly excluded from coverage under the Stewart policy. Consequently, we conclude that the Stewart policy exclusions pertaining to government police power and the condemning of property are clear and unambiguous as applied to the Stewarts' claims. Accordingly, those exclusions unambiguously establish that the defendant did not have a duty to defend the Stewarts in the Greenwich action.

In addition, as correctly stated by the defendant in its response to the Stewarts' notice of claim letter, "[a]ny action taken by the town and [the commission] with respect to the property would certainly occur after the date of [the Stewart] [p]olicy and would [be] excluded from coverage by [e]xclusion 4 d." Thus, we conclude that exclusion 4. d. was plain and unambiguous as applied to the claims within the Stewarts' complaint. Because the applicability of the exclusions to the allegations within the complaint were unambiguous, the defendant had no duty to defend the Stewarts in the Greenwich action.[10]

[10] The defendant also claims that the Stewarts materially breached the Stewart policy by failing to "provide timely notice of commencement and later settlement of the Greenwich [action]" thus depriving it "of its contractual right to control the defense, including its right to authorize defense costs, and to select counsel." (Internal quotation marks omitted.) Accordingly, the

For the foregoing reasons, we conclude that the court properly granted the defendant's motion for summary judgment as to count two.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* RAIKES Y. DELACRUZ-GOMEZ
(AC 44356)

Bright, C. J., and Moll and Vertefeuille, Js.

Syllabus

Convicted, after a jury trial, of the crimes of assault of public safety personnel and interfering with an officer, the defendant appealed to this court, claiming that the trial court had improperly admitted into evidence certain prejudicial, uncharged misconduct evidence. Police officers

defendant argues that, "even if [it] had a duty to defend the Stewarts . . . the aforementioned material breaches discharged it."

"Connecticut requires two conditions to be satisfied before an insurer's duties can be discharged pursuant to the 'notice' provision of a policy: (1) an unexcused, unreasonable delay in notification by the insured; and (2) resulting material prejudice to the insurer." (Internal quotation marks omitted.) *Arrowood Indemnity Co.* v. *King*, 304 Conn. 179, 198, 39 A.3d 712 (2012); id., 199 (duty to notify arises when "facts develop which would suggest to a person of ordinary and reasonable prudence that liability may have been incurred" (internal quotation marks omitted)). "[T]he insurer bears the burden of proving, by a preponderance of evidence, that it has been prejudiced by the insured's failure to comply with a notice provision." Id., 201.

In the present case, the trial court found that "the Stewarts breached the [Stewart] policy by depriving [the defendant] of its contractual right to control the defense, including its right to authorize defense costs, and to select counsel, by the Stewarts' failure to provide timely notice of commencement and later settlement of the Greenwich [action]." Significantly, the court did not state whether the Stewarts' delay in providing the defendant with notice of the Greenwich action was unexcused or unreasonable or whether the delay resulted in material prejudice to the defendant. Consequently, we do not rely on the Stewarts' failure to provide notice of the Greenwich action in affirming the court's judgment.

working with the Violent Fugitive Task Force of the United States Marshals Service came to the defendant's apartment to execute an arrest warrant that contained outstanding charges against him of assault in the first degree and criminal possession of a firearm. The officers, including C, had their weapons drawn as they searched the apartment for the defendant, who was found hiding in a bedroom. As C placed a handcuff on the defendant's wrist, the defendant lunged at him, causing C to fall backward into a nightstand, fracturing his ribs and puncturing a lung. During their testimony at trial, officers identified by name the charges against the defendant in the arrest warrant and the name and purpose of the task force as the entity that executed the arrest warrant. On appeal, the defendant claimed, inter alia, that evidence of the names of the charges in the warrant and the identity and purpose of the task force were indicative to the jury of his propensity for criminal conduct and that he was violent and dangerous and that the probative value of that evidence was not outweighed by its prejudicial effect. *Held*:

1. The trial court did not abuse its discretion in admitting as uncharged misconduct evidence the officers' testimony as to the names of the charges in the arrest warrant: the names of the charges were relevant to the jury's determination as to whether the officers were acting in the performance of their duties and whether the force they used during the execution of the arrest warrant was reasonable, there was no evidence that the uncharged misconduct, which did not include details of the prior assault charge, was more severe than the crimes with which the defendant was charged, the officers' testimony was limited to the names of the charges in the warrant and did not include any details of those charges, and the officers mentioned the charges only in the context of explaining why they used certain tactical gear and had their weapons drawn; moreover, the court reduced any prejudicial impact the evidence might have had when it instructed the jury during C's testimony and in its final charge that evidence of the names of the charges could be considered only on the issue of the reasonableness of the force used by the officers, that the evidence was not admitted to demonstrate a criminal propensity on the part of the defendant and that details involved in the warrant were not pertinent and should not be considered.
2. The defendant could not prevail on his claim that the trial court abused its discretion when it permitted police officers to identify the name and purpose of the Violent Fugitive Task Force: the officers' brief testimony about the name and purpose of the task force was relevant to whether they were acting in the performance of their duties when they executed the arrest warrant, it explained why the officers were at the defendant's apartment and the nature of the task force, as evidenced by its name and its purpose to apprehend violent fugitives, and the officers' testimony helped explain why they executed the arrest warrant in the manner that they did, including why they had their weapons drawn when they

searched the apartment; moreover, the evidence was not unduly prejudicial, as the name and purpose of the task force was not likely to arouse the emotions of the jurors any more than the officers' testimony about the nature of the charges contained in the arrest warrant.

Argued September 13, 2022—officially released March 21, 2023

Procedural History

Substitute information charging the defendant with the crimes of assault of public safety personnel and interfering with an officer, brought to the Superior Court in the judicial district of Waterbury, where the court, *Klatt, J.*, overruled the defendant's objection to the admission of certain evidence and denied the defendant's motion to exclude certain evidence; thereafter, the case was tried to the jury before *Klatt, J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

Jennifer B. Smith, assistant public defender, for the appellant (defendant).

Jonathan M. Sousa, assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, *Don E. Therkildsen, Jr.*, supervisory assistant state's attorney, and *Alexandra Arroyo*, deputy assistant state's attorney, for the appellee (state).

Opinion

VERTEFEUILLE, J. The defendant, Raikes Y. Delacruz-Gomez, appeals from the judgment of conviction, rendered after a jury trial, of assault of public safety personnel in violation of General Statutes § 53a-167c (a) (1) and interfering with an officer in violation of General Statutes § 53a-167a (a). On appeal, the defendant claims that the trial court improperly admitted into evidence (1) testimony as to the names of felony charges contained in a prior outstanding warrant for the defendant's arrest as prior uncharged misconduct evidence, and (2) testimony naming the task force that

had executed that warrant, specifically, the Violent Fugitive Task Force.[1] We affirm the judgment of the trial court.

The jury reasonably could have found the following facts. On November 18, 2016, officers working with the United States Marshals Service's Violent Fugitive Task Force arrived at 8 Elmer Street in Waterbury to execute arrest warrants for the defendant and his son, Hendimbert Delacruz (Hendimbert). Both warrants contained charges for violent felony offenses, and the defendant, more specifically, had outstanding charges of assault in the first degree and criminal possession of a firearm. The task force had received information that the defendant and Hendimbert were residing in an apartment at that address.

The apartment was a two-story end unit, which had front and rear entrances. After setting up a perimeter around the area, the entry team of the task force positioned itself at the front door of the apartment. The entry team included James Masterson, a member of the United States Marshals Service, and Detectives Daniel Chalker, Edward Mills, and Jeffrey Taylor of the Waterbury Police Department. All of the officers wore tactical

[1] In his principal appellate brief, the defendant also claims that the trial court erred in its instruction to the jury on the charge of assault of public safety personnel in violation of § 53a-167c (a) (1). Specifically, the defendant contends that the court improperly failed to instruct the jury to consider whether the law enforcement officers, in arresting the defendant, used a reasonable and necessary amount of physical force, which pertains to the second element of § 53a-167c (a) (1), namely, whether the officers were acting in the performance of their duties. The defendant effectively abandoned this claim, however, as he conceded, in his reply brief and at oral argument before this court, that any claimed error was harmless beyond a reasonable doubt because (1) defense counsel conceded during closing arguments that the officer acted in accordance with his official duties, and (2) there was no evidence that the officers used unwarranted or excessive force. Therefore, we decline to review this claim. See *State* v. *Gray*, 342 Conn. 657, 685 n.12, 271 A.3d 101 (2022); see also *Moutinho* v. *500 North Avenue, LLC*, 191 Conn. App. 608, 612 n.4, 216 A.3d 667, cert. denied, 333 Conn. 928, 218 A.3d 68 (2019).

vests that displayed markings of their respective agencies and clearly identified them as law enforcement personnel.

The members of the entry team knocked on the front door of the apartment for at least five minutes, while announcing, "police with a warrant," but they received no response. After Masterson and Mills saw the defendant looking out a window on the second floor, Mills attempted to force entry into the apartment using a battering ram, but he was unsuccessful. They heard a woman's voice from inside the apartment, telling them to "wait a minute." The woman, later identified as the defendant's wife, opened the back door of the apartment and let the officers inside.

The officers then entered the kitchen area of the apartment. They detained the defendant's wife and, when they asked her who else was in the apartment, she told them that her children were there. When the officers showed her a photograph of the defendant, she nodded her head to indicate that he also was there, and she pointed upstairs. The officers did a quick search of the first floor, then yelled for anyone who was on the second floor to come downstairs. Several people came downstairs, including a man and some children, but the defendant and Hendimbert did not.

Masterson, carrying a ballistic shield, then led Chalker, Mills, and Taylor upstairs to the second floor of the apartment, while Timothy McMahon, a probation officer assisting the task force, remained on the first floor with the individuals in the kitchen area. When they reached the top of the stairs, Masterson stayed in the hallway to protect the other officers with the shield while they began to search the rooms for the defendant and Hendimbert, as well as for any firearms or other weapons.

After searching a bathroom, Chalker, Mills, and Taylor entered a bedroom located to the left of the stairs with their guns drawn. The room was small and "very cluttered" with a king-size bed that took up three quarters of the room and a nightstand next to it. A large pile of clothing was on the floor at the foot of the bed between the bed and a wall. The pile appeared to contain "an extreme amount" of clothing, which was approximately the same height as the bed.

Chalker holstered his weapon, got onto the bed, and began to remove clothing from the pile to determine whether someone was hiding underneath. After removing a couple of items of clothing, Chalker could see part of a person's body. Chalker yelled, "[s]how me your hands, show me your hands," but the person did not move. After seeing the person's eyes, Chalker recognized him as the defendant. Chalker grabbed the defendant's left hand, started to pull him up onto the bed, and placed a handcuff on his wrist in the process. Chalker continued to provide instructions to the defendant, informing him that he was under arrest, but the defendant provided no assistance or effort in getting up and, instead, acted as "dead weight."

When the defendant was pulled halfway up onto the bed, he used his feet to push off the wall and lunge at Chalker. The defendant's head and shoulder hit Chalker in his chest. As a result, Chalker fell backward off the bed, striking the right side of his back on the nightstand. He dropped onto the floor in severe pain and had difficulty breathing.

Taylor yelled for help from the other task force members. McMahon immediately ran upstairs and observed that Chalker "appeared to be [in] excruciating pain . . . cowering toward his side . . . and seemed to be gasping for air." He assisted Chalker back down the stairs, out of the apartment building, and into a police car.

Mills and Taylor holstered their weapons and finished handcuffing the defendant, then continued searching for Hendimbert, whom they also found hiding underneath the pile of clothing.[2]

After transporting the defendant to the police station, Taylor brought Chalker to Saint Mary's Hospital in Waterbury. At the hospital, Chalker learned that he had sustained multiple fractures of his ribs and a punctured lung. He also suffered from shoulder pain and, as a result of the injuries to his ribs, continued to experience pain for several months.

The defendant subsequently was charged by way of a substitute information with one count of assault of public safety personnel in violation of § 53a-167c (a) (1) and one count of interfering with an officer in violation of § 53a-167a (a). The jury found the defendant guilty on both counts, and the trial court sentenced the defendant to a total effective term of eight years of incarceration followed by two years of special parole. This appeal followed. Additional facts and procedural history will be set forth as necessary.

We begin by setting forth our standard of review governing both of the defendant's claims, which are evidentiary in nature. "We review the trial court's decision to admit evidence, if premised on a correct view of the law . . . for an abuse of discretion. . . . We will make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion. . . . In determining whether there has been an abuse of discretion, the ultimate issue is whether the court could reasonably conclude as it did." (Internal quotation marks omitted.) *State* v. *Wynne*, 182 Conn. App. 706, 718, 190 A.3d 955,

[2] At trial, the defendant testified that, when he learned that the police were at his apartment, he helped cover Hendimbert with clothing before hiding himself.

cert. denied, 330 Conn. 911, 193 A.3d 50 (2018). We address the defendant's claims in turn.

I

The defendant first claims that the court improperly admitted into evidence the testimony of several police officers who named the felony offenses contained in the defendant's arrest warrant as uncharged misconduct evidence. Specifically, the defendant contends that the probative value of the evidence was outweighed by its prejudicial effect. We are not persuaded.

Prior to trial, the state filed a notice of its intent to introduce evidence of uncharged misconduct pursuant to § 4-5 (c) of the Connecticut Code of Evidence.[3] Specifically, the state advised the defendant that it intended to present evidence that "the Violent Fugitive Task Force was in possession of an arrest warrant charging the defendant with, among other things, assault in the first degree and criminal possession of a firearm." The state clarified that it was "not seeking to introduce the other charges on the warrant, nor [was] it seeking to introduce the underlying conduct that led to the arrest warrant being issued."

The defendant filed a written objection to the uncharged misconduct evidence, arguing that such evidence would be unduly prejudicial because it was inflammatory, confusing, and would create a side issue about the facts underlying the charges in the warrant. He also argued that there was a high risk that the jury improperly would consider it as propensity evidence. He acknowledged that the jury would likely wonder why the police were at

[3] Section 4-5 (c) of the Connecticut Code of Evidence provides: "Evidence of other crimes, wrongs or acts of a person is admissible for purposes other than those specified in subsection (a), such as to prove intent, identity, malice, motive, common plan or scheme, absence of mistake or accident, knowledge, a system of criminal activity, or an element of the crime, or to corroborate crucial prosecution testimony."

his apartment to arrest him but argued that a sufficient explanation could "be accomplished simply by instructing the jury [that] there was an arrest warrant for him without addressing the charges."

Prior to the start of evidence, a hearing on the admissibility of the prior uncharged misconduct evidence was held before the court, *Klatt, J.* The prosecutor argued that he was offering the uncharged misconduct evidence to prove an element of both of the crimes charged—specifically, that the officers were acting in the performance of their duties at the time that the assault and interference occurred—and to corroborate crucial prosecution testimony. The prosecutor contended that he sought to introduce the evidence to provide an explanation for the amount of force that the officers used, and to explain "their conduct for the entry, for the ballistic shield, and for holding the defendant at gunpoint." Defense counsel argued that the evidence was "highly prejudicial" and that it was likely that the jury would improperly consider it as propensity evidence because the charges in the defendant's arrest warrant and the charges then at issue in the present case both involved assault. He maintained that the evidence should be limited to the fact that the officers were executing a warrant and that the court should instruct the jurors that "they're not to be concerned as to what the charges were . . . ."

The court then made the following oral ruling: "Well, it appears from both parties that you're all in agreement that the fact that the officers were there to serve a warrant is something that's admissible. I'm going to allow the state's motion regarding naming the two charges. From the argument that I heard from both parties, it would appear to be relevant evidence on the charge of interference. It goes to the reasonable belief

of the officers, and it does . . . help establish the prosecution testimony, as well as complete the story of why they're there.

"I do find, listening again to the argument of both parties, that it would appear to be more probative than prejudicial, and that any prejudice could be eliminated through an appropriate jury charge. So, I'll allow the state's offer as it exists."

Subsequently, during trial, Masterson and Chalker testified that the defendant's arrest warrant contained charges of assault in the first degree and criminal possession of a firearm, and that such charges fell within the purview of the task force.

The officers also provided testimony explaining how the nature of these charges influenced the manner in which they executed the arrest warrants.[4] For example, they testified that Masterson was carrying a ballistic shield due to the defendant's firearm charge. Masterson explained that there were a large number of officers involved in securing and searching the apartment because "this is someone . . . [who] is wanted for a violent felony charge." Mills testified that he had a battering ram with him at the front door of the apartment because, "for a felony warrant of this type, it's normal for that procedure." Mills and Taylor further explained that they began to search the bedroom with their guns drawn due to the nature of the case and, more specifically, the defendant's firearm charge.

During defense counsel's cross-examination of Chalker,[5] the court provided the following limiting

[4] The officers testified that they had discussed the defendant's charges at a briefing that took place prior to their arrival at the apartment.

[5] Defense counsel began to question Chalker about whether he knew the outcome and underlying facts of the assault and firearm charges contained in the arrest warrant. During a discussion conducted outside the presence of the jury, defense counsel explained that he sought to explore the reason why Chalker had characterized the defendant as a "violent felon" when he testified that Masterson was leading the officers upstairs with the ballistic

instruction to the jury: "So, ladies and gentlemen, there's certain rulings that the court made, and there are reasons for those rulings and they're based on the principles that I've already instructed you on many times. The officers were there to serve a warrant, that's their testimony, that the charges were for assault one and criminal possession of a firearm, which are classified as violent felon[ies]. That is not to say that the defendant committed these offenses; he enjoys the same presumption of innocence as to any warrant that's being served. But the officers' testimony reflect[s] their preparation for the service of a violent . . . of a warrant that charges a violent felony. That's it, nothing more. The details involved in that warrant are not pertinent to this, not relevant, and should not be considered by you."

Defense counsel continued to question the officers about whether they had used their firearms to hit or strike the defendant.[6] Ultimately, however, defense counsel conceded during his closing argument that the officers had been acting in the performance of their duties when executing the arrest warrant.

In its final instructions to the jury, the trial court charged that "[t]he state has . . . offered evidence . . . that there was a warrant for the defendant for

shield "[b]ecause [they were] serving a warrant on a violent felon that's been charged with a gun charge." The court noted that defense counsel had not objected to Chalker's testimony characterizing the defendant as a "violent felon," warned defense counsel that that line of questioning may open the door to testimony about the underlying facts of the uncharged misconduct, and offered to provide the limiting instruction that followed.

[6] The defendant, testifying on his own behalf, claimed that an officer had pulled him from the pile of clothing and started to hit him in the back of the head with a gun, but he did not recognize Chalker as that officer. Hendimbert testified that he could not see what was happening during that time, but he could hear the defendant say, "ow," and then ask the officers why they were hitting him. The officers, however, denied hitting or striking the defendant.

the charge of assault in the first degree and criminal possession of a firearm as an act of misconduct of the defendant. This evidence is not being admitted to prove the bad character, propensity or criminal tendencies of the defendant. Such evidence is being admitted solely to show or establish an element of the . . . crimes charged . . . .

"You may not consider such evidence as establishing a predisposition on the part of the defendant to commit any of the crimes charged or to demonstrate a criminal propensity. You may consider such evidence if you believe it and further find that it logically, rationally and conclusively supports the issue for which it is being offered by the state, but *only as it may bear on the issue of reasonableness of force as used by the peace officers.*

"On the other hand, if you do not believe such evidence, or even if you do, if you find that it does not logically, rationally and conclusively support the issue for which it is being offered by the state, namely, reasonableness of force used, then you may not consider that testimony for any other purpose.

"You may not consider evidence of other misconduct of the defendant for any purpose other than the one I've just told you because it may predispose your mind uncritically to believe that the defendant may be guilty of the offense here merely because of the alleged other misconduct. For this reason, *you may consider this evidence only on the issue of reasonableness of force used and for no other purpose.*" (Emphasis added.)

On appeal, the defendant claims that the trial court erred by admitting testimony about the names of the charges contained in the defendant's arrest warrant because the probative value of the evidence was outweighed by its prejudicial effect. The state responds

that the court properly admitted the uncharged misconduct evidence because of the significant probative value of the evidence in proving an element of the charged offenses, the limited nature of the evidence, and the court's cautionary instructions to the jury. We agree with the state and conclude that, under the circumstances of the present case, the trial court did not abuse its discretion in admitting the testimony as to the names of the felony offenses with which the defendant was charged.

"Although [e]vidence of a defendant's uncharged misconduct is inadmissible to prove that the defendant committed the charged crime or to show the predisposition of the defendant to commit the charged crime, such evidence is admissible if it is offered to prove intent, identity, malice, motive, a system of criminal activity or the elements of a crime. . . . To determine whether evidence of prior uncharged misconduct is admissible for a proper purpose, we have adopted a two-pronged test: First, the evidence must be relevant and material to at least one of the circumstances encompassed by the exceptions. Second, the probative value of such evidence must outweigh the prejudicial effect of the other crime evidence." (Citation omitted; internal quotation marks omitted.) *State* v. *Patrick M.*, 344 Conn. 565, 597, 280 A.3d 461 (2022); see Conn. Code Evid. § 4-5 (a) and (c) ("[e]vidence of other crimes, wrongs or acts of a person is inadmissible to prove the bad character, propensity, or criminal tendencies of that person" but is admissible for other purposes, "such as to prove intent, identity, malice, motive, common plan or scheme, absence of mistake or accident, knowledge, a system of criminal activity, or an element of the crime, or to corroborate crucial prosecution testimony").

"The admission of evidence of prior uncharged misconduct is a decision properly within the discretion of the trial court. . . . [E]very reasonable presumption

should be given in favor of the trial court's ruling. . . . [T]he trial court's decision will be reversed only [when] abuse of discretion is manifest or [when] an injustice appears to have been done." (Internal quotation marks omitted.) *State* v. *Patrick M.*, supra, 344 Conn. 598.

We first consider the probative value of the prior uncharged misconduct evidence. In the present case, the state bore the burden of demonstrating that the officers were "acting in the performance of [their] duties" to prove the elements of the charged offenses of assault of public safety personnel and interference with an officer. General Statutes § 53a-167c (a); see also General Statutes § 53a-167a (a). The state was required to prove, in connection with this element, that the officers had used a reasonable amount of force during the incident underlying the defendant's current charges. See *State* v. *Davis*, 261 Conn. 553, 572, 804 A.2d 781 (2002) (jury must determine whether use of physical force by officers was justified such that it was within performance of their duties); see also *State* v. *Outlaw*, 179 Conn. App. 345, 351, 179 A.3d 219 ("an officer's exercise of reasonable force is inherent in the performance of duties, and therefore unreasonable and unnecessary force by a police officer would place the actions outside the performance of that officer's duties" (internal quotation marks omitted)), cert. denied, 328 Conn. 910, 178 A.3d 1042 (2018).

The uncharged misconduct evidence at issue here was relevant to the jury's determination of whether the officers had exercised a reasonable amount of force while executing the defendant's arrest warrant. Specifically, the testimony regarding the nature of the criminal charges the defendant faced as set forth in the arrest warrant provided an explanation for the manner in which the officers conducted themselves while they were at the apartment, such as their reason for using certain tactical gear, like the battering ram and ballistic

shield, and why they had their weapons drawn.[7] Accordingly, the court properly determined that the charges in the defendant's arrest warrant were relevant for the purpose of establishing that the officers were acting in the performance of their duties at the time of the incident underlying his conviction.[8]

We next turn to the issue of whether the probative value of the prior misconduct evidence outweighed its prejudicial effect. See *State* v. *Daniel M.*, 210 Conn. App. 819, 832, 271 A.3d 719, cert. denied, 343 Conn. 906, 273 A.3d 234 (2022). "Section 4-3 of the Connecticut Code of Evidence . . . provides that [r]elevant evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice or surprise, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence. [T]he determination of whether the prejudicial impact of evidence outweighs it probative value is left to the sound discretion of the trial court judge and is subject to reversal only where an abuse of discretion is manifest or injustice appears to have been done. . . . [Our Supreme Court] has previously enumerated situations in which the potential prejudicial effect of relevant evidence would counsel its exclusion. Evidence should be

[7] The defendant contends that "the state's purported reason for introducing [the challenged] evidence to establish that the police were acting in the performance of their duties was satisfied by simply admitting evidence that the police were there to execute a warrant for the defendant's arrest," and, therefore, the evidence should have been limited to that fact. We disagree. The fact that the officers were serving an arrest warrant explains their presence at the defendant's apartment in the first instance, but it does not shed light on the reasonableness of any force used during the execution of that warrant, which the defendant disputed throughout trial until his closing argument.

[8] Notably, the defendant does not dispute that the uncharged misconduct evidence was relevant to the jury's determination of whether the officers were acting in the performance of their duties and used a reasonable degree of force in their execution of the defendant's arrest warrant.

excluded as unduly prejudicial: (1) where it may unnecessarily arouse the jury's emotions, hostility or sympathy; (2) where it may create distracting side issues; (3) where the evidence and counterproof will consume an inordinate amount of time; and (4) where one party is unfairly surprised and unprepared to meet it." (Internal quotation marks omitted.) Id.

The defendant argues that the uncharged misconduct evidence "was likely to unduly arouse the emotions and hostilities of the jur[ors], especially given the severity of the charges and the similarity between the assault charge in the warrant and the assault of Detective Chalker." The defendant also contends that the evidence "created a side issue that risked the jur[ors'] engaging in speculation about the underlying facts of the two charges." The defendant's arguments are unavailing.

At the outset, we acknowledge that "evidence of dissimilar acts is less likely to be prejudicial than evidence of similar or identical acts"; (internal quotation marks omitted) *State* v. *Vega*, 259 Conn. 374, 398, 788 A.2d 1221, cert. denied, 537 U.S. 836, 123 S. Ct. 152, 154 L. Ed. 2d 56 (2002); and, in the present case, the uncharged misconduct and the charged crimes were similar insofar as they both involved assaults.

Nevertheless, our review of the record indicates that the uncharged misconduct evidence did not include any details of the prior assault charge that would have increased the risk of undue prejudice to the defendant. See, e.g., *State* v. *Morlo M.*, 206 Conn. App. 660, 693–94, 261 A.3d 68 (uncharged misconduct, although similar to crimes of which defendant was convicted, was not unduly prejudicial given lack of details about incidents of prior misconduct), cert. denied, 339 Conn. 910, 261 A.3d 745 (2021). There was no evidence to indicate that the uncharged misconduct was more severe than the crimes of which the defendant was charged; see *State*

v. *Patterson*, 344 Conn. 281, 298, 278 A.3d 1044 (2022) ("[t]he prejudicial impact of uncharged misconduct evidence is assessed in light of its relative viciousness in comparison with the charged conduct" (internal quotation marks omitted)); or that the underlying facts of the assaults contained similarities or common characteristics. Cf. *State* v. *Raynor*, 337 Conn. 527, 563–66, 254 A.3d 874 (2020); see id., 564 (uncharged misconduct evidence was unduly prejudicial when it "was not limited only to the fact that there was a shooting, with no other details regarding the surrounding events," and details demonstrated, inter alia, common characteristics of incidents).

Instead, the uncharged misconduct evidence in the present case was limited to testimony regarding the names of the charges in the warrant, thus minimizing the risk of prejudice to the defendant. See *State* v. *Griggs*, 288 Conn. 116, 140–42, 951 A.2d 531 (2008) (trial court minimized risk of prejudice to defendant by excluding details surrounding his prior convictions and permitting state to introduce only limited evidence about number and nature of convictions); *State* v. *Wilson*, 209 Conn. App. 779, 824, 267 A.3d 958 (2022) (uncharged misconduct evidence did not create unduly distracting side issue due to restricted nature of testimony); see also *State* v. *Patterson*, supra, 344 Conn. 296 (finding significant "the degree to which the trial court exercised its discretion to limit the extent of the evidence of the prior shootings it admitted").

Moreover, in addition to limiting the scope of their testimony about the prior uncharged misconduct, the officers mentioned the defendant's charges only in the context of explaining why they used certain tactical gear and had their weapons drawn during their execution of the arrest warrant, which highlighted the limited purpose for which the evidence was admitted.[9]

[9] In its closing argument, the state similarly tied the misconduct evidence to the issue of whether Chalker was acting in the performance of his duties

Finally, the fact that the court provided a limiting instruction during Chalker's testimony, as well as in its final charge to the jury, reduced any prejudicial impact the evidence might have had. See *State* v. *Daniel M.*, supra, 210 Conn. App. 834–35 (limiting instruction during testimony and in final charge reduced any prejudicial impact that uncharged misconduct evidence might have had); see also *State* v. *Pereira*, 113 Conn. App. 705, 715, 967 A.2d 121 ("[p]roper limiting instructions often mitigate the prejudicial impact of evidence of prior misconduct" (internal quotation marks omitted)), cert. denied, 292 Conn. 909, 973 A.2d 106 (2009). The court repeatedly instructed the jurors that they could consider such evidence only on the issue of reasonableness of force used by the officers and that the evidence was not admitted to demonstrate a criminal propensity on the part of the defendant. Moreover, although the defendant argues that the jurors would have "engag[ed] in speculation about the underlying facts of the two charges" and "wonder[ed] what gave rise to" the charges, the court specifically told the jurors that "[t]he details involved in that warrant are not pertinent . . . and should not be considered by you." We presume that the jury followed these instructions. See, e.g., *State* v. *Wilson*, supra, 209 Conn. App. 827.

Accordingly, considering the manner in which the testimony was limited and the cautionary instructions provided to the jury, we conclude that the court did not abuse its discretion by admitting evidence of the names of felony charges contained in the defendant's arrest warrant.

II

The defendant also claims that the court abused its discretion by admitting evidence that the Violent Fugitive Task Force was the entity that executed the warrant

and whether the officers had utilized a reasonable amount of force in their execution of the arrest warrant.

for his arrest. Specifically, he argues that testimony concerning the name and purpose of the task force was unfairly prejudicial. We are not persuaded.

Prior to the start of evidence, immediately after the court overruled the defendant's objection regarding the charges set forth in his arrest warrant, defense counsel orally moved to exclude evidence "that these police officers and this federal marshal were part of this Violent [Fugitive] Task Force . . . this special task force for violent offenders," on the ground that such evidence would be highly prejudicial. Defense counsel argued that it would be sufficient for the officers to testify that they were at the defendant's apartment to execute an arrest warrant. The prosecutor objected to the defendant's motion because the name of the task force explained the reason why the officers were at the defendant's apartment and the manner in which they executed the warrant.

The court denied the defendant's motion, explaining that "[i]t's an acronym for . . . you can explore it on cross-examination regarding any prejudice you think might exist because of the name of the unit. It's simply identifying themselves and . . . the court feel[s] that that's relevant and probative."

During trial, the officers testified that they were assigned to the Violent Fugitive Task Force at the time they executed the arrest warrants for the defendant and Hendimbert.[10] The officers also provided testimony about the purpose of the task force and its role in apprehending the defendant. For example, Masterson testified that the "Fugitive Task Force" works with state and local agencies "to apprehend individuals wanted

[10] The evidence demonstrates that Masterson, Mills, and Taylor were members of the Violent Fugitive Task Force, while Chalker and McMahon were not official "deputized" members but, nevertheless, had been assigned to assist the task force that day.

on violent felonies . . . ." Chalker similarly testified that the "Violent Fugitive Task Force" works with the United States Marshals Service in "locating violent fugitives and apprehending them."

On appeal, the defendant argues that evidence of the name and purpose of the task force was unfairly prejudicial because it was likely to unduly arouse the jurors' emotions and hostilities and "portrayed the defendant as a violent, dangerous individual." The state responds that the name and purpose of the task force helped explain the manner in which the officers executed the arrest warrant. In addition, the state contends that "[t]he name and purpose of the task force did not prejudice the defendant any more than the names of the felony charges on the warrant . . . because it was the latter that explained the task force's connection to the defendant." We agree with the state.

As explained in part I of this opinion, to the extent that the challenged testimony constitutes uncharged misconduct evidence,[11] it "must be relevant and material to at least one of the circumstances encompassed by the exceptions" set forth in § 4-5 (c) of the Connecticut Code of Evidence, and "the probative value of such evidence must outweigh the prejudicial effect of the other crime evidence." (Internal quotation marks omitted.) *State* v. *Patrick M.*, supra, 344 Conn. 597.

In the present case, the officers' brief testimony about the name and purpose of the Violent Fugitive Task Force, like the evidence regarding the charges against the defendant, was relevant to the issue of whether Chalker and the other officers were acting in the performance of their duties. See part I of this opinion. Specifically, the officers' testimony about their association

[11] On appeal, both the defendant and the state characterize the testimony concerning the name and purpose of the task force as uncharged misconduct evidence.

with the Violent Fugitive Task Force, and the purpose of that task force, provided an explanation for why Chalker and the other officers were at the defendant's apartment. In addition, the nature of the task force, as evidenced by its name and its purpose of apprehending "violent fugitives," helped explain, even if only to a slight degree, why the officers executed the arrest warrants in the manner that they did, including why they had their weapons drawn when they searched the apartment. See, e.g., *State* v. *Collins*, 299 Conn. 567, 587 n.19, 10 A.3d 1005 ("Evidence is relevant if it has *any* tendency to make the existence of any fact that is material to the determination of the proceeding more probable or less probable than it would be without the evidence. . . . All that is required is that the evidence tend to support a relevant fact *even to a slight degree*, [as] long as it is not prejudicial or merely cumulative." (Emphasis in original; internal quotation marks omitted.)), cert. denied, 565 U.S. 908, 132 S. Ct. 314, 181 L. Ed. 2d 193 (2011).

Moreover, the evidence was not unduly prejudicial. As the state points out, any prejudice arising from the challenged testimony pertained to its implication that the defendant was considered a "violent" fugitive who had an outstanding warrant for "violent" felonies. Thus, the testimony about the name and purpose of the task force was not likely to arouse the emotions of the jurors any more than the testimony about the nature of the charges in the defendant's arrest warrant, which, as we have explained in part I of this opinion, also was properly before the jury. See *State* v. *James G.*, 268 Conn. 382, 400, 844 A.2d 810 (2004) (evidence is less likely to unduly arouse jurors' emotions when similar evidence has been presented to jury); see also *State* v. *Gray-Brown*, 188 Conn. App. 446, 462–63, 204 A.3d 1161 (admission into evidence of electronic scale, which tended to show that defendant was involved in sale of

drugs, was unlikely to shock jury because witness later testified without objection that defendant used and sold drugs), cert. denied, 331 Conn. 922, 205 A.3d 568 (2019). Therefore, the court reasonably concluded that the evidence was relevant and that its probative value outweighed any undue prejudice to the defendant.

The judgment is affirmed.

In this opinion the other judges concurred.

KYLLE BREWER *v.* COMMISSIONER OF CORRECTION (AC 41635)

Prescott, Moll and Cradle, Js.

Syllabus

The petitioner, who had been convicted of the crime of manslaughter in the first degree and other offenses, sought a writ of habeas corpus, claiming, inter alia, that certain legislative changes to a risk reduction earned credit program had been improperly applied to him by the respondent, the Commissioner of Correction. The habeas court, sua sponte and without providing the petitioner with prior notice or an opportunity to be heard, dismissed the petitioner's amended petition pursuant to the rule of practice (§ 23-29), concluding that it lacked subject matter jurisdiction over the petition and that the amended petition failed to state a claim on which habeas corpus relief could be granted. On the granting of certification, the petitioner appealed to this court. The respondent, the Commissioner of Correction, argued on appeal that, because the petitioner was no longer incarcerated and was serving a probationary period, the appeal was moot. *Held* that, pursuant to this court's reasoning and conclusions in *Leffingwell* v. *Commissioner of Correction* (218 Conn. App. 216), the appeal was not moot and the habeas court was required to provide to the petitioner prior notice of its intention to dismiss, on its own motion, the amended petition and an opportunity to submit a brief or a written response addressing the proposed basis for dismissal, which it did not do; accordingly, on remand, should the habeas court again elect to exercise its discretion to dismiss the amended petition on its own motion pursuant to Practice Book § 23-29, the court must comply with *Brown* v. *Commissioner of Correction* (345 Conn. 1), and *Boria* v. *Commissioner of Correction* (345 Conn. 39), by providing the petitioner with prior notice and an opportunity

to submit a brief or written response addressing the proposed basis for dismissal.

Argued January 9—officially released March 21, 2023

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Hon. Edward J. Mullarkey*, judge trial referee, rendered judgment dismissing the petition, from which the petitioner, on the granting of certification, appealed to this court. *Reversed*; *further proceedings*.

Naomi T. Fetterman, assigned counsel, with whom, on the brief, was *Temmy Ann Miller*, assigned counsel, for the appellant (petitioner).

Zenobia G. Graham-Days, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Clare Kindall*, former solicitor general, for the appellee (respondent).

Opinion

CRADLE, J. The petitioner, Kylle Brewer, appeals, following the granting of his petition for certification to appeal, from the judgment of the habeas court dismissing sua sponte, pursuant to Practice Book § 23-29,[1] his amended petition for a writ of habeas corpus. In that petition, he claimed, inter alia, that his federal and state constitutional rights were violated as a result of legislative changes pertaining to the administration and

[1] Practice Book § 23-29 provides in relevant part: "The judicial authority may, at any time, upon its own motion or upon motion of the respondent, dismiss the petition, or any count thereof, if it determines that: (1) the court lacks jurisdiction; (2) the petition, or a count thereof, fails to state a claim upon which habeas corpus relief can be granted . . . (5) any other legally sufficient ground for dismissal of the petition exists."

application of risk reduction earned credits (RREC).[2] On appeal, the petitioner claims that the court improperly dismissed his petition without first providing him with notice and an opportunity to be heard. In accordance with our Supreme Court's decisions in *Brown* v. *Commissioner of Correction*, 345 Conn. 1, 282 A.3d 959 (2022), and *Boria* v. *Commissioner of Correction*, 345 Conn. 39, 282 A.3d 433 (2022), we conclude that the habeas court should not have dismissed the habeas petition pursuant to § 23-29 without first providing the petitioner with notice and an opportunity to submit a brief or other written response addressing the proposed basis for dismissal. Accordingly, we reverse the judgment of the habeas court and remand for further proceedings in accordance with this decision.

The following procedural history is relevant to this appeal. The petitioner was convicted of manslaughter in the first degree with a firearm and other offenses and received a total effective sentence of thirty years of incarceration, execution suspended after fifteen years, followed by five years of probation. On August 21, 2014, the petitioner filed a petition for a writ of habeas corpus as a self-represented party. He simultaneously filed a request for the appointment of counsel and an application for waiver of fees, both of which the court granted on August 28, 2014. The court subsequently issued the writ. An amended petition for a writ of habeas corpus was filed on September 30, 2014. Appointed counsel filed an appearance on behalf of the petitioner on January 9, 2017.

By order dated March 19, 2018, the court, *Hon. Edward J. Mullarkey*, judge trial referee, sua sponte

[2] On July 1, 2011, General Statutes § 18-98e became effective and authorized the Commissioner of Correction, in his discretion, to award a maximum of five days per month of RREC to reduce a sentence. In 2013, the legislature amended General Statutes § 54-125a (b) (2), to preclude RREC from being applied to advance the parole eligibility dates of certain incarcerated persons. See Public Acts 2013, No. 13-3, § 59.

dismissed the habeas action pursuant to Practice Book § 23-39 (1), (2) and (5). Prior to dismissing the action, the court did not provide the petitioner with an opportunity to be heard with respect to the dismissal.[3] The petitioner filed a motion for reconsideration on the grounds that the dismissal "improperly precluded [him] from amending his petition [filed in a self-represented capacity] and denied [him the] right to be present for arguments on a dispositive matter." On April 13, 2018, the court summarily denied that motion. The petitioner filed a petition for certification to appeal in accordance with General Statutes § 52-470 (g), which the court granted. This appeal followed.

On September 24, 2021, this court granted the parties' joint motion to stay the appeal pending a final resolution of the appeals in *Brown* v. *Commissioner of Correction*, supra, 345 Conn. 1, and *Boria* v. *Commissioner of Correction*, supra, 345 Conn. 39, which were then pending before our Supreme Court and involved similar claims. After our Supreme Court officially released its decisions in *Brown* and *Boria*, we ordered the parties to file supplemental briefs "addressing the effect, if any, of [*Brown* and *Boria*] on this appeal, including whether, if the judgment of dismissal is reversed, the habeas court should be directed on remand 'to first determine whether any grounds exist for it to decline to issue the

[3] In its decision dismissing the action, the habeas court, citing to *Perez* v. *Commissioner of Correction*, 326 Conn. 357, 163 A.3d 597 (2017), and *Petaway* v. *Commissioner of Correction*, 160 Conn. App. 727, 125 A.3d 1053 (2015), cert. dismissed, 324 Conn. 912, 153 A.3d 1288 (2017), provided the following reasons for dismissing the petition: "[T]he present petitioner's offense date *precedes* the enactment of RREC and the effective date of [General Statutes] § 18-98e. Because the petitioner has no right to earn and receive discretionary RREC, and any changes, alterations and even the total elimination of RREC at the most can only revert the petitioner to the precise measure of punishment in place at the time of the offense, the court concludes that it lacks subject matter jurisdiction over the habeas corpus petition and that the petition fails to state a claim for which habeas corpus relief can be granted." (Emphasis in original.)

writ pursuant to Practice Book § 23-24.' "[4] The parties complied with our supplemental briefing order.

In addition to the issues that we asked the parties to address in their supplemental briefs, the respondent raised a number of arguments suggesting that the appeal is now moot.[5] At oral argument before this court, the

[4] In *Brown*, our Supreme Court had directed this court to remand the case to the habeas court with direction to first consider whether any grounds existed for it to decline to issue the writ under Practice Book § 23-24. Furthermore, in footnote 11 of its opinion, the court in *Brown* also stated: "We are aware that there are other cases pending before this court and the Appellate Court that were decided without the benefit of this court's decision in *Gilchrist* [v. *Commissioner of Correction*, 334 Conn. 548, 561, 223 A.3d 368 (2020) (analyzing interplay between Practice Book §§ 23-24 and 23-29)]. . . . In cases decided prior to *Gilchrist*, the most efficient process to resolve those cases is to remand them to the habeas court to determine first whether grounds exist to decline the issuance of the writ." (Citation omitted.) *Brown* v. *Commissioner of Correction*, supra, 345 Conn. 17 n.11.

[5] Although the petitioner is no longer incarcerated, he is on probation until November 1, 2024. In response to an earlier order from this court requesting simultaneous memoranda addressing why this appeal should not be dismissed as moot because the petitioner no longer was incarcerated, the respondent and the petitioner, like the parties in *Leffingwell* v. *Commissioner of Correction*, 218 Conn. App. 216, A.3d (2023), submitted a joint response arguing that the appeal was not moot in light of *Dennis* v. *Commissioner of Correction*, 189 Conn. App. 608, 615–16, 208 A.3d 282 (2019), stating in relevant part: "The parties agree that if the petitioner were to successfully prevail on his claim, the benefit to the petitioner would be the retroactive modification of his definite sentence so as to incorporate RREC . . . thereby advancing his effective release date from prison and reducing the amount of time he is required to spend on [probation]." In *Dennis*, this court cited to our Supreme Court's decision in *Murray* v. *Lopes*, 205 Conn. 27, 529 A.2d 1302 (1987), in which, during the pendency of his appeal from the denial of his petition for a writ of habeas corpus, the petitioner was released from confinement and began serving a period of probation. *Dennis* v. *Commissioner of Correction*, supra, 615. In addressing a mootness argument similar to that asserted in *Dennis*, we noted that our Supreme Court in *Murray* had concluded that "the petitioner's appeal was not moot, despite his release from confinement, because, although no longer 'confined,' he was still serving the probationary portion of his sentence." Id. The court in *Murray* reasoned that it could afford the petitioner practical relief because an order directing the respondent to recalculate the petitioner's sentence with the credits sought by the petitioner would affect the period of probation and result in the petitioner completing his probationary period sooner by advancing his release date. *Murray* v. *Commissioner of Correction*, supra, 30–31. Accordingly, the fact that the petitioner in this case is on probation, and the petitioner in *Leffingwell* was serving a period

respondent raised an additional mootness argument not contained in his supplemental brief.

The arguments asserted by the parties in their supplemental briefs and at oral argument, as to the effect of *Brown* and *Boria* on this appeal and the respondent's mootness arguments, are identical to those considered in *Leffingwell* v. *Commissioner of Correction*, 218 Conn. App. 216, A.3d (2023), which we also decide today. We conclude that our examination of the same issues in *Leffingwell* thoroughly resolves the claims in the present appeal and that there is nothing in this case that would mandate a different result. Accordingly, we adopt the reasoning and conclusions in *Leffingwell* in resolving the issues raised in the present appeal.

We also adopt the following reasoning and conclusion set forth in *Leffingwell* as to the remand order. "With respect to whether we should permit the court another opportunity to consider declining to issue the writ pursuant to Practice Book § 23-24, we decline to include this as part of our remand order. The court's dismissal in the present case occurred prior to our Supreme Court's decision in *Gilchrist* [v. *Commissioner of Correction*, 334 Conn. 548, 223 A.3d 368 (2020). In the present case, however, [the petitioner had filed an amended petition and] counsel had been appointed . . . prior to the habeas court's dismissal. As this court previously has clarified in declining to apply footnote 11 of *Brown* in similar cases, '[i]t would strain logic to construe footnote 11 of *Brown* as advising that we should direct the habeas court on remand to consider declining to issue the writ under § 23-24 vis-à-vis the amended petition, which was filed after the writ had been issued. Moreover, affording the habeas court on remand another

of special parole, does not impact our analysis of the respondent's mootness claims in this appeal. It is unclear why the respondent elected to change its prior position.

opportunity to consider declining to issue the writ under § 23-24 vis-à-vis the original habeas petition, in effect, would vitiate the filing of the amended petition, which is not an outcome that we believe our Supreme Court in *Brown* intended.' . . . *Hodge* v. *Commissioner of Correction*, [216 Conn. App. 616, 623–24, 285 A.3d 1194 (2022)]; see also *Villafane* v. *Commissioner of Correction*, 216 Conn. App. 839, 850–51, 287 A.3d 138 (2022).[6] 'Although the present dismissal occurred prior to *Gilchrist*, we are not persuaded that we should apply the rationale in footnote 11 of *Brown* to the present case. Unlike in *Brown* and *Boria*, the dismissal in the present case occurred not merely after the writ had issued but after counsel had appeared on the petitioner's behalf and an amended petition was filed. . . . The fact that an amended petition had been filed at the time of the court's dismissal in this case leads us to conclude that the proper course on remand is not for the court to first consider whether declining to issue the writ under . . . § 23-24 is warranted.' . . . See *Villafane* v. *Commissioner of Correction*, supra, 216 Conn. App. 849–50"

[6] "In *Howard* v. *Commissioner of Correction*, 217 Conn. App. 119, 287 A.3d 602 (2022), we expanded upon our reasoning in *Hodge* and *Villafane*. In *Howard*, although counsel had been appointed for the petitioner, no amended petition was filed prior to the habeas court dismissing the petition sua sponte pursuant to Practice Book § 23-29 without providing notice and an opportunity to be heard. Id., 132. This court concluded that the appointment of counsel alone provided a compelling reason not to apply footnote 11 of *Brown*, explaining: 'Our Supreme Court has explained that the purpose of appointing counsel in habeas actions, following the issuance of the writ, is so that any potential deficiencies can be addressed in the regular course after the proceeding has commenced. . . . In the present case, the habeas court appointed counsel to represent the petitioner, and counsel will have an opportunity to address any potential deficiencies in the original petition that he filed in a self-represented capacity. In light of this fact, and the length of time in which the habeas action has been pending on the court's docket, we conclude that permitting the court on remand to decline to issue the writ pursuant to Practice Book § 23-24 could lead to an unjust outcome that our Supreme Court would not have intended.' . . . Id., 133." *Leffingwell* v. *Commissioner of Correction*, supra, 218 Conn. App. 225 n.6.

(Footnote in original.) *Leffingwell* v. *Commissioner of Correction*, supra, 218 Conn. App. 225–26.

The judgment is reversed and the case is remanded for further proceedings consistent with this opinion and this court's decision in *Leffingwell* v. *Commissioner of Correction*, 218 Conn. App. 216, A.3d (2023).

In this opinion the other judges concurred.