DIMITRI PERDIKIS ET AL. *v.* JAY H. KLARSFELD ET AL.
(AC 43955)

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

Syllabus

The plaintiff sought to recover damages for the alleged medical malpractice of the defendant ear, nose and throat surgeon, claiming, inter alia, that the defendant had been negligent in the performance of his nasal surgery, which caused him to suffer serious and permanent injuries. During a postoperative appointment with the defendant, at which the plaintiff discussed postsurgical concerns, the defendant observed the plaintiff manipulating the surgical site by pulling on his lip and nose and inserting fingers and tissues into his nose. The defendant told the plaintiff that he was "more than concerned" that these actions could damage the result of the surgery and later noted such concerns in the plaintiff's medical chart. The plaintiff later experienced bleeding from his nose and was diagnosed with a large perforation in his septum. He also experienced, inter alia, persistent nasal septal deviation, diminished and altered sense of smell, congested sinuses, and frequent recurring headaches. At trial, the defendant claimed that the plaintiff was the sole proximate cause of his own injuries due to his alleged manipulation of his fresh surgical wound in the early postoperative period. The plaintiff

presented the expert testimony of B, an ear, nose and throat surgeon, who testified, inter alia, that he believed that the defendant had deviated from the appropriate standard of care during the plaintiff's operation and that, with a reasonable degree of medical certainty, it was highly improbable that the plaintiff had caused his own injuries. The defendant did not present any expert testimony. Over the plaintiff's objection, the trial court rejected his proposed jury instructions and, instead, submitted to the jury the defendant's proposed instruction that, if it determined that the plaintiff's actions were the sole proximate cause of his injuries, it must return a verdict for the defendant. During its deliberations, the jury asked the court three questions regarding B's testimony on the structure of the nose and the location of the plaintiff's perforation. No interrogatories were submitted to the jury. The jury returned a defendant's verdict and, thereafter, the trial court denied the plaintiff's motion to set aside the verdict. On the plaintiff's appeal to this court, *held*:

1. The trial court's instructions to the jury on sole proximate cause were improper:

a. The trial court improperly instructed the jury to consider whether the plaintiff's alleged postsurgical conduct was the sole proximate cause of his injuries in the absence of any competent evidence supporting the charge: the defendant presented no expert testimony that established a causal link between the plaintiff's postsurgical manipulations of his lip and nose and his injuries, as whether the plaintiff's actions caused his injuries was outside the common knowledge of laypersons and, thus, required the introduction of competent medical opinion evidence, which the defendant did not offer, to remove it from the realm of speculation and conjecture before the court could issue a sole proximate cause instruction; moreover, the defendant could not prevail on his argument that his own medical opinion testimony as a fact witness and medical records evidence that the plaintiff's actions could have caused his injuries rose to a level of reasonable medical probability and, thus, sufficiently demonstrated causation to warrant the sole proximate cause instruction, as such an opinion, even if it had been proffered as expert testimony, was speculative and did not indicate the probability that the plaintiff had caused his own injuries; furthermore, the defendant could not prevail on his claim that B's testimony in response to a hypothetical was sufficient to establish that the plaintiff's conduct could have caused his injuries, as B testified that such a result was only possible and not probable, and he further testified that he did not believe the plaintiff could have engaged in the type of manipulation possible to cause the injuries he sustained.

b. The trial court erred in failing to instruct the jury in accordance with the plaintiff's proposed charge that it could not consider his alleged postsurgical actions in manipulating his nose and lip as a cause of his injuries; because the defendant had placed the issue of whether the plaintiff's postsurgical conduct was the sole proximate cause of his

injuries before the jury without the requisite accompanying expert medical opinion on causation, the plaintiff's proposed charge was a correct statement of the applicable legal principles relevant to the issues of the case and, thus, should have been presented to the jury by the court.

2. The trial court's erroneous instruction regarding sole proximate cause was harmful and the likelihood of actual prejudice to the plaintiff was significant enough to warrant a new trial: the court's instruction that if the jury found that the plaintiff's actions were the sole proximate cause of his injuries, it must find for the defendant, coupled with closing arguments from the defendant's counsel that the plaintiff had caused his own injuries, likely misled the jury that competent evidence existed to support the defendant's theory, although there was no expert testimony to this effect, and caused the jury to speculate, as indicated by its questions to the court during deliberations; moreover, this court declined to apply the general verdict rule to the present case, as previous holdings from the Supreme Court and this court clarified that the rule does not apply to cases such as the present one, in which various grounds were advanced to defeat the claimed cause of action under a general denial, and this court was not at liberty to overrule such precedent.

Argued January 4—officially released May 23, 2023

Procedural History

Action to recover damages for alleged medical malpractice, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the named plaintiff withdrew the claims against the defendant Advanced Specialty Care, P.C., et al., and the plaintiff Theodora Vogiatzi-Perdikis withdrew her claims as to all defendants; thereafter, the matter was tried to the jury before *Cobb*, *J.*; verdict for the named defendant; subsequently, the court, *Cobb*, *J.*, denied the named plaintiff's motion to set aside the verdict and rendered judgment for the named defendant, from which the named plaintiff appealed to this court. *Reversed*; *new trial.*

Brandon B. Fontaine, for the appellant (named plaintiff).

Stuart C. Johnson, with whom were *Thomas J. Plumridge*, and, on the brief, *Sally O. Hagerty*, for the appellee (named defendant).

BRIGHT, C. J. In this medical malpractice action, the plaintiff Dimitri Perdikis appeals from the judgment of the trial court, rendered after a jury verdict in favor of the defendant Jay H. Klarsfeld, a physician and surgeon.[1] The plaintiff claims that the court erred by denying his request to charge the jury that it *could not* consider his postsurgical actions as a cause of his injuries and, instead, instructing the jury that it *could* consider his postsurgical actions in its causation analysis. We conclude that, in the context of the present case, the introduction of competent evidence—an expert medical opinion stated with a degree of reasonable medical probability—was required to allow the jury to infer a causal link between the plaintiff's actions and his injury. Because no such evidence was presented at trial, we conclude that the court's jury instruction was improper and harmful and, therefore, reverse the judgment of the trial court and remand the case for a new trial.[2]

The following facts, which the jury reasonably could have found, and procedural history are relevant to our analysis of the plaintiff's claim. The defendant is a Connecticut licensed physician and surgeon who specializes in otolaryngology, colloquially referred to as an ear, nose, and throat doctor (ENT). In June, 2012, the

[1] The complaint was originally comprised of twelve counts against additional named defendants including Advanced Specialty Care, P.C., Danbury Hospital, and Ridgefield Surgical Center, LLC. The plaintiff later withdrew the counts of the complaint as to each of these defendants. The plaintiff's wife, Theodora Vogiatzi-Perdikis, was also originally named as a plaintiff in this case alleging loss of consortium, but she withdrew her claim as to all defendants in November, 2016. Accordingly, the case went to trial only as between Dimitri Perdikis and Jay H. Klarsfeld. We therefore refer to Dimitri Perdikis as the plaintiff and Klarsfeld as the defendant.

[2] The plaintiff also claims that the court erred by denying a motion to withdraw filed by his counsel. Because we agree with the plaintiff's first claim and reverse the judgment on this ground, we do not consider his second claim.

defendant began treating the plaintiff for nasal congestion and chronic sinusitis.[3] On January 2, 2013, the defendant performed nasal surgery on the plaintiff to treat his ailments and reduce his nasal congestion.[4] The surgery involved the removal of infected tissue and bone in the plaintiff's sinuses to improve drainage, enlarging a portion of his sinus cavity, correcting portions of his nasal cavity that were causing difficulty in the plaintiff's breathing, and correcting the plaintiff's deviated septum—the wall, consisting of a cartilage section and a bony section, that divides the nasal cavity into halves—by removing crooked portions of the septal bone and cartilage.[5] The surgery was accomplished in approximately one hour.

On January 3, 2013, the plaintiff reported to the defendant's office for his first postoperative visit. At that visit, the defendant removed surgical packing from the plaintiff's nose. Later that day, the plaintiff called the defendant's office to report swelling of his upper lip, an inability to lift his lip, and a concern that his smile would not be the same postsurgery. On January 4, 2013, the plaintiff returned to the defendant's office to discuss those issues. During that visit, the defendant observed the plaintiff manipulating the surgical site by pulling on his lip and nose and inserting fingers and tissues up

[3] Sinusitis is the "[i]nflammation of the mucous membrane of the nose and paranasal sinuses." Stedman's Medical Dictionary (27th Ed. 2000) p. 1645. The plaintiff also was diagnosed with chronic rhinitis, "a protracted sluggish inflammation of the nasal mucous membrane; in the later stages the mucous membrane with its glands may be thickened (hypertrophic rhinitis) or thinned (atrophic rhinitis)." Id., p. 1566.

[4] The surgery consisted of a bilateral endoscopic ethmoidectomy, bilateral endoscopic antrostomy, endoscopic removal of concha bullosa, septoplasty and valvular repair of nasal stenosis.

[5] The nasal septum "is composed of a central supporting skeleton covered on each side by a mucous membrane." Stedman's Medical Dictionary (27th Ed. 2000) p. 1621. The nasal septum includes the maxillary bone, the perpendicular plate of ethmoid bone, septal nasal cartilage, and the vomer bone. See id., pp. 296, 1620.

into his nose. In response, the defendant "told [the plaintiff that] these actions could damage the result" and reiterated that the plaintiff could use a light ice pack on his lip for twenty-four hours, should use saline nasal spray five times a day, should use bacitracin two times a day, and should take his antibiotics. The defendant did not examine the plaintiff at that time. The next day, the defendant called the plaintiff and, in an addendum to the plaintiff's patient report, recorded his impression that the plaintiff seemed to be doing "a little better in terms of anxiety." The defendant further wrote in the addendum that the plaintiff was experiencing congestion and had informed the defendant that "when he pulls his nose forward, he can breathe better." The defendant wrote that in response to the plaintiff's statement, he "repeated [his] insistence that [the plaintiff] not try to pull or stretch his nose either to improve breathing or change its shape." The defendant was aware of no further incidents thereafter of the plaintiff manipulating the surgical site.

On January 9, 2013, the plaintiff returned to the defendant's office for another postoperative visit at which time the defendant removed the plaintiff's sutures. Sometime in the early morning hours of January 17, 2013, the plaintiff woke up from his sleep because he was choking on blood in his throat and mouth and was bleeding from his nose. He ran to the shower at which point he turned on the water, felt something choking him in the back of his throat, cleared his throat, and coughed out what he observed to be a mass of something that "could've been a very large blood clot." The bleeding from his nose continued, and the plaintiff called the defendant's office later that morning and reported the prolonged nosebleed. Later that day, he went to the defendant's office and was examined by Doug Bloch, another ENT at the defendant's practice,

who located a bleed in the defendant's right nasal cavity and cauterized it with silver nitrate.

On January 21, 2013, the plaintiff was seen by Seth Brown, an ENT at the Connecticut Sinus Institute—Farmington (Sinus Institute), who examined the plaintiff and detected abnormal crusting within the plaintiff's nasal cavity. After Brown removed the crusting, he detected a large septal perforation. The perforation began about three quarters of an inch behind the columella[6] and continued back into the nose toward the posterior of the head and spanned portions of both the cartilage and boney parts of the septum. Although measurements of the perforation varied, the perforation was at least 2.4 centimeters long and was approximately the size of an American quarter coin. In addition to several other issues in the plaintiff's nasal cavities, Brown found scarring in both nostrils and determined that the plaintiff's septum remained deviated. Given that the plaintiff was only three weeks postsurgery, Brown recommended that the plaintiff follow up with the defendant "to see what [the defendant] can do to fix this." On January 22, 2013, however, the plaintiff failed to report to the defendant's office for a scheduled postoperative appointment. From January, 2013, through the time of trial, the plaintiff continued treatment with Brown and, later, Belachew Tessema, an ENT also of the Sinus Institute.[7] On October 12, 2015, Tessema performed a functional endoscopic sinus surgery on the plaintiff to ameliorate symptoms associated with the plaintiff's chronic sinusitis and to resolve certain nasal

[6] The columella is "the fleshy lower margin (termination) of the nasal septum." Stedman's Medical Dictionary (27th Ed. 2000) p. 384. Essentially, it is the bridge of tissue that separates the nostrils at the base of the nose.

[7] From January, 2013, through early 2015, the plaintiff consulted with as many as six other medical practitioners about his nasal ailments and sought their opinions as to the risks and benefits of a second surgery to treat those issues.

issues that remained after the plaintiff's first surgery performed by the defendant.

On January 23, 2015, the plaintiff instituted this medical malpractice action against the defendant. In his complaint, the plaintiff asserted two counts against the defendant. In count one, the plaintiff alleged that the defendant had been negligent in his performance of the plaintiff's surgery.[8] The plaintiff alleged that, as a result of the defendant's malpractice, he suffered severe, serious, painful and/or permanent injuries including a large nasal septal perforation, persistent nasal septal deviation, a diminished and altered sense of smell, congested sinuses, diminished or a sensation of diminished nasal air flow, and frequent recurring headaches. The plaintiff alleged further that he has incurred and will continue to incur medical expenses and treatment, has endured pain and suffering as well as the loss of his ability to carry on and enjoy life's activities, and his earning capacity has been impaired. The plaintiff sought damages for these harms. In count two, the plaintiff sought damages for the defendant's alleged failure to sufficiently inform him of all material medical information related to his treatment, which, if properly done, the

[8] The plaintiff alleged that the defendant and/or his servants, agents, apparent agents, and/or employees failed to exercise the degree of care and skill ordinarily and customarily used by other similar medical professionals. Specifically, the plaintiff alleged that the defendant failed to adequately and properly perform the aforementioned procedures, failed to provide reasonable care to avoid exposing the plaintiff to said injuries, extensively and bilaterally tore and/or disrupted the nasal septal mucoperichondrium and periodteum, disrupted and/or obstructed the blood supply to the nasal septal mucosa and underlying bone and cartilage, placed sutures too tightly across the nasal septal splints, lateralized and/or caused excessive trauma to the middle turbinate, lateral nasal walls, and nasal septum, failed to place stenting material to prevent adhesions to the medial orbital wall, failed to provide reasonable care to prevent the obstruction to drainage of the ethmoid and maxillary sinuses, failed to provide reasonable care to prevent persistent chronic sinusitis, failed to provide reasonable care to prevent a persistent nasal septal deviation, failed to provide reasonable care to correct the nasal valve obstruction, and hastily performed the aforementioned procedures.

plaintiff alleges would have caused him to refuse consent to the surgery. On March 27, 2015, the defendant filed an answer to the complaint and denied the material allegations therein.

A jury trial was held on November 7, 8, 12, 13, 14, and 15, 2019. During opening statements, it became clear that, as part of his general denial, the defendant intended to demonstrate that the plaintiff was the sole proximate cause of his own injuries. The defendant's counsel stated: "I think you will conclude that [the plaintiff] manipulated and disrupted a fresh surgical wound in the early postoperative period and caused disruption of a fresh suture line in the delicate tissue in his nose. I think you will find that there simply is no credible evidence of malpractice. I think you will find that [the defendant] did only what was necessary, no more, no less, and that he took the time necessary to do it.

"I will return to you at the end of the case and ask for a verdict in [the defendant's] favor. . . . Because we don't hold our doctors liable for risks accepted by a patient and complications or suboptimal results that happen in the absence of medical negligence. We also don't hold our doctors accountable for postoperative complications brought about by the patient's own conduct."

The jury heard four days of evidence during which the plaintiff presented the testimony of John R. Bogdasarian, an ENT surgeon. Bogdasarian served as the plaintiff's medical expert and testified as to the standard of care and the cause of the plaintiff's injuries. He testified that, typically, the nasal surgery that the plaintiff underwent would take approximately ninety minutes to complete. Because the defendant completed the surgery in approximately one hour, Bogdasarian testified that he believed the defendant had deviated from the

appropriate standard of care by rushing through the procedure.

Relevant to the plaintiff's claim on appeal, Bogdasarian also testified that there were two possible scenarios that probably caused the plaintiff's septal perforation. "[T]he first one would be if a tear is created in the lining of the septum on each side, kind of in the same location, and if you've taken the cartilage and bone that separate those two areas out, essentially you've created an opening that goes one side to the other, and the septum may heal with a hole rather than healing up and down with the [mucus membrane] intact on each side. So that's one way. Usually, one is all right if there's a tear on one side and the other side's intact, the side that's torn will oftentimes heal, but if there's a hole on each side, there's a good chance you're going to end up with a perforation that goes through.

"The second way, and one that probably is a little more likely given the size of this perforation, would be when [the septal] splints were put in, the plastic, if the stitch that holds them on each side of the nose is too tight, then the blood supply to the lining may be cut off and so that would create a larger area of pressure and a larger defect. So, if I were saying which is more likely, I would think it would be that."[9] Bogdasarian testified that, in the present case, both possible causes of the perforation would be a result of the defendant's deviation from the standard of care. Although Bogdasarian acknowledged that a septal perforation could form over weeks to months from a person picking at

[9] Bogdasarian also testified that large septal perforations may be caused by the use of cocaine, a septal hematoma resulting from trauma to an individual's nose—i.e., a broken nose—or "overzealous cauterization" from a doctor cauterizing a nosebleed. Nothing in the record indicates, and the defendant does not argue, that there was any evidence that the plaintiff's septal perforation was the result of any of these potential causes.

a crust on the septum, he further testified with "a reasonable degree of medical certainty" that the plaintiff's postsurgical conduct, i.e., inserting fingers and tissues up his nose, pulling on his lip, and pulling on the tip of his nose, "wouldn't cause [the plaintiff's] septal perforation" or any of the injuries the plaintiff suffered postsurgery. Bogdasarian reiterated this stance on cross-examination when he testified that "it would be extremely unlikely that anything that the patient could do would cause the type of trauma that would result in a big perforation." In addition, in response to a hypothetical situation posed by the defendant's counsel, Bogdasarian stated that, although it was theoretically possible for an individual to manipulate a postsurgical wound such that a large perforation could occur, he did not believe that had occurred in the present case.

The plaintiff also presented his own testimony and that of the defendant as a fact witness.[10] The defendant testified that, at the time of the plaintiff's surgery, he had completed more than 3000 nasal surgeries in which he corrected a deviated septum. Septal perforations occurred in fewer than one half of 1 percent of those surgeries, and none of the perforations were greater than one square centimeter in size.[11] The defendant further testified that, when informing patients of risks attendant to nasal surgery, he typically informs them that a septal perforation may occur, though he does

[10] The plaintiff also called Richard L. Doty, who holds a Ph.D. in comparative psychology and is the director of the Smell and Taste Center at the Perelman School of Medicine at the University of Pennsylvania, as his expert on his diminished sense of smell. As part of his case-in-chief, the defendant introduced into evidence Doty's records regarding his treatment of the plaintiff. Neither Doty's testimony nor his records are relevant to the plaintiff's claim on appeal. In addition, the plaintiff called Bloch as a fact witness to testify as to his treatment of the plaintiff's heavy nosebleed on January 17, 2013.

[11] In a similar vein, Bogdasarian testified that, in approximately 5 percent of septal surgeries, a septal perforation may result in the absence of any negligence on the part of the surgeon. Those perforations, however, are typically "the diameter of a pencil."

not specify the possible size of such a perforation. Significantly, no one testified that a perforation as large as the plaintiff's was a risk attendant to a properly performed nasal surgery. The defendant also recounted that, on January 4, 2013, he observed the plaintiff with tissues in his nose pulling on his nose and lip. The defendant recalled being "more than concerned" that the plaintiff's actions "might cause problems" with the results of the surgery.

The defendant's case-in-chief consisted of recalling the defendant for further fact testimony on his stitching process. The defendant did not present any expert testimony. The defendant did, however, present the records of several physicians who treated the plaintiff for his nasal congestion and chronic sinusitis both before and after the January 2, 2013 surgery, the defendant's postoperative report from the surgery, the hospital records relating to the surgery, and the records of Richard L. Doty, the director of the Smell and Taste Center at the Perelman School of Medicine at the University of Pennsylvania, on the plaintiff's alleged loss of smell. None of those records expressed any opinion as to the cause of the plaintiff's septal perforation.

On November 12, 2019, the defendant submitted to the court the following proposed jury charge on the sole proximate cause doctrine: "There has been evidence in this case that [the defendant] is not responsible for the injuries suffered by [the plaintiff], and that the sole proximate cause of his injuries is the conduct of the plaintiff. As I just stated, proximate cause is an act or failure to act which is a substantial factor in producing a result. Substantial factors may include the acts or omission of the plaintiff and may include forces other than negligent conduct. If you find that the conduct of [the plaintiff] contributed so powerfully to the creation of the plaintiff's injuries, such that [the defendant's] conduct may be considered trivial or inconsequential,

those [alternative] forces are considered the sole proximate cause of the injuries. In that case, [the defendant's] negligence necessarily will not be a substantial factor, or proximate cause of the plaintiff's injuries.

"It is the plaintiff's burden to prove that the negligence of [the defendant] was a proximate cause of the injury alleged by [the plaintiff]. If you find that the negligence of [the defendant] was a proximate cause of the injury, even if not the sole proximate cause, then you will find in favor of the plaintiff on causation. [The defendant] is liable if he was a proximate cause of the injury, even if you find that there were also other proximate causes.

"The corollary to this rule is that if you find from the evidence that [the defendant's] negligence was not a substantial factor in causing the injury—that is, if the injury was caused only by one or more conditions, persons or factors other than the negligence of [the defendant]—then the [plaintiff] ha[s] not proven [the defendant] liable."

In response, the plaintiff submitted the following proposed instruction: "In this case you have heard some testimony and may see in some of the exhibits some evidence that would indicate that the plaintiff performed some action to his lip and/or nose that the defendant claims may have caused some or all of the plaintiff's injuries. You may NOT consider such evidence on the question of what caused the plaintiff's injuries. There was no evidence from a properly qualified witness that any such claimed actions of the plaintiff were, with reasonable medical certainty, causes of the plaintiff's injuries. It is not enough that [the defendant] may have testified that the plaintiff's actions could cause damage to the work he performed. Nor was it sufficient that he testified that, had the plaintiff returned to his care, he would have provided further services to

assist in the plaintiff's healing process. Without testimony from an expert witness that such actions of the plaintiff were, with reasonable medical certainty, a cause of his later injuries, you may not consider such claims of the defendant. The ONLY questions you should concern yourselves with are: Was the defendant negligent (or did he commit malpractice) and, if so, were his actions a proximate cause of any or all of the plaintiff's claimed injuries and harms. You may not consider the plaintiff's actions as a contributing factor." (Emphasis in original.)

On the evening of November 13, 2019, the court, *Cobb*, *J.*, provided the parties with its intended jury instructions, which included an instruction consistent with the defendant's requested charge on the sole proximate cause doctrine.[12] On the morning of November 14, 2019, the plaintiff objected to the court's sole proximate cause instruction. In response, the defendant argued that he was entitled to a charge on sole proximate cause pursuant to *Mulcahy* v. *Hartell*, 140 Conn. App. 444, 59 A.3d 313 (2013). In particular, the defendant argued that a charge on sole proximate cause was appropriate when, as in the present case, the issue of whether the plaintiff's actions were indeed the sole proximate cause of his injuries is "a factual issue that comes out of [the defendant's] general denial of negligence."

Following this exchange, the court declined to make any further changes to its proposed instructions, and

[12] On the morning of November 14, 2019, the parties discussed their respective proposed charges with the court in its chambers before going on the record. On the basis of that discussion, the court made some adjustments to its intended instructions. Although the court's proposed instructions are not in the record before us, it is clear from the plaintiff's objection that the court intended to charge the jury consistent with the defendant's requested instruction on the sole proximate cause doctrine. As the court's original proposed instructions are not part of the record, it is unknown whether any changes were made to the court's proposed sole proximate cause instruction.

both parties gave their closing arguments. In the plaintiff's closing argument, the plaintiff's counsel argued that the defendant was negligent in rushing through the surgery and that negligence was the proximate cause of the plaintiff's injuries. In addition, the plaintiff's counsel further argued that the plaintiff could not have been the cause of his own injuries, stating: "[Y]ou heard [Bogdasarian] say, look, that area up there is very tender at that point, two days postsurgery, he couldn't . . . imagine somebody pushing something up his nose so hard that it would cause the disruption . . . ." "[T]hose two [medical chart addendum] entries are the only thing[s] in this whole record about [the plaintiff] manipulating his nose. And [Bogdasarian] said it's highly unlikely that would cause these problems." Finally, the plaintiff's counsel stated that "there's only one person who really talked about the cause [of the perforation], really, in terms of more likely than not from a reasonable medical probability: that was [Bogdasarian]. And there's been no counterevidence [indicating] that [Bogdasarian] is wrong."

The defendant's counsel, however, told the jury that, "[i]n order for the plaintiff to prevail, you must believe [Bogdasarian]. In order for [the defendant] to prevail you need only believe him." She then argued "that [the defendant] did [the] procedure with all due care, and that it was actually [the plaintiff's] own postoperative manipulation of his surgical site that resulted in bleeding two weeks postoperatively, the passing of a blood clot or a hematoma, and the development of a two centimeter perforation that was first seen by [Brown] when he removed a scab that revealed a perforation in the nasal septum."

Thereafter, the court instructed the jury on the law of the case. With respect to sole proximate cause, the court instructed the jury in relevant part: "Proximate cause. . . . The plaintiff must prove that any injury for

which he seeks compensation from the defendant was caused by the defendant.

"The first issue for your consideration is, 'Was the plaintiff injured?' If the answer is no, you will render a verdict for the defendant. If the answer is yes, you will proceed to the second issue, which is, 'Were such injuries caused by the negligence of the defendant?' This is called 'proximate cause.'

"Negligence is a proximate cause of an injury if it was a substantial factor in bringing the injury about. In other words, if the defendant's negligence contributed materially and not just in a trivial or inconsequential manner to the production of the injury, then the negligence was a substantial factor. If you find that the defendant's negligence was not a substantial factor in bringing about the injury suffered by the plaintiff, you will render a verdict in favor of the defendant. However, if you find that the defendant's negligence was a substantial factor in causing injury to the plaintiff, you will consider damages.

"Multiple causes. . . . Under the definitions I have given you, negligent conduct can be a proximate cause of an injury if it is not the only cause, or even the most significant cause of the injury, provided it contributes materially to the production of the injury, and thus is a substantial factor in bringing it about. Therefore, when a defendant's negligence combines together with one or more other causes to produce an injury, such negligence is a proximate cause of the injury if its contribution to the production of the injury, in comparison to all other causes, is material or substantial.

"When, however, some other cause contributes so powerfully to the production of an injury as to make the defendant's negligent contribution to the injury merely trivial or inconsequential, the defendant's negligence must be rejected as a proximate cause of the injury for

it has not been a substantial factor in bringing about the injury.

"Sole proximate cause. . . . The defendant denies that any of his actions caused the plaintiff's injury. The defendant claims that the plaintiff's postsurgery conduct was the cause of the perforation. Evidence that an actor other than the defendant was the sole proximate cause of the plaintiff's injuries constitutes a factual scenario inconsistent with the plaintiff's allegation that the defendant's actions were the proximate cause of the plaintiff's injuries. If you find that the plaintiff's actions were the sole proximate cause of his injuries, then you will find for the defendant."

The court then provided the jury with two verdict forms, one for the plaintiff and one for the defendant.[13] No jury interrogatories were submitted to the jury. After the jury departed to begin deliberations, the plaintiff's counsel again objected to the court having given the sole proximate cause charge. On November 15, 2019, the jury returned a verdict for the defendant, which the court accepted.

On November 25, 2019, the plaintiff filed a motion to set aside the verdict. The motion alleged, inter alia, that the court improperly had instructed the jury on the issue of sole proximate cause. The motion was heard by the court on February 3, 2020, which summarily denied it in open court.[14] Judgment was rendered for the defendant that same day.

[13] The plaintiff's verdict form is not in the record before us and, thus, it is unclear as to what was contained in that form, if anything, as to how the jury should address causation.

[14] No order reflecting the court's denial of the plaintiff's motion to set aside the verdict was entered at or about the time the court denied the motion from the bench. On February 20, 2020, the plaintiff filed a caseflow request, asking the court to enter an order reflecting its February 3, 2020 denial of the plaintiff's motion to set aside the verdict. The court addressed the matter by issuing an order, dated February 20, 2020, stating that the motion to set aside the verdict was denied, "[a]s stated on the record."

On February 21, 2020, the plaintiff filed the present appeal. On March 13, 2020, the plaintiff filed a notice pursuant to Practice Book § 64-1, asking the court to issue a memorandum of decision stating the reasons for its denial of his motion to set aside the verdict. On January 21, 2021, the court vacated its prior ruling on the motion to set aside the verdict and entered a new ruling that stated "[d]enied." The plaintiff subsequently filed with this court a motion for permission to file a late motion for articulation in the trial court. In that motion, he represented that he sought to file the motion for articulation to obtain a memorandum of decision on the denial of his motion to set aside the verdict because the court had yet to issue one in accordance with § 64-1. On April 14, 2021, this court denied the motion but ordered, sua sponte, that "the trial court . . . shall articulate the factual and legal basis for the denial of the plaintiff's motion to set aside the verdict." The court thereafter issued a memorandum of decision in accordance with this court's order on October 8, 2021. Additional facts will be set forth as necessary.

I

On appeal, the plaintiff claims that the court erred by (1) instructing the jury that it *could* consider whether the plaintiff's postsurgical actions were the sole proximate cause of his injuries and (2) declining his request to charge the jury that it *could not* consider alleged postsurgical actions of the plaintiff in manipulating his nose as a cause of his injuries. The plaintiff argues that, because the defendant presented no expert evidence causally linking the plaintiff's postsurgical conduct with his injuries, there was no basis for the court to give a sole proximate cause instruction and the issue should not have been submitted to the jury for consideration. The defendant, contrastingly, argues that the court properly instructed the jury that it could consider whether the plaintiff's conduct was the sole proximate

cause of his injuries and that any error was harmless. We agree with the plaintiff.

A

We first address the plaintiff's claim that the court improperly instructed the jury on the sole proximate cause doctrine in the absence of any competent evidence supporting the charge. The plaintiff argues that, to give the instruction, an expert had to testify with reasonable medical probability that the plaintiff's post-surgical conduct could cause his injuries. We agree.

The standard of review and principles of law that guide our analysis are well established. "A challenge to the validity of jury instructions presents a question of law. Our review of this claim, therefore, is plenary. . . . We must decide whether the instructions, read as a whole, properly adapt the law to the case in question and provide the jury with sufficient guidance in reaching a correct verdict. . . . [T]he test of a court's charge is . . . whether it fairly presents the case to the jury in such a way that injustice is not done to either party under the established rules of law. . . . It is established law that it is error for a court to submit to the jury an issue [that] is wholly unsupported by the evidence." (Internal quotation marks omitted.) *Ocasio* v. *Verdura Construction, LLC*, 215 Conn. App. 139, 151–52, 281 A.3d 1205 (2022).

In its October 8, 2021 memorandum of decision, the court explained its reasoning for instructing the jury on the sole proximate cause doctrine consistent with the defendant's proposed charge: "Because the defendant did not plead the special defense of contributory negligence, the defendant did not assume any burden to establish that the plaintiff's actions contributed to his injuries. [See] *Juchniewicz* v. *Bridgeport Hospital*, 281 Conn. 29, 45, [914 A.2d 511] (2007). Under a general

denial, it is the plaintiff's burden to prove that the defendant's negligence caused the injury. In a medical malpractice case 'evidence of a plaintiff's posttreatment conduct may be offered by a defendant under a general denial for the purpose of showing that the plaintiff's conduct was the sole proximate cause of [the plaintiff's] injuries.' *Mulcahy* v. *Hartell*, [supra, 140 Conn. App. 446]. The plaintiff's postsurgical actions were not a surprise to the plaintiff, as his conduct was discussed at depositions and in the medical records.

"The court's sole proximate cause charge was approved by the Appellate Court in *Mulcahy* v. *Hartell*, [supra, 140 Conn. App. 446]. . . . In *Mulcahy* . . . the dispositive issue was 'whether evidence of a plaintiff's posttreatment conduct may be offered by a defendant under a general denial for the purpose of showing that the plaintiff's conduct was the sole proximate cause of her injuries.' [Id.] The court held that it could. The pleadings, facts of [the present case], and the court's charge are similar to and consistent with *Mulcahy*. In addition, because this was a general verdict and the plaintiff did not seek any jury interrogatories, it cannot be known whether the jury rendered its verdict for the defendant based on this charge or based on the plaintiff's failure to prove his case that the defendant was negligent as outlined [in] the jury charge as a whole."

We read *Juchniewicz* and *Mulcahy* more narrowly than the trial court and emphasize that there are material differences between the evidence in those cases and the evidence in the present case. In *Juchniewicz*, the plaintiff's decedent died of an untreated bacterial infection that caused her to suffer toxic shock syndrome. *Juchniewicz* v. *Bridgeport Hospital*, supra, 281 Conn. 33. In that case, the defendant physician's "alleged negligence was based entirely on his responses to the plaintiff's decedent's reports of her symptoms to

him . . . .'' Id., 44. As part of his defense, the defendant sought to present evidence that the decedent had caused her own death. Id. Accordingly, ''[t]hrough his *expert witness*, the defendant . . . presented evidence on the decedent's failure accurately to describe her symptoms [to the defendant].'' (Emphasis added.) Id. As a result of this evidence, the court determined that the plaintiff was not entitled to a jury charge that the decedent was presumed to be in the exercise of reasonable care. Id., 31.

Similarly, in *Mulcahy*, the ''medical malpractice action [arose] out of a bacterial infection that the plaintiff developed after obtaining acupuncture treatment from the defendant . . . .'' *Mulcahy* v. *Hartell*, supra, 140 Conn. App. 446. As part of his general denial, the defendant sought to present evidence that the plaintiff caused her own injuries. ''[T]he defendant presented *expert testimony* from Gary Schleiter, a physician who specialized in internal medicine and infectious disease, that the plaintiff's [infection] was caused by the plaintiff's wiping of her skin with an unwashed hand or unsterile object in her car after the acupuncture treatment.'' (Emphasis added.) Id., 448–49.

Thus, in both *Juchniewicz* and *Mulcahy*, the defendants introduced expert testimony demonstrating a causal link between an injury and the plaintiff's conduct. The defendant in the present case, contrastingly, introduced no such expert testimony. Therefore, the court's reliance on *Mulcahy* and *Juchniewicz* to support the sole proximate cause instruction was misplaced in the absence of similar expert testimony of a causal link between the plaintiff's postsurgical conduct and his injuries. In fact, this distinction between the present case and *Mulcahy* and *Juchniewicz* is central to our analysis.

Connecticut law is clear that, in a medical malpractice case, expert testimony is typically required to establish a causal link between an injury and its alleged cause so that the question of causation can "be removed from the realm of speculation and conjecture." *Samose* v. *Hammer-Passero Norwalk Chiropractic Group, P.C.*, 24 Conn. App. 99, 103, 586 A.2d 614, cert. denied, 218 Conn. 903, 588 A.3d 1079 (1991). It is well established that, "[w]hen [a] causation issue . . . goes beyond the field of ordinary knowledge and experience of judges and jurors, expert testimony is required." (Internal quotation marks omitted.) *Hughes* v. *Lamay*, 89 Conn. App. 378, 381, 873 A.2d 1055, cert. denied, 275 Conn. 922, 883 A.2d 1244 (2005). "[E]xpert medical opinion evidence is usually required to show the cause of an injury or disease because the medical effect on the human system of the infliction of injuries is generally not within the sphere of the common knowledge of the lay person." (Internal quotation marks omitted.) *Cockayne* v. *Bristol Hospital, Inc.*, 210 Conn. App. 450, 460, 270 A.3d 713, cert. denied, 343 Conn. 906, 272 A.3d 1128 (2022). Moreover, a "causal connection must rest upon more than surmise or conjecture. . . . A trier is not concerned with possibilities but with reasonable probabilities. . . . The causal relation between an injury and its later physical effects may be established by the direct opinion of a physician, by his deduction by the process of eliminating causes other than the traumatic agency, or by his opinion based upon a hypothetical question." (Emphasis omitted; internal quotation marks omitted.) Id., 461.

Nevertheless, we recognize that there are circumstances when expert evidence regarding causation is not required. "[E]xpert opinion may not be necessary as to causation of an injury or illness if the plaintiff's evidence creates a probability so strong that a lay jury can form a reasonable belief." (Internal quotation marks

omitted.) *Sherman* v. *Bristol Hospital, Inc.*, 79 Conn. App. 78, 89, 828 A.2d 1260 (2003). This exception does not apply in the present case. The jury was presented with conflicting theories as to how the plaintiff suffered an abnormally large postsurgical septal perforation and other complications. The defendant's testimony that he was "more than concerned" that the plaintiff's postsurgical conduct "might cause problems" falls far short of that required to eliminate the need for expert testimony that such conduct did cause, to a reasonable degree of medical probability, the plaintiff's postsurgical complications and injuries. This is particularly true given that the plaintiff's expert witness testified, to a reasonable degree of medical probability, that the plaintiff's postsurgical conduct did not cause the injury.

Put another way, whether the plaintiff's manipulation of his lip and nose disrupted his surgical wounds such that it caused a large perforation, persistent nasal septal deviation, diminished and altered sense of smell, congested sinuses, diminished or a sensation of diminished nasal air flow, and frequent recurring headaches, is outside the common knowledge of laypersons. Compare *Dimmock* v. *Lawrence & Memorial Hospital, Inc.*, 286 Conn. 789, 813, 945 A.2d 955 (2008) (neither cause and effect of infection after spinal surgery nor proper surgical treatment for synovial cyst on spine are matters within common knowledge of laypersons), *Boone* v. *William W. Backus Hospital*, 272 Conn. 551, 572–73, 864 A.2d 1 (2005) (expert testimony necessary to establish whether decedent's symptoms, first exhibited after receiving medications, were consistent with uncomfortable but normal reaction to medication or were indicative of serious allergic reaction requiring readmission and treatment), *Krause* v. *Bridgeport Hospital*, 169 Conn. 1, 6–7, 362 A.2d 802 (1975) (expert testimony necessary where decedent's shoulder was dislocated during administrationof barium enema), and *Poulin* v. *Yasner*, 64 Conn.

App. 730, 749, 781 A.2d 422 (not within jury's common knowledge to determine whether, if plaintiff had ceased drinking alcohol, acute pancreatitis would not have resulted), cert. denied, 258 Conn. 911, 782 A.2d 1245 (2001), with *Puro* v. *Henry*, 188 Conn. 301, 305, 449 A.2d 176 (1982) (expert testimony was not necessary where circumstantial evidence was sufficient for jury to conclude that defendants left needle in plaintiff's abdominal wall during surgery, and needle caused plaintiff's injuries), *State* v. *Orsini*, 155 Conn. 367, 372, 232 A.2d 907 (1967) ("[t]he state of pregnancy is such a common condition that a woman may give her opinion that she herself is pregnant"), and *Sprague* v. *Lindon Tree Service, Inc.*, 80 Conn. App. 670, 676, 836 A.2d 1268 (2003) ("[i]t is sufficiently within common knowledge and ordinary human experience that the lifting of heavy objects, such as wood and brush soaked with water may cause lower back injury, including a ruptured disc, and therefore it was unnecessary for the commissioner to turn to expert testimony to find that such work was the cause of the plaintiff's injury").

Accordingly, although a defendant may rely on a general denial to introduce " 'affirmative evidence tending to establish' "; *Mulcahy* v. *Hartell*, supra, 140 Conn. App. 451; that "an actor other than the defendant was the sole proximate cause of the plaintiff's injuries"; id., 452; in medical malpractice actions such as the present case, in which the causation issue raised by the defendant goes beyond the field of ordinary knowledge and experience of the layperson, the issue of causation must be removed from the realm of speculation and conjecture by the introduction of competent expert medical opinion evidence before the court can instruct the jury that it may consider the plaintiff's conduct as the sole proximate cause of his injuries.[15]

[15] Our conclusion is consistent with case law from other jurisdictions that we find persuasive. For example, in *Brdar* v. *Cottrell, Inc.*, 372 Ill. App. 3d 690, appeal denied, 224 Ill. 2d 572 (2007), the Illinois Appellate Court determined that "[a] defendant is only entitled to a sole-proximate-cause instruction if

On appeal, although the defendant testified only as a fact witness and called no expert witness on the issue of causation, he argues that his fact testimony on direct examination and his medical records pertaining to the plaintiff "supported an alternative cause of the [plaintiff's] injuries," and constituted "medical evidence regarding the grave concern the [defendant] had about the [plaintiff's] manipulation of the fresh surgical site and the damage it risked. Even more, the [defendant] testified . . . that he was 'more than concerned' that the [plaintiff's] manipulation of the surgical site endangered the integrity of the surgical site. Certainly, a jury would be at liberty to interpret the fact [that] the [defendant] was 'more than concerned' that the [plaintiff] could be doing damage to the surgical site to mean that the [defendant] believed the plaintiff *was* causing damage."[16] (Emphasis in original.)

there is competent evidence to support its theory that someone or something other than the defendant was the sole proximate cause of the plaintiff's injuries." Id., 704; see id. (defendant was not entitled to sole proximate cause instruction where potential evidence on sole proximate cause came from fact witness, without any competent expert testimony). Similarly, in *Grauer* v. *Clare Oaks*, 136 N.E.3d 123 (Ill. App. 2019), the Illinois Appellate Court stated: "[A] defendant has the right to endeavor to establish by *competent evidence* that the conduct of a third person, or some other causative factor, is the sole proximate cause of plaintiff's injuries. . . . Though what constitutes competent evidence may vary depending on the type of case, in complex cases expert testimony is often necessary to constitute competent evidence that the sole proximate cause of a plaintiff's injury is the conduct of a nonparty or some other cause. . . . This would be true in medical negligence cases such as this. Although it may not be necessary to show that a nonparty's conduct causing the plaintiff's injury amounted to negligence . . . expert testimony on the matter is still necessary before a defendant can argue in closing that a nonparty's conduct was the sole proximate cause of the injury at issue." (Citations omitted; emphasis in original; internal quotation marks omitted.) Id., 158.

[16] In his appellate brief, the defendant, citing *Argentinis* v. *Gould*, 23 Conn. App. 9, 16–17, 579 A.2d 1078 (1990) ("[a] general denial does not place any burden on the denier . . . and the burden is properly placed on the party seeking recovery" (citation omitted)), rev'd in part on other grounds, 219 Conn. 151, 592 A.2d 378 (1991), argues that "it is not the [defendant's] burden to present expert opinion testimony to support his denial—the defendant can choose to put on some evidence, or simply limit himself to cross-examination of the plaintiff's evidence." The defendant accordingly argues that he was not required to present *any* evidence in support of his argument that the plaintiff was the sole proximate cause of his own injuries. We disagree.

At oral argument before this court, the defendant's counsel clarified this argument, contending that the defendant's testimony as to his opinion at the time of treating the plaintiff and his contemporaneous medical report rose to a level of reasonable medical probability and, accordingly, sufficiently demonstrated causation to warrant the sole proximate cause instruction.[17] We are not persuaded.

The law is clear as to the requirements for competent expert testimony as to causation. "[A]n expert opinion

"[T]he trial court has a duty not to submit any issue to the jury upon which the evidence would not support a finding. . . . Accordingly, the right to a jury instruction is limited to those theories for which there is any *foundation in the evidence*." (Emphasis added; internal quotation marks omitted.) *Farmer-Lanctot* v. *Shand*, 184 Conn. App. 249, 256, 194 A.3d 839 (2018). Thus, in cases where a defendant seeks to establish that another actor was the sole proximate cause of a plaintiff's injuries, there must be *some* evidence in the record establishing that factual scenario. See, e.g., *Bernier* v. *National Fence Co.*, 176 Conn. 622, 630, 410 A.2d 1007 (1979) ("By *introducing evidence* that the state of Connecticut was the sole proximate cause of the decedent's death, the defendant was seeking to establish a set of facts inconsistent with the plaintiff's allegation that the proximate cause of the injuries to the plaintiff's decedent was the negligence, whether sole or concurrent, of the defendant. . . . [W]hile that defense involved *evidence of an affirmative character*, the evidence was inconsistent with a prima facie case and was therefore properly admitted under a general denial." (Emphasis added; footnote omitted.)); *Mulcahy* v. *Hartell*, supra, 140 Conn. App. 451–52 ("[A] party generally *may introduce affirmative evidence* tending to establish a set of facts inconsistent with the existence of a disputed fact. . . . [T]he defendant was entitled, under a general denial, to *present evidence* that the plaintiff caused her own injuries, because this defense constitutes a set of facts inconsistent with the defendant's liability." (Citations omitted; emphasis added; internal quotation marks omitted.)).

At oral argument before this court, the defendant's counsel, despite the argument to the contrary in the defendant's appellate brief, acknowledged that the defendant was required at trial to present competent evidence that the plaintiff's postsurgical conduct caused his injuries. He argued that the defendant's testimony that he was "more than concerned" that the plaintiff's conduct "might cause problems" constituted sufficient evidence to warrant the sole proximate cause instruction. For the reasons stated in this opinion, we conclude that the defendant's testimony was too speculative to meet "the reasonable degree of medical probability" requirement, and was, therefore, insufficient to justify a sole proximate cause instruction.

[17] Specifically, counsel contended: "[The defendant], when he said—when he was asked, 'Were you concerned that this might cause a damage to the surgical results,' he said, 'I was more than concerned.' That, while it's not the talismanic language, was sufficient for the jury to—to have found—to have

need not walk us through the precise language of causation . . . . To be reasonably probable, a conclusion must be more likely than not. . . . Whether an expert's testimony is expressed in terms of a reasonable probability that an event has occurred does not depend upon the semantics of the expert or his use of any particular term or phrase, but rather, is determined by looking at the entire substance of the expert's testimony. . . . [S]ee, e.g., *State* v. *Weinberg*, 215 Conn. 231, 245, 575 A.2d 1003 ([a]n expert witness is competent to express an opinion, even though he or she may be unwilling to state a conclusion with absolute certainty, so long as the expert's opinion, if not stated in terms of the certain, is at least stated in terms of the probable, and not merely the possible . . .), cert. denied, 498 U.S. 967, 111 S. Ct. 430, 112 L. Ed. 2d 413 (1990); *Aspiazu* v. *Orgera*, 205 Conn. 623, 632–33, 535 A.2d 338 (1987) ([w]hile we do not believe that it is mandatory to use talismanic words or the particular combination of magical words represented by the phrase reasonable degree of medical certainty [or probability] . . . there is no question that, to be entitled to damages, a plaintiff must establish the necessary causal relationship between the injury and the physical or mental condition that he claims resulted from it . . .)." (Emphasis omitted; internal quotation marks omitted.) *Cockayne* v. *Bristol Hospital, Inc.*, supra, 210 Conn. App. 462. The same is true when a party seeks to prove causation through a treating physician's medical records.[18] Our Supreme Court has held that—as with all medical expert opinions—in order for expert opinions within a treating physician's report to be admissible as evidence of causation, they

found that . . . [the plaintiff's] own actions were the cause of his claimed injury."

[18] In medical malpractice actions, "causation may be established by a signed report of a treating physician in place of live [expert medical opinion] testimony, so long as the [opposing party] was afforded the opportunity to cross-examine the author of such a report." *Cockayne* v. *Bristol Hospital, Inc.*, supra, 210 Conn. App. 477.

"must be based upon reasonable probabilities rather than mere speculation or conjecture . . . . To be reasonably probable, a conclusion must be more likely than not. . . . Whether an expert's testimony is expressed in terms of a reasonable probability . . . *does not depend upon the semantics of the expert or his use of any particular term or phrase, but rather, is determined by looking at the entire substance of the expert's testimony. . . .* [*Similarly, when*] *reports are the substitute for testimony, the entire report should be examined, not only certain phrases or words*." (Emphasis in original; footnote omitted; internal quotation marks omitted.) *Milliun* v. *New Milford Hospital*, 310 Conn. 711, 730, 80 A.3d 887 (2013); see also *Struckman* v. *Burns*, 205 Conn. 542, 554–55, 534 A.2d 888 (1987). We thus review the defendant's report and his trial testimony to see if they meet this standard.

The report on which the defendant relies consists of the medical chart compiled in relation to the plaintiff's visits and treatments with the defendant. The chart described the history and treatment of the plaintiff and included notes and addendums entered by the defendant after certain visits. In particular, the defendant points to an addendum dated January 4, 2013: "[Patient] very distressed/inconsolable over difficulty in elevating upper lip. He has no recollection about our multiple discussions about post-op swelling, congestion, plastic, sutures, etc. I used the analogy of gum swelling after periodontal surgery and how it takes weeks to resolve. . . . He repeatedly stated that I must have elevated the periosteum over his maxilla and disrupted his nasal spine. I assured him repeatedly that this was not done and the tightness he is feeling is the septo columella stitch repositioning his septum and giving support. He wanted a new upper lip sling . . . [p]laced to reposition his lip and nose. During the visit he was trying to stretch the stitch and over move his lip. *I told him these actions could damage the result*." (Emphasis added.)

On direct examination, when the plaintiff's counsel asked the defendant to clarify the addendum, the following exchange occurred:

"A. [The plaintiff was] trying to move his lip that he was pulling—

"Q. Okay.

"A. —[because] he had trouble with its motion. He kept pulling on this area and putting his fingers up into his nose. . . .

"Q. Okay. Now, and when you say putting his fingers in his nose you mean like this, you know, putting them just inside the nose and pulling?

"A. No, he was pulling with force on his lip and on the columella area.

"Q. *And you were concerned that this might cause problems with your work. Correct*?

"A. *I was more than concerned.*

"Q. Okay. So, did you look to see whether he in fact had damaged anything?

"A. It doesn't matter at that point. If what you're doing is you touch nothing, you've got to let—if there's tears, you let it be. There's nothing to do to fix anything at that point. It's stop, wait, and see what's going to happen. There is no repair, there's nothing more to do.

"Q. Okay. So, any damage he had done, he had already done.

"A. He'd already—or would continue to do. . . .

"Q. . . . do you have a note of him doing this further?

"A. No, I don't.

"Q. Okay. So, you know that he did it, you said don't do it, okay, and he was inconsolable, and had he done damage it was already done at that point. Right?

"A. That is correct.

"Q. Okay. And it would be guesswork on your part to say whether he did it or didn't do it in the future. Correct?

"A. I can't tell.

"Q. Which means you'd be guessing.

"A. Yes." (Emphasis added.)

Assuming, arguendo, that the statements in the defendant's report and testimony could be considered the defendant's expert medical opinion, even though he was never designated as an expert witness, we conclude that they set forth mere possibilities and did not adequately raise a probable causal connection between the plaintiff's postsurgical conduct and his resulting injuries.

Although we are mindful that "talismanic words" are not required to prove causation; (internal quotation marks omitted) *DiNapoli* v. *Regenstein*, 175 Conn. App. 383, 401 n.14, 167 A.3d 1041 (2017); the defendant's testimony and medical report failed to support an argument that the plaintiff's postsurgical conduct was the sole proximate cause of his injuries. The only "opinion" the defendant expressed in his report was that the plaintiff's postsurgical conduct "could damage the result." This statement is speculative and conveys no opinion that the plaintiff's conduct probably caused the injuries of which he complained. Similarly, the defendant's trial testimony that he was "more than concerned" that the plaintiff's postsurgical conduct "might cause problems" merely states a general concern of unspecified possibilities. Nowhere in the totality of the medical report or the defendant's testimony does he opine in any way that the plaintiff's postsurgical conduct *probably* caused his subsequent injuries.

Although an expert opinion need not walk us through the precise language of causation, it must "*at least* [*be*] *stated in terms of the probable, and not merely the possible*." (Emphasis added; internal quotation marks omitted.) *State* v. *Weinberg*, supra, 215 Conn. 245; see also *Aspiazu* v. *Orgera*, supra, 205 Conn. 632–33 (expert opinion cannot rest on surmise or conjecture because trier of fact must determine probable cause, not possible cause).

After reviewing the defendant's testimony and medical report, it is clear that the defendant's opinions were stated in terms of possibility rather than probability and were not competent evidence on which the jury could conclude that the plaintiff's postsurgical conduct caused his injuries. See *Peatie* v. *Wal-Mart Stores, Inc.*, 112 Conn. App. 8, 22, 961 A.2d 1016 (2009) (trial court properly precluded expert causation testimony where, although expert stated he believed incident was related to subsequent event, "he did not express it in terms of probabilities, and, therefore, he did not state his opinion with the requisite standard of reasonable medical probability").

The defendant attempts to fill in the gaps left in his report and testimony by arguing that Bogdasarian's testimony in response to a hypothetical scenario posed by the defendant on cross-examination was sufficient to establish, via expert medical opinion, that the plaintiff's alleged postsurgical conduct could cause his subsequent injuries.[19] Specifically, the defendant contends that, given Bogdasarian's answer to the hypothetical, coupled "with the defendant's own testimony about the [plaintiff's] actions, and the contemporaneous medical record, the jury reasonably could have found that the [plaintiff's]

[19] "The causal relation between an injury and its later physical effects may be established by the direct opinion of a physician, by his deduction by the process of eliminating causes other than the traumatic agency, or by his opinion based upon a hypothetical question." (Emphasis omitted; internal quotation marks omitted.) *Cockayne* v. *Bristol Hospital, Inc.*, supra, 210 Conn. App. 461; see also Conn. Code Evid. § 7-4 (c).

conduct was the sole proximate cause of his own injuries." We disagree.

The following colloquy occurred between Bogdasarian and defense counsel on cross-examination:

"Q. So, when we talked about the potential for trauma to the area on the second postoperative day, one of the things you'd be considering, Doctor, correct, is whether the patient put their fingers up their nose, pushed tissues up their nose, was elevating their lip up over their teeth, because you don't dispute, Doctor, that those splints inside the nose could be manipulated by those sorts of actions, do you?

"A. Well, I think it would depend on with what type of vigor it was carried out. I think those stents are sutured in place so they're not going to be terribly mobile. I don't know as if moving the upper lip would displace them or certainly do enough trauma to cause a big perforation or—and, again, given the location of [the perforation] I think he'd have to have half of his finger in his nose and the stents or splints are there to protect the septum from any kind of trauma. So, I don't—I think in likelihood it would be extremely unlikely that anything that the patient could do would cause the type of trauma that would result in a big perforation. That's my assessment of it.

"Q. Your opinion with reasonable medical probability with regard to the splints is that, if the stitch was too tight over the splints that there was an interruption of blood supply to that area. Correct?

"A. Yes.

"Q. And that would be the mechanism by which a perforation would develop.

"A. Correct.

"Q. So, Doctor, would you agree with me—I'm not asking you to determine the facts of the case, I'm asking

you to assume if the patient was able to stuff tissues up the nose to the area of the splints, was able to get his fingers into his nose, was able to lift his lip in a way such that it disrupted those sutures, would you agree with me that that could interrupt the blood supply to that fresh postoperative site?

"A. Well, I think in a hypothetical situation, you're saying leaving aside the facts of this particular case, I suppose if someone stuffed tissues in his nose tightly enough or tugged on his lip vigorously enough, or put his finger to his second knuckle into this nose and wiggled it all around, I suppose those things could potentially cause trauma. Do I think that's what happened? You asked me not to consider that so I'll just say in general hypothetically those things would be possible."

Accordingly, although Bogdasarian stated that a patient stuffing tissue in their nose tightly enough, or tugging on their lip vigorously enough, or putting their finger to the second knuckle into their nose and wiggling it around, could cause trauma such that a large perforation similar to the plaintiff's was *possible*, because Bogdasarian did not say such a result was *probable*, this testimony was insufficient to establish causation. See *State* v. *Weinberg*, supra, 215 Conn. 245; *Peatie* v. *Wal-Mart Stores, Inc.*, supra, 112 Conn. App. 21. Furthermore, Bogdasarain testified that he did not believe that the plaintiff could have engaged in the type of manipulation necessary to make the plaintiff's postsurgical injuries possible. On direct examination, the following exchange took place between the plaintiff's counsel and Bogdasarian:

"Q. Okay. And are you also aware . . . from the notes about the claim that [the plaintiff] stuck his finger up his nose. Is that correct?

"A. Yes.

"Q. And was picking his nose, right, and . . . you're aware of that . . . claim, yes?

"A. Yes.

"Q. Do you have an opinion, with more likely—with a reasonable degree of medical certainty, more likely than not, whether or not . . . first of all, do you believe that someone with the surgery that [the plaintiff] had, picking the nose would cause the problem . . . [i]n the nose, and whether that would more or likely—in a reasonable degree of medical probability, cause the nasal perforation or any other problems?

"A. I would say, to a reasonable degree of medical certainty, number one, that that wasn't done, and number two, that it wouldn't cause a septal perforation.

"Q. Why do you think it wasn't done? . . .

"A. Well, I just think that it—first of all, the opening in the nose is not big enough to allow a finger to get as far up enough in the nose as to [where] this perforation was. And I . . . think you would have to put your finger pretty close to the second knuckle . . . and wiggle it around to make a perforation of this size. And . . . I'd think that'd be very uncomfortable. I don't think your [finger] could reach anyway, so I don't think that that would be the cause. And lastly, there was a splint in place for some time, anyway, that would protect the septum from any manipulation in that area, so I—I don't think that that's a reasonable supposition.

"Q. It's possible but like—likely or unlikely?

"A. Barely possible probably, yeah.

"Q. Okay. Now, are you aware from [the defendant's] notes the fact that [the plaintiff] came in and was upset about something about his lip. You're aware of that, correct?

* * *

"Q. . . . [D]o you believe that . . . assuming [the plaintiff] was pulling on his nose to increase airflow, do

you have an opinion, with a reasonable degree of medical probability, as to whether or not that that would cause any of the problems from which [the plaintiff] seemed to suffer after this accident—after this in—surgery?

"A. Right. I don't think it would've caused any of the problems that he had subsequent to his surgery.

"Q. Why not?

"A. Well, first of all, the pulling on the nose would have no influence at all on any of the sinus surgeries. . . . I can't really conceive of how pulling on the nose would create perforation of that size. . . . I just don't think it's possible to tear that amount of tissue just by pulling on the end of your nose.

"Q. And you're also aware . . . of the claim in the note that he pulled on his lip.

"A. Mm-hmm.

"Q. Do you have an opinion, with a reasonable degree of medical probability, whether pulling on the lip would cause any pressure or anything to disrupt . . . the sinus . . . the sutures or anything else?

"A. Right. My opinion, it would be, to a reasonable degree of medical certainty, that it did not have any influence on . . . the outcome of the nasal surgery.

"Q. When you pull on the lip, does it even transmit into the nose?

"A. Perhaps just at the very tip, but not—not enough to cause the kind of problems that he ended up having."

In addition, the following exchange between the plaintiff's counsel and Bogdasarian on redirect examination is of note:

"Q. Now, let me just ask you, if one pulls on the lip as is stated that [the plaintiff] did, if one pulls on the lip,

does that put enough pressure in your opinion on the stitches in the area where this perforation occurred toward the back [of the septum], does that put enough pressure to cause any damage to those areas?

"A. No. I think that, again, the septum is a, and even the part that was left, is a rigid structure, so that it's not connected to the upper lip. So, this perforation was higher up. I don't think you would tear stitches in that area or displace anything by pulling on an upper lip.

"Q. Now, you talked on direct exam about why you didn't think sticking a finger up would do it, you know, why—and then on cross you were asked about sticking tissues up there.

"A. Yeah.

"Q. Doctor, do you have an opinion as to, you know, two days post-op, which is what we're talking about, on [January 4, 2013], whether that would be painful or not to stick enough tissues up there to exert enough pressure to—

"A. Right. I mean—

"Q. —disrupt the stitches?

"A. —a couple of tissues likely wouldn't bother, but if you were putting enough up there to create pressure to cut off the blood supply to the mucus membrane, I think it would be—that would be a lot of packing, be pretty uncomfortable."

Consequently, Bogdasarian's testimony, read in its entirety, indicates that, at best, it was theoretically *possible* that the plaintiff's postsurgical conduct could cause trauma such that a large perforation could result. This hypothetical possibility is far from the reasonable degree of medical certainty required for expert medical opinion to be admissible as evidence of causation. See *Milliun* v. *New Milford Hospital*, supra, 310 Conn. 730.

Thus, at the close of trial, the jury had heard no competent expert medical opinion evidence that would allow them to draw a causal link between the plaintiff's postsurgical conduct and his postsurgical injuries. In the absence of such evidence, any conclusion that the plaintiff's postsurgical conduct was the sole proximate cause of his injuries would be the result of speculation. Consequently, we conclude that the court erred in instructing the jury to consider whether the plaintiff's postsurgical conduct was the sole proximate cause of his injuries. See *Goodmaster* v. *Houser*, 225 Conn. 637, 648, 625 A.2d 1366 (1993) ("[t]he court has a duty to submit to the jury no issue upon which the evidence would not reasonably support a finding" (internal quotation marks omitted)); *Ocasio* v. *Verdura Construction, LLC*, supra, 215 Conn. App. 155 ("[c]ourts are permitted to instruct juries only when the proposed instructions are supported by the evidence").

B

We now address the plaintiff's similar yet distinct claim that the court erred by declining his proposed jury instruction that the jury *could not* consider alleged postsurgical actions of the plaintiff manipulating his nose as a cause of his injuries. The plaintiff argues that, "[f]aced with two requested charges in direct conflict, the trial court was required to select the one that provided the 'correct statement of the governing legal principles.' [*Levesque* v. *Bristol Hospital, Inc.*, 286 Conn. 234, 248, 943 A.2d 430 (2008)]. The court opted for the principles espoused by the defendant. The court did not use generic language on sole proximate cause, but rather specifically underscored the defendant's theory." The plaintiff thus claims that, because there was no competent evidence that his postsurgical conduct was a proximate cause of his injuries, the court was required to instruct the jury in accordance with his proposed charge. We agree.

"In determining whether the trial court improperly refused a request to charge, [w]e . . . review the evidence presented at trial in the light most favorable to supporting the . . . proposed charge. . . . *A request to charge which is relevant to the issues of* [*a*] *case and which is an accurate statement of the law must be given.* . . . If, however, the evidence would not reasonably support a finding of the particular issue, the trial court has a duty not to submit it to the jury. . . . Thus, a trial court should instruct the jury in accordance with a party's request to charge [only] if the proposed instructions are reasonably supported by the evidence. . . .

"The court has a duty to submit to the jury no issue upon which the evidence would not reasonably support a finding. . . . The court should, however, submit to the jury all issues as outlined by the pleadings and as reasonably supported by the evidence. . . .

"Whether the evidence presented by a party reasonably supports a particular request to charge is a question of law over which our review is plenary. . . . Similarly, whether there is a legal basis for the requested charge is a question of law also entitled to plenary review." (Citations omitted; emphasis added; internal quotation marks omitted.) *Garcia* v. *Cohen*, 204 Conn. App. 25, 31–32, 253 A.3d 46 (2021), appeal dismissed, 344 Conn. 84, 277 A.3d 788 (2022).

As discussed in part I A of this opinion, the defendant's requested jury instruction was not supported by the evidence, and the court had a duty not to submit it to the jury. See id., 32. Contrastingly, the plaintiff's proposed charge was a correct statement of the applicable legal principles because the defendant indeed was required to present expert medical testimony that the plaintiff's postsurgical conduct was the sole proximate cause of his injuries to warrant a jury instruction to that effect. Moreover, because the defendant had placed the issue

of whether the plaintiff's postsurgical conduct was the sole proximate cause of his own injuries before the jury without the requisite accompanying expert medical opinion on causation, the plaintiff's proposed charge was relevant to the issues of the case. Thus, the court should have instructed the jury in accordance with the plaintiff's proposed charge. See id.

II

Because we conclude that the court's instructions to the jury were improper, we must next consider whether the court's sole proximate cause instruction was harmful. It is well established that "[n]ot every improper jury instruction requires a new trial because not every improper instruction is harmful. [W]e have often stated that before a party is entitled to a new trial . . . he or she has the burden of demonstrating that the error was harmful. . . . An instructional impropriety is harmful if it is likely that it affected the verdict. . . .

"In determining whether an instructional impropriety was harmless, we consider not only the nature of the error, including its natural and probable effect on a party's ability to place his full case before the jury, but the likelihood of actual prejudice as reflected in the individual trial record, taking into account (1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel's arguments, and (4) any indications by the jury itself that it was misled." (Citation omitted; internal quotation marks omitted.) Id., 36.

The plaintiff argues that the court's erroneous instruction was harmful because it "misled the jury to believe that it could and should decide if the plaintiff's conduct of touching around his surgical site caused a massive nasal perforation."[20] The defendant disagrees and argues

[20] More specifically, the plaintiff contends that, "[a]t trial, there was no dispute that the plaintiff had a severe septal perforation—the only question was what caused it. For the defendant, the key issue was whether the plaintiff caused his own injuries with his postsurgical conduct. It was the main point of the defendant's arguments to the jury, and central to his examination of witnesses.

that the court's sole proximate cause instruction was harmless because "[the plaintiff] did not submit jury interrogatories at any time during or after the trial. As such, it is pure speculation on the part of the [plaintiff] that the jury found that he was the sole proximate cause of his own injuries. It is equally likely, for instance, that the jury found that the [defendant] complied with the applicable standard of care in the performance of the procedure. Such a finding would have obviated consideration of causation entirely—as the trial court made clear in its charge to the jury." In the alternative, the defendant argues that the general verdict rule should apply because the plaintiff "failed to submit jury interrogatories in this case, and, as a result, the record is silent as to whether the jury addressed the concept of sole proximate cause at all. . . . [T]he jury may have reached its verdict on the issue of standard of care—it is impossible to know on the face of the record." We conclude that the general verdict rule does not apply in this case and, further, that the plaintiff has established that the court's decision to give the defendant's sole proximate cause instruction rather than the plaintiff's was harmful.

We begin with the application of the general verdict rule. "Under the general verdict rule, if a jury renders a

. . . At the trial's conclusion, the court was faced with two very different choices—the plaintiff's jury charge stating that the lack of expert testimony precluded consideration of whether the plaintiff caused his injury *or* the defendant's charge reinforcing his argument that the plaintiff caused his own injury and instructing the jury to consider it. Only one of these charges could be legally correct, and the [court chose] the defendant's charge. . . . Omitting the plaintiff's instruction was clearly harmful because the jury was not instructed to disregard the sole proximate cause evidence that was central to the [defendant's theory]. Giving the defendant's instruction was clearly harmful because the jury received instruction that specifically emphasized the defendant's theory of the case and required them to consider it. Giving that instruction also allowed the defendant to focus most of his closing argument on that defense theory, using his counsel to claim a causal link between the plaintiff's postsurgery conduct and his injuries, where no witness had done it before." (Emphasis in original.)

general verdict for one party, and [the party raising a claim of error on appeal did not request] interrogatories, an appellate court will presume that the jury found every issue in favor of the prevailing party. . . . Thus, in a case in which the general verdict rule operates, if any ground for the verdict is proper, the verdict must stand; only if every ground is improper does the verdict fall." (Internal quotation marks omitted.) *Garcia* v. *Cohen*, 335 Conn. 3, 10–11, 225 A.3d 653 (2020).

It is well established that the general verdict rule only applies to the following five situations: "(1) denial of separate counts of a complaint; (2) denial of separate defenses pleaded as such; (3) denial of separate legal theories of recovery or defense pleaded in one count or defense, as the case may be; (4) denial of a complaint and pleading of a special defense; and (5) denial of a specific defense, raised under a general denial, that had been asserted as the case was tried but that should have been specially pleaded." (Internal quotation marks omitted.) Id., 11–12; *Curry* v. *Burns*, 225 Conn. 782, 801, 626 A.2d 719 (1993). Significantly, in *Curry* v. *Burns*, supra, 801, our Supreme Court clarified that the general verdict rule does not apply to cases such as the present one, in which various grounds were advanced to defeat the claimed cause of action under a general denial. See id., 796 ("the [general verdict] rule should not be applied to grounds advanced to defeat the claimed cause of action which are admissible under mere denials of fact alleged in the complaint" (internal quotation marks omitted)); see also *Mulcahy* v. *Hartell*, supra, 140 Conn. App. 450 n.6 (general verdict rule not implicated where defense asserted was admissible under general denial).

"As a procedural matter, it is well established that this court, as an intermediate appellate tribunal, is not at liberty to discard, modify, reconsider, reevaluate or overrule the precedent of our Supreme Court. . . . Furthermore, it is axiomatic that one panel of [the Appellate Court]

cannot overrule the precedent established by a previous panel's holding." (Citation omitted; internal quotation marks omitted.) *St. Joseph's High School, Inc.* v. *Planning & Zoning Commission*, 176 Conn. App. 570, 595, 170 A.3d 73 (2017). Accordingly, we decline the defendant's invitation to overrule *Curry* and *Mulcahy*. Therefore, the general verdict rule does not apply to the present case.

We likewise are unconvinced by the defendant's claim that the court's sole proximate cause instruction was harmless because, "[i]n light of the evidence, the jury reasonably could have concluded that the [plaintiff] did not satisfy his burden to demonstrate that the [defendant] violated the standard of care. In that scenario, any instructional error on causation would not have affected the verdict. In the absence of any indication in the record that the jury resolved the case on causation grounds, the [plaintiff] cannot demonstrate harm, and the jury's verdict must stand."

To determine whether the court's instructional impropriety was harmless, we consider "not only the nature of the error, including its natural and probable effect on a party's ability to place his full case before the jury, but the likelihood of actual prejudice as reflected in the individual trial record, taking into account (1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel's arguments, and (4) any indications by the jury itself that it was misled."[21] (Internal quotation marks omitted.) *Garcia* v. *Cohen*, supra, 204 Conn. App. 36.

[21] In advancing his claim that the court's sole proximate cause instruction was harmless, the defendant relies on *Kos* v. *Lawrence + Memorial Hospital*, 334 Conn. 823, 225 A.3d 261 (2020), in which our Supreme Court cited the principle articulated in *Caron* v. *Adams*, 33 Conn. App. 673, 685, 638 A.2d 1073 (1994), that, despite an instructional error, "[a] verdict should not be set aside where the jury reasonably could have based its verdict on the evidence." (Internal quotation marks omitted.) *Kos* v. *Lawrence + Memorial Hospital*, supra, 846. In both *Kos* and *Caron*, however, the erroneous jury charges were found to be harmless because they were immaterial to the verdict and thus had no impact on the jury's deliberations or conclusions. See id., 848 ("[b]ecause the jury's finding centered on whether there was a third or fourth degree episiotomy extension, the inclusion of [the erroneous jury] charge, which *had*

First, we review the state of the evidence in this case. At trial, it was undisputed that the plaintiff suffered a large septal perforation. Moreover, at no point was any evidence presented that such a large perforation was a risk attendant to a properly performed nasal surgery. Accordingly, the pertinent question was what caused the abnormally large perforation. As discussed extensively in part I A, Bogdasarian was the only expert to testify at trial. He testified to a reasonable degree of medical probability that the plaintiff's large septal perforation was caused by the defendant's failure to meet the standard of care. Further, Bogdasarian testified that the postsurgical manipulation of a nose could, at most, be a *possible* cause of a perforation, but he stated with reasonable medical probability that the plaintiff's postsurgical conduct *did not* cause the perforation. The only other evidence as to causation was the defendant's statement that he was "more than concerned" that the plaintiff's postsurgical conduct *could cause* problems with the outcome of the surgery, which is not sufficient to constitute expert medical opinion on causation. Therefore, the state of the evidence was such that the jury would have to rely on speculation to conclude that the plaintiff was the sole proximate cause of his injuries. In effect, the jury was invited to decide the case on the basis of a theory for which there was no evidence. See, e.g., *Faulkner* v. *Reid*, 176 Conn. 280, 281, 407 A.2d 958 (1978) (trial court erred in submitting to jury issue of plaintiff's contributory negligence

no bearing on the degree of the extension, would not have confused or misled the jury and, therefore, was harmless" (emphasis added)); *Caron* v. *Adams*, supra, 684–85 ("Under the particular circumstances herein, whether the jury was misled into believing that the plaintiff had three years from the discovery of the injury to file suit, instead of only two years, is immaterial. Because of our conclusion that the limitations period was tolled and that the plaintiff commenced suit within two years of reaching majority, the plaintiff's suit was timely filed."). In the present case, contrastingly, the erroneous instruction was material to the verdict and likely impacted the jury's deliberations and conclusions. In light of those distinct factual differences, we conclude that the defendant's reliance on *Kos* and *Caron* is misplaced.

when no evidential foundation had been established for such instruction).

Second, the court's other instructions failed to minimize or correct the harm of the sole proximate cause instruction. Although the court gave correct statements of the law on proximate cause and multiple causes, those correct instructions did not undo the harm of the improper sole proximate cause instruction. The court correctly instructed the jury to consider whether the defendant's alleged negligence was a substantial factor in bringing about the plaintiff's injuries. Immediately thereafter though, the court instructed the jury that there may be other significant causes of the plaintiff's injuries which contribute so powerfully to the production of the injuries as to make the defendant's negligent contribution to the injuries trivial or inconsequential, underscored the defendant's unsupported theory that the plaintiff's postsurgical conduct was the cause of the perforation, and erroneously instructed the jury that, "if you find that the plaintiff's actions were the sole proximate cause of his injuries, then you will find for the defendant." Thus, the court suggested to the jury that competent evidence existed to support the defendant's theory, and, given the lack of such evidence, the jury was put in the position of speculating as to whether the plaintiff's actions were the sole proximate cause of his injuries.

Third, the arguments of counsel demonstrate that the defendant's sole proximate cause theory played a large role at trial. In her closing argument, the defendant's counsel focused on proving the sole proximate cause theory, stating that "it was actually [the plaintiff's] own postoperative manipulation of his surgical site that resulted in . . . the development of a two centimeter perforation . . . ." In making her argument, the defendant's counsel emphasized that the stitches in the plaintiff's nose were "right at the entrance to the nose and that the sutures that overlie those septal splints go through

and through, and . . . they're tied . . . down by the entrance to the nose in an area that clearly can be easily reached and disrupted by stuffed tissues, a finger, a stretching or pulling of the lip, and a pulling on the nose. *The notion that the manipulation two days postoperatively that's recorded in* [*the defendant's*] *detailed office note could not disrupt his handiwork is, in a word, preposterous*." In addition, she argued that the plaintiff's postsurgical conduct constituted the kind of trauma that Bogdasarian acknowledged theoretically could be a possible cause of a perforation, although there was no evidence presented at trial that the plaintiff in fact manipulated his nose in the way Bogdasarian stated could be traumatic.[22] The defendant's counsel then argued: "Ladies and gentlemen, we submit to you that this is exactly what happened. That the events documented by [the defendant relating to the plaintiff's manipulation of his nose and lip] two days postoperatively on January 4, 2013, happened and they happened as [the defendant] documented them."

[22] "[The Defendant's Counsel]: Which brings us to the other possible cause that [Bogdasarian] acknowledges is in the short list of causes of nasal septal perforation after septoplasty, and that is trauma. That testimony came out when he was on direct by [the plaintiff's counsel]. And then I followed up and asked him about that. Let's talk about trauma, [Bogdasarian]. He did not want to consider that as a possibility. Remember those questions, you think if somebody stuffed tissue up their nose, put a finger up their nose, no way, those stitches are up way too high . . . . Where were those stitches? I don't know. What kind of suture material did he use? I don't know. What kind of splints did he use? I don't know. How do you determine how tight he put those sutures in? I don't know. But for sure trauma couldn't have done it in this case.

"Okay. What if trauma does happen to the nasal septum and causes perforation, what's that clinical context? Well, you have trauma and that can be by force, that can be by manipulation. I don't think it happened in this case; I asked him that hypothetical; I don't think it happened in this case but it can do it. If it does it, what happens? A hematoma forms on the septum. Remember that? A hematoma. And I said, A hematoma, is that a blood clot? And he said yes. That didn't happen here, says [Bogdasarian].

"But yesterday you did hear [the plaintiff] talk about what happened to him on the 17th, exactly two weeks post-op. Remember that? He had an episode of bleeding, he got in the shower, and he passed a two inch blood clot. Remember that?"

Finally, at the outset of closing argument the defendant's counsel expressly invited the jury to form its own expert opinion by stating that, "[i]n order for the plaintiff to prevail you must believe [Bogdasarian]. In order for [the defendant] to prevail you need only believe him." The plaintiff's counsel, of course, argued that the plaintiff could not have been the cause of his own injuries and further that Bogdasarian had been the only expert to discuss the cause of the perforation in terms of reasonable medical probability and had stated that the plaintiff's actions could not have caused his injuries. Thus, the issue of the plaintiff's postsurgical conduct and whether it was the sole proximate cause of the plaintiff's injuries was a central issue in the case and a particular focus of the defendant's argument to the jury.

Finally, the record reflects that the jury may have been misled by the court's sole proximate cause instruction. During deliberations, the jury asked the court three questions: (1) "Can we see [the] diagram again where [the defendant] showed where he placed stitches?" (2) "Where is [the] perforation in relationship to the stents?" (3) "Can we please obtain testimony from [Bogdasarian] regarding the olfactory structures?" These questions suggest that the jury was considering whether the plaintiff's actions caused his injuries, as the defendant's counsel stated during closing argument that the stitches in the plaintiff's nose were "right at the entrance to the nose and that the sutures that overlie those septal splints go through and through, and . . . they're tied . . . down by the entrance to the nose in an area that clearly can be easily reached and disrupted by stuffed tissues, a finger, a stretching or pulling of the lip, and a pulling on the nose. The notion that the manipulation two days postoperatively that's recorded in [the defendant's] detailed office note could not disrupt his handiwork is, in a word, preposterous." That the jury asked for Bogdasarian's testimony on the structure of the nose, where the perforation was

in relation to the stents, and where exactly the defendant placed the stitches, indicates that it was trying to determine whether the plaintiff's actions interfered with the stitches in his nose and, further, whether those stitches tore to create the perforation. Such an exercise, in the absence of expert testimony supporting such a theory, would amount to speculation by the jury. The jury would not have engaged in such speculation had the court correctly given the plaintiff's proposed sole proximate cause instruction.

For the foregoing reasons, we conclude that the likelihood of actual prejudice to the plaintiff is significant enough to warrant a new trial.

The judgment is reversed and the case is remanded for a new trial.

In this opinion the other judges concurred.

DANIEL CARTER *v.* COMMISSIONER OF CORRECTION (AC 44979)

Moll, Cradle and Clark, Js.

Syllabus

The petitioner, who had been convicted of various crimes in connection with the aggravated sexual assault of the victim, sought a writ of habeas corpus. He alleged that his trial counsel provided ineffective assistance because he failed to investigate certain evidence, namely, tissues containing biological material found at the scene of the alleged crime, and to submit that evidence for DNA analysis, and, but for that deficiency, the jury would have decided differently. The habeas court denied in part the petition, and, on the petitioner's certified appeal to this court, *held*: the habeas court properly denied in part the petition for a writ of habeas corpus, the petitioner having failed to meet his burden under the prejudice prong of the test set forth in *Strickland* v. *Washington* (466 U.S. 668) that, if his trial counsel had submitted the biological material for DNA analysis, there was a reasonable probability that the outcome of his trial would have been different: the record did not support the petitioner's assertion that his theory of mistaken identity would have

been bolstered by DNA test results demonstrating that he was not a contributor to the biological material on the tissues because, as the court aptly found, the link between the tissues soiled with fecal matter and the perpetrator, or even the offense, had not been established, and, aside from the victim's testimony as to the petitioner's use of tissues after the assault, there was no evidence presented that the soiled tissues had any connection to the assault, as they did not contain spermatozoa or seminal fluid and did not match the tissues found in the petitioner's vehicle where the assault had taken place; moreover, as the court emphasized, the state's case against the petitioner was not dependent on the tissues and, instead, relied on evidence of the victim's fingerprint on the petitioner's vehicle, a firearm recovered from the petitioner's residence, unaccounted for time during which the petitioner was absent from work, and the victim's identification of the petitioner as the person who sexually assaulted her; furthermore, because the petitioner failed to meet his burden under the prejudice prong of the *Strickland* test, this court did not need to address the petitioner's argument as to the performance prong of that test.

Argued February 6—officially released May 23, 2023

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Bhatt, J.*; judgment denying in part the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

Robert L. O'Brien, assigned counsel, with whom, on the brief, was *Christopher Y. Duby*, assigned counsel, for the appellant (petitioner).

Melissa L. Streeto, senior assistant state's attorney, with whom, on the brief, were *John P. Doyle*, state's attorney, and *Adrienne Russo*, senior assistant state's attorney, for the appellee (respondent).

Opinion

CRADLE, J. The petitioner, Daniel Carter, appeals following the grant of his petition for certification to appeal from the judgment of the habeas court denying in part his petition for a writ of habeas corpus alleging

ineffective assistance of counsel. On appeal, the petitioner claims that the habeas court incorrectly concluded that his trial counsel did not provide ineffective assistance by failing to investigate evidence containing biological material found at the crime scene and to submit that evidence for DNA analysis. We affirm the judgment of the habeas court.

The following facts, as set forth by the habeas court, and procedural history are relevant to the petitioner's claim on appeal. The petitioner was convicted after a jury trial of aggravated sexual assault in the first degree in violation of General Statutes (Rev. to 1995) § 53a-70a (a) (1), attempt to commit aggravated sexual assault in the first degree in violation of General Statutes (Rev. to 1995) §§ 53a-49 (a) (2) and 53a-70a (a) (1), kidnapping in the first degree in violation of General Statutes § 53a-92 (a) (2) (A), and commission of a class A, B, or C felony with a firearm in violation of General Statutes § 53-202k. The court, *Fracasse*, *J.*, sentenced the petitioner to a total effective sentence of seventy years of incarceration. The judgment of conviction was affirmed. See *State* v. *Carter*, 45 Conn. App. 919, 696 A.2d 1322, cert. denied, 243 Conn. 911, 701 A.2d 334 (1997).

The habeas court, in its memorandum of decision, then set forth portions of this court's decision that summarized the underlying facts in addressing the petitioner's appeal from the denial of a petition for a new trial.[1] "The petitioner's conviction stemmed from a kidnapping and sexual assault that occurred in the early morning hours of May 24, 1995. At the time of the incident, the victim, a self-identified chronic drug abuser, was battling a $300 a day crack cocaine habit. To support

[1] The petition for a new trial was based on the discovery of the same DNA evidence at issue in the present appeal. See *Carter* v. *State*, 159 Conn. App. 209, 210–11, 122 A.3d 720, cert. denied, 319 Conn. 930, 125 A.3d 204 (2015).

her habit, the victim frequently stole and engaged in prostitution. On May 24, 1995, at approximately 2 a.m., the victim left the apartment she shared with her fiancé in the Fair Haven section of New Haven to purchase and smoke crack cocaine. She had last smoked crack cocaine around 1:30 a.m. and was craving more. The victim had walked about four blocks when she saw a man in a burgundy car driving around [her]. She approached the car, and the man, who had his window open, offered her a ride. The area was illuminated by streetlights, and thus she was able to see the man's face. He was a [B]lack male, heavy set, with thick glasses, very short hair, and a little mustache. He said his name was Devon.

"The victim got into the car, and the man agreed to take her to Quinnipiac Avenue. Shortly thereafter, he said he had to make a quick stop. He stopped the car on Bailey Street, sat back in his seat, and reached down and pulled out a big black gun. The victim heard a clicking noise, which she immediately recognized as the sound of a gun being cocked. The man put the gun to the victim's head and told her that if she did what he said, he would not harm her. He ordered the victim to perform oral sex on him. Fearing for her safety, she did so. After a few minutes, he told the victim to remove her pants. The victim partially disrobed, removing one of her pant legs. The man, still holding the gun to the victim's head, penetrated her vaginally with his penis. He told the victim to turn over, and then he attempted to penetrate her anally. The victim testified that it was hurting so bad, I started to holler and cry real loud. He stopped, told the victim to stop crying, and handed her some tissues from a tissue box on the backseat of the car to wipe her eyes. He then penetrated the victim vaginally a second time and ejaculated inside her. When he had finished assaulting the victim, he got off of her, put the gun down, wiped his penis off with tissues from

the backseat, and threw them out of the car window. After he had zipped up his pants, he drove down the street, took a right, and dropped the victim off at the corner at her request. He then backed his car all the way up the street, and left.

"The victim, who had a criminal record and was on probation, did not initially report the incident to the police. Instead, she went home, showered, and went to bed. The next morning, the victim met with her probation officer, Lisa D'Amato, at the Office of Adult Probation in New Haven. As the victim was exiting D'Amato's office, she saw a man in the hallway whom she immediately recognized as the man who had sexually assaulted her. The victim went back into D'Amato's office and told her that she had been raped and that she had just identified the man who had done it. D'Amato contacted the police, and the victim went home, where she was interviewed by Officer Martin D'Adio of the New Haven Police Department. Shortly thereafter, the victim gave D'Adio descriptions of her assailant and his vehicle. She described the vehicle as a red, two door sedan. The victim later identified the petitioner in a showup identification conducted on the street outside of the probation office. The police located the petitioner's vehicle parked on State Street, across from the probation office. The victim accompanied police officers to that location, where she identified the vehicle as that driven by her assailant. The victim told D'Adio that he would find a box of tissues on the backseat of the vehicle. When D'Adio looked inside the vehicle, he confirmed that there was a box of tissues on the backseat. The victim then directed D'Adio to the location where the assault allegedly had taken place. The victim pointed out several tissues soiled with fecal matter lying on the ground, and identified them as the tissues that the petitioner had used to wipe himself off with following the assault. D'Adio seized the tissues and bagged them as evidence.

"D'Adio then drove the victim to Yale-New Haven Hospital, where she was treated for sexual assault. A forensic examination was performed and biological evidence for a rape kit was collected. The victim reported to attending medical personnel that she had been raped, anally, orally and vaginally, at gunpoint.

"The police later executed a search warrant at the petitioner's home, where they seized a black, semiautomatic handgun and a magazine from the second drawer of a bureau in the bedroom. The petitioner's wife testified that the handgun was in the drawer when the petitioner left for work on the evening of the alleged assault, and that it was still in the drawer at 2 a.m. The petitioner's car also was seized. Detective Christopher Grice testified concerning the forensic investigation of the petitioner's vehicle. Grice testified that he had lifted a latent print from the exterior passenger side door of the vehicle that was consistent with the victim's right thumbprint. Detective Robert Benson also examined the print and confirmed the identification.

"The petitioner agreed to be interviewed by the police. The petitioner stated that he had been working at the Howmet Corporation in North Haven on the morning of the assault. A subsequent check by the police of the petitioner's employment records, however, revealed that he had clocked out of work at 1:44 a.m. on May 24. The petitioner's supervisor at Howmet, Steve Nilsen, related to the police that, on that day, the petitioner had told him that his mother-in-law had died suddenly, and therefore that he was needed at home. Nilsen did not see the petitioner for the remainder of the shift. The police subsequently determined, after speaking with the petitioner's wife, that his mother-in-law was still alive and living in Hartford. When confronted by the police about his employment records—specifically, his recorded 1:44 a.m. departure time—the petitioner maintained that he had been at work for his

full shift on May 24, and suggested that he must have forgotten to clock back in after his break. Unprompted, the petitioner further offered that, on the day of the assault, he had had sexual intercourse with an old friend named Charmilla Brooks. He stated that this sexual encounter took place in the front seat of his vehicle at a McDonald's restaurant around 10 a.m. Police investigators were unable to locate a person named Charmilla Brooks.

"Beryl Novitch, a biochemist with the Connecticut Forensic Science Laboratory (laboratory), was called as a defense witness. Novitch testified concerning her examination of the biological samples collected by medical personnel who treated the victim for sexual assault, the soiled tissues collected at the crime scene, and the tissue box found on the backseat of the petitioner's vehicle. Novitch testified that the tests she performed on these items did not detect the presence of spermatozoa or seminal fluid. She was able to detect the presence of fecal matter on the tissues found at the crime scene. On cross-examination, the prosecutor elicited testimony that the waffle design on the soiled tissues did not match the waffle design on the tissues found in the open tissue box in the petitioner's vehicle. Although the difference in the waffle design was not highlighted for the jury in the state's closing argument, the prosecutor did argue, consistent with D'Adio's testimony, that the soiled tissues at the crime scene had been collected by the police out of prudence, even though it could not be determined whether they had any connection to the assault." (Footnotes omitted; internal quotation marks omitted.) *Carter* v. *State*, 159 Conn. App. 209, 211–16, 122 A.3d 720, cert. denied, 319 Conn. 930, 125 A.3d 204 (2015).

The habeas court then set forth the following: "[The petitioner] first filed a consent petition for DNA testing of the soiled tissues and, after that DNA testing showed

he was not a contributor of DNA to those materials [in 2008 and 2009], filed a petition for a new trial on the basis of newly discovered evidence. See *Carter* v. *State*, Docket No. CV-12-6032165-S, 2013 WL 4504920 (Conn. Super. August 7, 2013). [The petitioner] had request[ed] that the soiled tissues recovered at the crime scene be subjected to DNA testing. Neither the state nor the defense had requested DNA testing in 1995 or 1996. Based on the results of the DNA testing, which excluded the petitioner as a possible contributor of DNA to the biological material on the tissues, the petitioner filed [a] . . . petition for a new trial pursuant to General Statutes § 52-270. His petition was based on a claim of newly discovered evidence, which was supported by allegations that [t]he DNA testing procedures used for casework by the [laboratory] before June 6, 1996, would not have been capable of identifying DNA profiles from the biological material recovered from the tissues. The petitioner further alleged, on that basis, that the results of the DNA testing are newly discovered evidence that was not discoverable or available at the time of the original trial. *Carter* v. *State*, supra, 159 Conn. App. 216–17.

"[The petitioner] presented one witness, Carll Ladd, [a forensic laboratory analyst], in support of his petition for a new trial. Id., 217–21. Ultimately, the court, [*Young*, *J.*] concluded that the petitioner had failed to present evidence that the DNA technology available at the time of his trial could not have been utilized to exclude him as a contributor of DNA to the biological evidence on the soiled tissues, thus foreclosing his claim that the results from the DNA testing performed in 2008 constituted newly discovered evidence under § 52-270. The court thus dismissed the petition for a new trial. . . . Id., 221. Nevertheless, the court in the alternative addressed the petition for a new trial on its merits, concluding that [the petitioner] had failed to meet three

of the four prongs of the applicable test. [See] *Shabazz* v. *State*, 259 Conn. 811, [820–21], 792 A.2d 797 (2002); *Asherman* v. *State*, 202 Conn. 429, 434, 521 A.2d 578 (1987) (the evidence (1) is newly discovered such that it could not have been discovered previously despite the exercise of due diligence; (2) would be material to the issues on a new trial; (3) is not cumulative; and (4) is likely to produce a different result in the event of a new trial).

"Judge Young noted that the first *Asherman* prong was not satisfied because [t]he court [had] found that DNA testing existed in 1996 which would have yielded the same result as the 2008 and 2009 testing. Therefore, such new testing does not constitute newly discovered evidence. *Carter* v. *State*, supra, 2013 WL 4504920, *[3–4]. Judge Young further noted that two other *Asherman* prongs [had] not been met by the petitioner, that the newly discovered evidence would be material to the issues on a new trial and that it is likely to produce a different result in the event of a new trial. *Asherman* [v. *State*], [supra], 202 Conn. 434. The subject tissues were not recovered by the police from the scene until approximately fifteen hours after the incident had occurred. . . . The [state] specifically did not attempt to utilize these tissues in support of its case and, in closing argument, refuted that the tissues were to be considered by the jury, calling them a red herring.

"[Judge Young further stated that] [t]he petitioner makes much of the fact that there was a presence of fecal material on the tissues. However, the petitioner ignores the [victim's] testimony that the perpetrator was unsuccessful in his attempt at anal rape. Although the petitioner presented the testimony of a social worker that the [victim] told her that she was raped anally, orally and vaginally . . . the [victim] herself testified [that the petitioner] tried to penetrate [her] anus.

. . . The [victim] informed the physician who interviewed her prior to conducting the rape examination that her rectum was not penetrated. The investigating officer described the tissues as very soiled with feces. Furthermore, the forensic examiner in the underlying trial testified that the tissues which had fecal material on them contained no sperm and did not match the tissues in the tissue box recovered from the petitioner's car. Cumulatively, the testimony was that the [victim] was not anally penetrated, and that the recovered tissues did not match the tissues in the tissue box recovered from the petitioner's car, had a substantial amount of fecal material and there was no presence of semen on them. As there was no evidence elicited in the underlying trial which tied the tissues to the crime, it is irrelevant that the petitioner was excluded as a source of the biological material contained in the tissues. . . . [See] *Carter* v. *State*, supra, 2013 WL 4504920, *[4].

"The Appellate Court noted that [the petitioner] alleged that the DNA evidence was newly discovered on the ground that it could not have been obtained using the technology that was available in 1995 and 1996. Ladd, however, debunked that proposition entirely, and the petitioner presented no other evidence from which the trier of fact could have drawn an inference to the contrary. [*Carter* v. *State*, supra, 159 Conn. App.] 226." (Emphasis omitted; footnotes omitted; internal quotation marks omitted.)

On November 23, 2015, the petitioner filed a petition for a writ of habeas corpus and requested that the court appoint him counsel. After the petitioner was appointed counsel, he filed an amended petition on February 26, 2019, in which he claimed both ineffective assistance of his trial counsel, Attorney Earl Williams, and a violation of his due process rights as to the conviction for

kidnapping in the first degree.[2] The petitioner alleged, inter alia, that Williams' representation was deficient because he failed to investigate evidence containing biological material found at the crime scene and to submit that evidence for DNA analysis, and, but for that deficiency, the jury would have decided differently.[3] The petitioner's claims were tried before the habeas court, *Bhatt*, *J.*, on February 25, 2020, and February 9, 2021. On July 30, 2021, the habeas court issued its memorandum of decision denying in part and granting in part the petitioner's petition for a writ of habeas corpus.[4]

In its memorandum of decision, the habeas court recounted that, "[a]t the habeas trial, [the petitioner] again presented the testimony of [Ladd], as well as that of his expert witness, Attorney Frank Riccio II. According to Ladd, DNA testing was available in 1992 on a very limited basis, but steadily increased with time, so that by 1995 such testing was more available. Ladd became involved in the present case in either 2008 or 2009, when he was the technical reviewer of the DNA reports done pursuant to the request for DNA testing in conjunction with the petition for a new trial. [The

[2] The parties stipulated that the petitioner's habeas petition, as to his due process claim under *State* v. *Salamon*, 287 Conn. 509, 949 A.2d 1092 (2008)—alleging that the restraint underlying his kidnapping conviction was incidental to the restraint necessary to commit sexual assault in the first degree—should be granted. The habeas court accordingly granted the petition, in part, as to the petitioner's due process claim. Resultantly, the habeas court vacated the petitioner's kidnapping conviction, and remanded the matter to the trial court for further proceedings. The due process issue is not a subject of this appeal.

[3] The petitioner also alleged that his trial counsel was ineffective insofar as he failed to file a motion to correct an illegal sentence. On appeal, the petitioner does not challenge the habeas court's rejection of this claim. Consequently, our review is limited to the petitioner's claim that Williams was ineffective for failing to investigate the tissues containing biological material found at the crime scene and to submit the biological material for DNA analysis.

[4] See footnote 2 of this opinion.

petitioner] was eliminated as a DNA source or contributor to all samples tested—four tissue samples, one genital swab. The fecal matter on the recovered tissues, which were collected in 1995, but not tested in 2009, had human DNA present. However, that DNA was degraded.

"Riccio testified about the standard of care for defense counsel in sexual assault cases that involve DNA. According to Riccio, the standard of care is for counsel to have available evidence tested to determine if tested DNA belongs to a client or another individual. Riccio conceded that such testing runs the risk of confirming a client's DNA is in a sample and that defense counsel is stuck with the results if they do not favor the client. Conversely, if the DNA results confirm that a client is not a contributor to tested samples, then that is helpful to the defense. Riccio also acknowledged that it would be reasonable for defense counsel to forgo DNA testing after consulting with a client and obtaining the client's consent to not request DNA testing, but that counsel must have such testing performed if the client persists."

The habeas court further noted that "Williams represented the petitioner at all times relevant" to the petitioner's ineffective assistance of counsel claim and is now deceased. Moreover, "the record does not reflect that [Williams] ever testified in any proceeding." The habeas court found that "[i]t is unknown and unknowable if Williams considered DNA testing and, if he did consider it, why it was not requested."

The habeas court denied the petitioner's petition as to his claim of ineffective assistance of counsel because it concluded that the petitioner failed to prove that Williams' representation of him was deficient and that he was prejudiced by that alleged deficiency, as required under the two-pronged test set forth in *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052,

80 L. Ed. 2d 674 (1984). The habeas court thereafter granted certification to appeal, and this appeal followed.

We begin our analysis by setting forth the standard of review and relevant legal principles. "When reviewing the decision of a habeas court, the facts found by the habeas court may not be disturbed unless the findings were clearly erroneous." (Internal quotation marks omitted.) *Diaz* v. *Commissioner of Correction*, 214 Conn. App. 199, 212, 280 A.3d 526, cert. denied, 345 Conn. 967, 285 A.3d 736 (2022). "[W]hether the representation [that] a defendant received at trial was constitutionally inadequate is a mixed question of law and fact. . . . As such, that question requires plenary review by this court unfettered by the clearly erroneous standard. . . . Under the *Strickland* test, when a petitioner alleges ineffective assistance of counsel, he must establish that (1) counsel's representation fell below an objective standard of reasonableness, and (2) counsel's deficient performance prejudiced the defense because there was a reasonable probability that the outcome of the proceedings would have been different had it not been for the deficient performance. . . . Furthermore, because a successful petitioner must satisfy both prongs of the *Strickland* test, failure to satisfy either prong is fatal to a habeas petition. . . .

"To satisfy the first prong, that his counsel's performance was deficient, the petitioner must establish that his counsel made errors so serious that [counsel] was not functioning as the counsel guaranteed the [petitioner] by the [s]ixth [a]mendment. . . . The petitioner must thus show that counsel's representation fell below an objective standard of reasonableness considering all of the circumstances. . . . [A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption

that, under the circumstances, the challenged action might be considered sound trial strategy. . . . Furthermore, the right to counsel is not the right to perfect counsel." (Citations omitted; internal quotation marks omitted.) Id., 212–13.

"To satisfy the prejudice prong, a claimant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . . A reasonable probability is a probability sufficient to undermine confidence in the outcome. . . . In its analysis, a reviewing court may look to the performance prong or to the prejudice prong, and the petitioner's failure to prove either is fatal to a habeas petition." (Internal quotation marks omitted.) *Lance W.* v. *Commissioner of Correction*, 204 Conn. App. 346, 355, 251 A.3d 619, cert. denied, 337 Conn. 902, 252 A.3d 363 (2021). "In a habeas proceeding, the petitioner's burden of proving that a fundamental unfairness had been done is not met by speculation . . . but by demonstrable realities." (Internal quotation marks omitted.) *Ayuso* v. *Commissioner of Correction*, 215 Conn. App. 322, 369, 282 A.3d 983, cert. denied, 345 Conn. 967, 285 A.3d 736 (2022).

The habeas court denied the petitioner's petition on the grounds that he failed to satisfy both the performance prong and the prejudice prong. On appeal, the petitioner challenges the habeas court's conclusions as to both prongs. Because we agree with the habeas court that the petitioner failed to meet his burden under the prejudice prong of the *Strickland* test, we need not address the petitioner's argument as to the performance prong. See *Harris* v. *Commissioner of Correction*, 205 Conn. App. 837, 857, 257 A.3d 343 ("[a]lthough a petitioner can succeed only if he satisfies both prongs, a reviewing court can find against the petitioner on either ground" (internal quotation marks omitted)), cert. denied, 339 Conn. 905, 260 A.3d 484 (2021).

In its memorandum of decision, the habeas court concluded that the petitioner failed to meet his burden under the prejudice prong, finding that "[t]he state's case was based on identification and other evidence such as the [victim's] print on [the petitioner's] vehicle, the firearm recovered from his residence, and the unaccounted time [the petitioner] was absent from work with his disproven explanation." The habeas court determined, based on the evidence that was before the jury, that "[the petitioner] has not undermined this court's confidence in the outcome of the jury trial."

Although the petitioner does not challenge any of the habeas court's findings of fact, he nevertheless argues that Williams' failure to have the tissues containing biological material DNA tested was prejudicial because the victim's "identification of the petitioner was the central issue in his trial and . . . the lack of forensic evidence exculpating the petitioner was a major theme in the state's case." The record does not support the petitioner's assertion that his theory of mistaken identity would have been bolstered by DNA test results demonstrating that he was not a contributor to the biological material on the tissues found at the crime scene because, as the habeas court aptly found, the link between the tissues and the perpetrator—or even the offense—had not been established. Aside from the victim's testimony as to the petitioner's use of tissues after the assault, there was no evidence presented that the tissues found at the crime scene had any connection to the assault—they did not contain spermatozoa or seminal fluid and did not match the tissues found in the petitioner's car. Further, as the habeas court emphasized, the state's case against the petitioner was not dependent on the tissues,[5] and instead relied on evidence of the victim's fingerprint on the petitioner's vehicle, the firearm recovered from the petitioner's residence, the unaccounted for time during which the

[5] During closing arguments in the underlying criminal trial, the state disavowed any reliance on the tissues collected from the crime scene.

petitioner was absent from work, and the victim's identification of the petitioner as the person who sexually assaulted her. On the basis of the foregoing, the habeas court properly concluded that the petitioner failed to demonstrate that, if Williams had submitted the biological material for DNA analysis, there is a reasonable probability that the outcome of the petitioner's trial would have been different. Accordingly, the court properly denied the petition for a writ of habeas corpus.

The judgment is affirmed.

In this opinion the other judges concurred.

NICOLE AHERN *v.* BOARD OF EDUCATION OF REGIONAL SCHOOL DISTRICT NUMBER 13 ET AL.
(AC 45249)

Prescott, Clark and Seeley, Js.

Syllabus

The plaintiff, a former high school student, sought damages from the defendant cheerleading coaches, M and B, for injuries that she suffered while attempting a stunt during a cheerleading practice at the high school she attended. The plaintiff's complaint alleged claims of negligence against, inter alia, M, B, and the defendant board of education and the defendant V, the superintendent of schools. The plaintiff also alleged counts of negligence against the defendant town of Middlefield and the defendant P, the high school's cheerleading consultant, but those counts remained pending as they did not seek summary judgment. The plaintiff also alleged that the board was required to indemnify its employees, M, B, V and P, pursuant to statute (§ 10-235). The trial court rendered summary judgment in part in favor of M, B, V, and the board, concluding that the plaintiff's negligence claims were barred by governmental immunity pursuant to statute (§ 52-557n (a) (2) (B)) because the plaintiff failed to establish that the identifiable person-imminent harm exception to governmental immunity applied. On the plaintiff's appeal to this court, *held*:

1. The summary judgment rendered by the trial court with respect to some, but not all, counts of the complaint brought against the board was not an appealable final judgment as to the board and, accordingly, the plaintiff's appeal as to the board was dismissed; even if this court were

to assume that the disposition of the negligence counts as to M, B and V implicitly disposed of the corresponding derivative § 10-235 indemnification counts against the board, because the trial court did not dispose of the pending negligence count against P, and because that court did not explicitly address the counts brought against the board pursuant to § 10-235, it could not have implicitly rendered judgment for the board on the indemnification count pertaining to P.

2. The trial court properly rendered summary judgment in favor of V, M, and B on the ground that they are entitled to governmental immunity because there was no genuine issue of material fact that the plaintiff was not subject to imminent and apparent harm; V, M, and B put forth evidence in support of their motion for summary judgment establishing that the alleged dangerous condition, namely, the continued execution of a certain cheerleading stunt after the plaintiff repeatedly had fallen safely and without injury during the same practice while performing that same stunt, did not subject the plaintiff to imminent and apparent harm:

a. The plaintiff did not demonstrate a genuine issue of material fact that she was subject to imminent and apparent harm because she had fallen several times prior to falling and hitting her head; the repeated failed stunt attempts during the same practice did not tend to establish that continuing to practice the stunt exposed the plaintiff to a high probability of harm, as there was no evidence that she had been injured in these previous attempts, there was no evidence that the bases and back spotter cheerleaders had been unable to catch her when she followed her training and fell backward or that she had hit the mats when she unsuccessfully attempted the stunt and, during her previous failed attempts of the stunt, she had neither fallen forward nor fallen and hit her head.

b. The plaintiff could not prevail on her claim that there was a genuine issue of material fact that she was subject to imminent and apparent harm because she had asked M and B "for their help" and had indicated to them that she was "getting worried"; the plaintiff's general, vague request for help, which was made after the previous failed attempts that had not resulted in injury, did not tend to establish that it was apparent to M and B that an injury was so likely to occur that they needed to act to prevent it.

c. The plaintiff did not demonstrate a genuine issue of material fact that she was subject to imminent and apparent harm because B told the plaintiff that B "knew that was going to happen" immediately before the plaintiff fell and hit her head; although this statement, which was made in reference to one of the plaintiff's previous falls, supported the plaintiff's claim that it was apparent to B that the plaintiff would not successfully complete the stunt and would fall, B's statement did not tend to establish that she knew the plaintiff would fall and not be properly caught or hit her head.

d. The plaintiff did not establish that *Sestito* v. *Groton* (178 Conn. 520) was analogous to the present case and, therefore, established that the

harm was imminent and apparent: our Supreme Court has repeatedly stated that *Sestito* is confined to its facts, and this court was not persuaded that the facts in the present case were similar to those in *Sestito*; in the present case, it was undisputed that the plaintiff had always fallen backward into the base and back spotter cheerleaders and, therefore, although M and B witnessed the plaintiff's repeated falls, unlike in *Sestito*, it did not create an "ongoing and escalating scene" in which they failed to intervene to prevent harm to the plaintiff until it was too late.

Argued March 1—officially released May 23, 2023

Procedural History

Action to recover damages for the defendants' alleged negligence, and for other relief, brought to the Superior Court in the judicial district of Middlesex, where the court, *Shah*, *J.*, granted in part the motion for summary judgment filed by the named defendant et al. and rendered judgment thereon, from which the plaintiff appealed to this court. *Appeal dismissed in part*; *affirmed*.

Matthew D. Popilowski, for the appellant (plaintiff).

Thomas R. Gerarde, with whom, on the brief, was *Eric E. Gerarde*, for the appellees (named defendant et al.).

Opinion

PRESCOTT, J. The plaintiff, Nicole Ahern, a former student of Coginchaug Regional High School (high school) and a former member of the high school's cheerleading squad, brought this action against the defendants, the Board of Education of Regional School District Number 13 (board); Kathryn Y. Veronesi,[1] the superintendent of Regional School District Number 13; Paula Murphy, the high school's head cheerleading coach; and Marissa Barletta, the high school's assistant

[1] Kathryn Y. Veronesi is also known as Kathryn Y. Serino.

cheerleading coach.[2] The plaintiff alleged that, due to the negligence of the defendants and the board, she was injured while attempting a stunt during the high school's cheerleading practice. The plaintiff appeals from the partial summary judgment the trial court rendered in favor of the defendants and the board on the ground that governmental immunity barred certain counts of the action.

The plaintiff claims on appeal that the court improperly rendered summary judgment because there are genuine issues of material fact as to whether she was subject to imminent and apparent harm and was an identifiable individual pursuant to the identifiable person-imminent harm exception to governmental immunity. After oral argument, this court ordered the parties to file supplemental briefs addressing whether this appeal should be dismissed, in part, for the lack of a final judgment as to the board because the trial court did not dispose of all of the counts brought against it.

We conclude that (1) the summary judgment rendered with respect to some, but not all, counts of the complaint brought against the board is not an appealable final judgment as to the board, and (2) the court properly rendered summary judgment in favor of Veronesi, Murphy, and Barletta on the ground that they are entitled to governmental immunity because there is no genuine issue of material fact that the plaintiff

[2] Nicole Perlini, the high school's cheerleading consultant, and the town of Middlefield, the town in which the plaintiff resides, also were named as defendants. Perlini and the town of Middlefield did not appear in the trial court and the matter remains pending as to them. The plaintiff has not moved to default them for failure to appear. Therefore, Perlini and the town of Middlefield did not seek a summary judgment in their favor and they have not participated in this appeal. Furthermore, for the reasons set forth in this opinion, the plaintiff's appeal is dismissed in part as it pertains to the board and all references to the defendants in this opinion are to the individual defendants Veronesi, Murphy, and Barletta only.

was not subject to imminent and apparent harm.[3] Accordingly, we dismiss the plaintiff's appeal as it pertains to the board and affirm the court's judgment in favor of Veronesi, Murphy, and Barletta.

The record before the court reveals the following facts, viewed in the light most favorable to the plaintiff as the nonmoving party, and procedural history. The plaintiff was a student at the high school and, from the fall of 2014 through February, 2018, she was also a member of the high school's cheerleading squad. Cheerleading is an extracurricular activity and cheerleading practices are held at 3 p.m. after school hours. The high school's cheerleading squad performs after school hours at sporting events and competitions but also performs for the student body during regular school hours at certain school events.

The high school allowed the plaintiff to receive a limited number of physical education credits toward her graduation requirements for her participation in certain extracurricular activities. The plaintiff previously had elected to receive these credits for cheerleading. At the time she was injured, she already had completed the required credits.

On February 8, 2018, the plaintiff attended cheerleading practice after regular school hours in the high school gymnasium. Murphy and Barletta were present and supervised the practice. During the practice, the plaintiff and other members of the cheerleading squad were

[3] Because the plaintiff would need to demonstrate that (1) there was an imminent harm, (2) she was an identifiable victim, and (3) it was apparent to the defendants and the board that their conduct was likely to subject her to that harm; see *Brooks* v. *Powers*, 328 Conn. 256, 266, 178 A.3d 366 (2018); our conclusion that the plaintiff was not subject to an apparent and imminent harm is dispositive of this appeal and we do not reach the issue of whether the plaintiff was an identifiable person pursuant to the identifiable person-imminent harm exception to governmental immunity. See footnote 12 of this opinion.

practicing a stunt. The plaintiff was acting as the flyer for the stunt, which meant that the other cheerleaders lifted her into the air. With the assistance of the cheerleaders in the base and back spotter positions, the plaintiff was then lowered back to the ground in a controlled manner after the stunt attempt was either successful or unsuccessful. If the stunt was unsuccessful, the flyer could fall backward but still safely land on her feet with the assistance of the cheerleaders acting as the bases and back spotter.

While practicing the stunt during the February 8, 2018 practice, some of the stunt attempts were unsuccessful, and the plaintiff fell approximately seven times without injury. Following these repeated failed stunt attempts, the plaintiff asked Murphy and Barletta for their "help" with the stunt. In response, they told her to continue practicing it. Barletta also told the plaintiff that she "knew" the plaintiff "was going to fall that last time." Immediately after asking Murphy and Barletta for their help, the plaintiff lost her balance during the next stunt attempt and fell forward. Although she was caught around the waist by the bases and back spotter, she hit her head on the floor mats. As a result of her falling and hitting her head, the plaintiff suffered injuries, including a concussion.

The plaintiff commenced the underlying action on February 4, 2020. The operative amended complaint was filed on May 14, 2020, and contained ten counts. Counts one, two, three, five, seven, and nine sounded in negligence and were brought against the board, the town of Middlefield, Veronesi, Murphy, Barletta, and Nicole Perlini, respectively. In counts four, six, eight, and ten, the plaintiff asserted a claim against the board pursuant to General Statutes § 10-235,[4] which requires

[4] General Statutes § 10-235 provides in relevant part: "(a) Each board of education shall protect and save harmless any member of such board or any teacher or other employee thereof or any member of its supervisory or administrative staff . . . from financial loss and expense, including legal

the board to indemnify its employees from financial loss and expense arising out of allegedly negligent acts that were made within the scope of their employment.[5] The town and Perlini did not file an appearance with the court, but no default has been entered against them and the counts pertaining to them remain pending.[6]

The defendants and the board filed an answer and special defenses to the operative complaint on June 12, 2020. By way of special defense, they asserted that governmental immunity barred all counts sounding in negligence brought against them.[7]

On July 1, 2021, the defendants and the board filed a motion for summary judgment on all counts of the plaintiff's operative complaint brought against them. The memorandum of law in support of their motion argued only that "the negligence claims [were] barred by governmental immunity, to which no exception [was] applicable." The motion for summary judgment was accompanied by a memorandum of law submitted with supporting exhibits. In their memorandum of law, the defendants and the board argued that they were entitled to summary judgment because the negligence counts were barred by governmental immunity according to General Statutes § 52-557n[8] and, thus,

fees and costs, if any, arising out of any claim, demand, suit or judgment by reason of alleged negligence or other act resulting in accidental bodily injury to or death of any person . . . provided such teacher, member or employee, at the time of the acts resulting in such injury, damage or destruction, was acting in the discharge of his or her duties or within the scope of employment or under the direction of such board of education . . . ."

[5] Veronesi, Murphy, Barletta, and Perlini all were alleged to be employees of the board.

[6] Specifically, the counts sounding in negligence brought against the town and Perlini, counts two and nine, remain unresolved.

[7] By way of special defense, the defendants and the board also asserted that the counts seeking indemnification from the board for its employees' acts failed to state a claim upon which relief could be granted and could not be brought properly by the plaintiff.

[8] General Statutes § 52-557n provides in relevant part: "(a) (1) Except as otherwise provided by law, a political subdivision of the state shall be liable

"there [was] no genuine issue of material fact that the defendants [and the board] [were] entitled to summary judgment as a matter of law as to the entirety of the plaintiff's complaint." Specifically, the defendants and the board argued that their purportedly negligent acts or omissions were discretionary acts relating to their public duty and, thus, they were entitled to governmental immunity according to § 52-557n (a) (2) (B). They further argued that no recognized exception to governmental immunity applied to the present case.

In support of their motion for summary judgment, the defendants and the board attached as exhibits affidavits from Murphy and Barletta. Murphy and Barletta attested that "[a] failed stunt attempt where the flyer unsuccessfully completes the stunt, falls and lands on her feet with the assistance of the base and back [spotter] cheerleaders does not expose the flyer to a risk of imminent harm. . . . On February 8, 2018, only a matter of seconds elapsed between when [the plaintiff's] stunt group was performing the stunt properly and when she lost her balance and began to fall . . . . Prior to February 8, 2018, the cheerleaders, including [the plaintiff], were taught the proper technique on how to fall after a failed stunt attempt, which was to fall

for damages to person or property caused by: (A) The negligent acts or omissions of such political subdivision or any employee, officer or agent thereof acting within the scope of his employment or official duties; (B) negligence in the performance of functions from which the political subdivision derives a special corporate profit or pecuniary benefit; and (C) acts of the political subdivision which constitute the creation or participation in the creation of a nuisance; provided, no cause of action shall be maintained for damages resulting from injury to any person or property by means of a defective road or bridge except pursuant to section 13a-149. (2) Except as otherwise provided by law, a political subdivision of the state shall not be liable for damages to person or property caused by: (A) Acts or omissions of any employee, officer or agent which constitute criminal conduct, fraud, actual malice or wilful misconduct; or (B) negligent acts or omissions which require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law. . . ."

backwards into the base and back spotter cheerleaders, and to never fall forward . . . . On February 8, 2018, [the plaintiff] lost her balance and fell forward, with one foot on the mat, she used her hands to brace her fall against the mat, and was caught around the waist by her bases and back spotter, but her head hit the mat . . . . On February 8, 2018, there was no indication that [the plaintiff] would fail to complete a stunt attempt, lose her balance, fall forward, or be injured until the instant she lost her balance and fell. There had been no indication prior to [the plaintiff] losing her balance that she would fall or would be injured . . . . Prior to February 8, 2018, [the plaintiff] and the other members of the cheerleading team had always applied their training and technique to fall backward into the bases and back spotter following a failed stunt attempt . . . . As of February 8, 2018, [the plaintiff] was an accomplished cheerleader and stunt flyer who had successfully performed complex stunts as a flyer on numerous occasions, including the stunt she was practicing when she was injured . . . .”

The plaintiff filed a timely objection to the motion for summary judgment. In her objection, the plaintiff did not dispute that the defendants’ and the board’s allegedly negligent acts or omissions were in performance of their discretionary public duties and that they were entitled to governmental immunity pursuant to § 52-557n (a) (2) (B) unless an exception applied. The plaintiff argued, however, that a genuine issue of material fact existed as to whether the identifiable person-imminent harm exception to governmental immunity applied in the present case. Specifically, the plaintiff argued that, pursuant to the identifiable person-imminent harm exception, (1) she was subject to imminent harm, (2) she was an identifiable victim, and (3) it was apparent to the defendants and the board that their conduct was likely to subject her to harm.

In support of her objection to the defendants' motion for summary judgment, the plaintiff submitted an excerpt of her deposition testimony: "I walked over to [Murphy and Barletta] and I begged them for their help because I was getting worried. We kept, you know, crumbling, and my group just wasn't working well together. And the only real response I got was, we knew that was going to happen. You know, you guys aren't . . . getting it down. Like, let's just keep going. And then . . . [Barletta] said she knew it was going to happen . . . . Right before I had fallen and hit my head." In her deposition, the plaintiff was asked: "When you say 'she knew that was going to happen,' what is 'that'?" The plaintiff explained: "I had fallen. I just didn't hit my head yet. I kept crumbling and crumbling and the group was getting exhausted, and [Barletta] said she knew that I was going to fall that last time. And this is right before I went back in and ended up falling and hitting my head."

The defendants and the board filed a reply memorandum in support of their motion for summary judgment and in response to the plaintiff's objection. In their reply memorandum, they argued that no genuine issue of material fact existed as to whether, pursuant to the identifiable person-imminent harm exception, (1) the plaintiff was not subject to imminent harm, (2) she was not an identifiable person and (3) it was not apparent to them that their conduct was likely to subject her to harm.

Attached to the reply memorandum was a portion of the plaintiff's deposition. In her deposition, the plaintiff attested that, during the same practice or event, a stunt could be successful in one attempt and then unsuccessful in the next attempt. In her deposition, the plaintiff also stated that, even if a stunt attempt was unsuccessful, the cheerleaders were trained to control the flyer's

return to the ground so that the flyer landed softly, feetfirst, on the mat.

On January 4, 2022, the court issued a memorandum of decision and rendered summary judgment in favor of the defendants and the board. The court concluded, on the basis of the pleadings and evidence submitted by the parties, that governmental immunity barred the negligence claims against the defendants and the board and that no exception to governmental immunity applied in the present case. The court determined that there was no genuine issue of material fact that the identifiable person-imminent harm exception did not apply in the present case because the evidence before the court could not support a determination that the plaintiff was either an identifiable individual or a member of an identifiable class of foreseeable victims. The court first concluded that the plaintiff was not an identifiable individual because she was "one of several girls participating in cheerleading practice." The court next concluded that the plaintiff was not a member of an identifiable class of foreseeable victims because she was not compelled to attend cheerleading practice. The court's memorandum of decision did not address counts four, six, eight, and ten seeking indemnification pursuant to § 10-235 against the board. This appeal followed.

On appeal, the plaintiff does not challenge the court's conclusions that the defendants and the board were engaged in discretionary public duties and that they are entitled to governmental immunity unless an exception applies. Instead, the plaintiff claims that the court improperly rendered summary judgment because there was a genuine issue of material fact as to whether the identifiable person-imminent harm exception to governmental immunity applied in the present case. The plaintiff argues on appeal that there was a genuine issue of material fact as to all three prongs of the identifiable person-imminent harm exception or, in other words,

that (1) she was subject to imminent harm, (2) she was an identifiable individual,[9] and (3) it was apparent to the defendants and the board that their conduct was likely to subject her to harm. We conclude that there was no genuine issue of material fact that the plaintiff was not subject to imminent and apparent harm. Because all three elements must be satisfied to establish the identifiable person-imminent harm exception to governmental immunity; see *Brooks* v. *Powers*, 328 Conn. 256, 266, 178 A.3d 366 (2018); this conclusion is dispositive of the plaintiff's claim on appeal against Veronesi, Murphy, and Barletta and we need not determine whether there was a genuine issue of material fact that the plaintiff was an identifiable victim.[10]

[9] "The identifiable person-imminent harm exception applies to narrowly defined classes of foreseeable victims as well as identifiable individuals. . . . Thus far, the only identifiable class of foreseeable victims that we have recognized for these purposes is that of schoolchildren attending public schools during school hours." (Citations omitted; internal quotation marks omitted.) *Cotto* v. *Board of Education*, 294 Conn. 265, 274, 984 A.2d 58 (2009). "[S]choolchildren who are statutorily compelled to attend school, during school hours on school days, can be an identifiable class of victims." (Emphasis omitted; internal quotation marks omitted.) *Durrant* v. *Board of Education*, 284 Conn. 91, 102, 931 A.2d 859 (2007). "An individual may be identifiable for purposes of the exception to qualified governmental immunity if the harm occurs within a limited temporal and geographical zone, involving a temporary condition." (Internal quotation marks omitted.) *Cotto* v. *Board of Education*, supra, 275–76.

The plaintiff does not argue in her principal appellate brief that she was a member of a foreseeable class of victims. The plaintiff argues on appeal only that she was an identifiable individual. Furthermore, the plaintiff's counsel conceded at oral argument before this court that the plaintiff had already received all of the required physical education credits and, therefore, she was not compelled to be at the cheerleading practice.

[10] During oral argument before this court, counsel for the defendants and the board stated that our case law is unclear as to whether an individual always must be compelled to be at a location in order to invoke the identifiable person-imminent harm exception to governmental immunity. To invoke the identifiable person-imminent harm exception, typically an individual must be identifiable either as a member of a narrowly defined class of foreseeable victims or as a specifically identifiable individual. See *Cotto* v. *Board of Education*, supra, 294 Conn. 274. Compulsion is clearly required for an individual to be classified as a member of an identifiable class of

We interpret the court's memorandum of decision as concluding that the defendants and the board were entitled to governmental immunity because there was no genuine issue of material fact that the plaintiff was not an identifiable individual or a member of an identifiable class of foreseeable victims pursuant to the identifiable person-imminent harm exception to governmental immunity. Therefore, our conclusion that there is no genuine issue of material fact that the plaintiff was not subject to imminent and apparent harm is an alternative ground for affirming the court's judgment.

Ordinarily, we do not review issues that the trial court did not decide. *Grady* v. *Somers*, 294 Conn. 324, 349 n.28, 984 A.2d 684 (2009). We will, however, resolve the plaintiff's claim on an alternative ground for affirmance that is dispositive of the issue when "it is a question of

foreseeable victims. It is less clear whether an individual must be compelled to be at the location where and when the injury occurred to be classified as an identifiable individual. Furthermore, counsel for the defendants and the board conceded that there were "facts" to support that the plaintiff was a specific, identifiable individual, despite the concession by the plaintiff's counsel that the plaintiff was not compelled to be at the cheerleading practice.

We note that "whether the plaintiff was compelled to be at the location where the injury occurred remains a paramount consideration in determining whether the plaintiff was an identifiable person or member of a foreseeable class of victims." (Internal quotation marks omitted.) *Strycharz* v. *Cady*, 323 Conn. 548, 575–76, 148 A.3d 1011 (2016). The compulsion requirement, however, is not without contention: "At least three members of our Supreme Court recently have observed that the court's application of the identifiable person-imminent harm exception, particularly with respect to the identifiable person prong of the exception, may be doctrinally flawed, unduly restrictive, and/or ripe for revisiting in an appropriate future case. See *Borelli* v. *Renaldi*, [336 Conn. 1, 59–60 n.20, 243 A.3d 1064 (2020)] (*Robinson*, *C. J.*, concurring); id., 67 (*D'Auria*, *J.*, concurring); id., 67–113, 146–54 (*Ecker*, *J.*, dissenting)." *Buehler* v. *Newtown*, 206 Conn. App. 472, 488 n.14, 262 A.3d 170 (2021). Because we do not reach the issue of whether the plaintiff was an identifiable individual subject to imminent harm, we need not determine whether the "facts" to which counsel for the defendants and the board referred created a genuine issue of material fact as to whether the plaintiff was an identifiable individual despite the plaintiff not being compelled to be at the cheerleading practice.

law, the essential facts of which are undisputed, over which our review is plenary . . . and the plaintiff will not be prejudiced or unfairly surprised by our consideration of this issue . . . .'' (Citation omitted.) Id., 349–50 n.28. In the present case, our review of the court's rendering of summary judgment is plenary; *Recall Total Information Management, Inc.* v. *Federal Ins. Co.*, 317 Conn. 46, 51, 115 A.3d 458 (2015); and the plaintiff will not be prejudiced or unfairly surprised because she raised the issues of whether the harm was imminent and apparent in her principal appellate brief and argued it before the trial court in her objection to the defendants' summary judgment motion.

We further conclude, for the reasons set forth in part I of this opinion, that the court failed to render a final judgment with respect to the board. Accordingly, we dismiss the plaintiff's appeal as to the board and affirm the court's judgment as to Veronesi, Murphy, and Barletta.

I

Because the finality of the court's judgment implicates the jurisdiction of this court to hear the appeal, we first consider whether the trial court's granting of the motion for summary judgment filed by the defendants and the board constitutes a final judgment with respect to the board. In their supplemental briefs, the parties argue that there is a final judgment with respect to the board because the court's rendering of summary judgment in favor of the defendants and the board on the negligence counts against them implicitly resolved the indemnification counts brought against the board.[11]

[11] On April 5, 2023, after oral argument before this court, we ordered the parties, sua sponte, to file supplemental briefs addressing ''whether this appeal should be dismissed, in part, for a lack of a final judgment as to [the board], because the trial court's memorandum of decision did not dispose of all causes of action brought against [the board], in particular counts four, six, eight, and ten asserting claims against [the board] pursuant to . . . § 10-235.'' The parties filed their supplemental briefs on April 25 and 26, 2023.

We conclude that the judgment was not final as it pertained to the board because the court's judgment did not explicitly or implicitly resolve all counts of the complaint brought against the board. Accordingly, we dismiss the plaintiff's appeal as to the partial summary judgment rendered in favor of the board.

We begin by setting forth the relevant legal principles relating to final judgments. "Because our jurisdiction over appeals . . . is prescribed by statute, we must always determine the threshold question of whether the appeal is taken from a final judgment before considering the merits of the claim. . . . A judgment that disposes of only a part of a complaint is not a final judgment. . . . Our rules of practice, however, set forth certain circumstances under which a party may appeal from a judgment disposing of less than all of the counts of a complaint. Thus, a party may appeal if the partial judgment disposes of all causes of action against a particular party or parties . . . ." (Citations omitted; footnotes omitted; internal quotation marks omitted.) *Kelly* v. *New Haven*, 275 Conn. 580, 593–94, 881 A.2d 978 (2005); see Practice Book § 61-3.

"If a party wishes to appeal from a partial judgment rendered against it, barring a limited exception . . . it can do so only if the remaining causes of action or claims for relief are withdrawn or unconditionally abandoned before the appeal is taken.[12]" (Footnote in original.) *Meribear Productions, Inc.* v. *Frank*, 328 Conn. 709, 717, 183 A.3d 1164 (2018).

[12] "Practice Book § 61-4 (a), setting forth the exception to that rule, provides that when partial summary judgment has been granted upon fewer than all of the causes of action against a party, '[s]uch a judgment shall be considered an appealable final judgment only if the trial court makes a written determination that the issues resolved by the judgment are of such significance to the determination of the outcome of the case that the delay incident to the appeal would be justified, and the chief justice or chief judge of the court having appellate jurisdiction concurs.' (Emphasis omitted.)." *Meribear Productions, Inc.* v. *Frank*, 328 Conn. 709, 717–18 n.5, 183 A.3d 1164 (2018).

The court's memorandum of decision explicitly disposed of counts one, three, five, and seven, which sounded in negligence and were brought against the defendants and the board. The decision did not dispose of the counts brought against Perlini and the town, as they did not file or join in the motion for summary judgment. Moreover, neither the motion for summary judgment nor the court's decision on it explicitly addressed the counts brought against the board pursuant to § 10-235. Accordingly, the court's rendering of summary judgment disposed of only a part of the complaint.[13] In order for the defendants and the board to have appealed from a final judgment, that judgment must have disposed of all causes of action against them. See *Office Condominium Assn., Inc.* v. *Rompre*, 196 Conn. App. 370, 376, 229 A.3d 1124 (2020). Counts three, five, and seven were the only counts brought against Veronesi, Murphy, and Barletta. Therefore, the judgment was final as it pertained to them because it disposed of all causes of action against them. See Practice Book § 61-3.

The summary judgment rendered by the court did not, however, dispose of all causes of action brought against the board. Although the defendants and the board indicated in their motion that they sought summary judgment on the complaint "in its entirety," the court's memorandum of decision did not address explicitly counts four, six, eight, and ten, which the plaintiff brought against the board pursuant to § 10-235, claiming that the board was required to indemnify Veronesi, Murphy, Barletta, and Perlini.[14] In its memorandum of decision, the court concluded only that the defendants and

[13] There is nothing in the record to indicate that the plaintiff withdrew her indemnification counts against the board or the counts against the town and Perlini, or that these counts were unconditionally abandoned. See, e.g., *Tunick* v. *Tunick*, 201 Conn. App. 512, 523, 242 A.3d 1011 (2020), cert. denied, 336 Conn. 910, 244 A.3d 561 (2021).

[14] We note that "§ 10-235 does not create a direct cause of action allowing a person allegedly injured by a negligent employee of a board of education

the board were entitled to governmental immunity as a matter of law because their allegedly negligent acts were discretionary and there was no genuine issue of material fact as to whether the identifiable person-imminent harm exception applied. The defendants and the board did not refer to the counts brought against the board pursuant to § 10-235 in their motion for summary judgment or state why those counts should also be disposed of as a matter of law in their memorandum of law in support of their motion. Instead, the motion for summary judgment stated that the defendants and the board "are entitled to summary judgment because *the negligence claims* are barred by governmental immunity, to which no exception is applicable in this case." (Emphasis added.)

Even if, as the plaintiff, the defendants, and the board assert, the court's disposition of the negligence counts brought against the defendants and the board implicitly disposed of the corresponding "derivative" § 10-235 counts, we are nonetheless compelled to conclude that the judgment was not final as to the board. Assuming without deciding that counts four, six, and eight, which claimed that the board was required to indemnify Veronesi, Murphy, and Barletta, implicitly were resolved by the court's conclusion that no exception to governmental immunity existed, count ten, which claimed that the board was required to indemnify Perlini, would not be implicitly resolved by that same reasoning. As we have indicated, the negligence count against Perlini remains before the court. Because that count remains pending before the court, it could not have implicitly rendered judgment for the board on the indemnification count pertaining to Perlini.

to sue the board directly." (Internal quotation marks omitted.) *Costa* v. *Board of Education*, 175 Conn. App. 402, 405 n.2, 167 A.3d 1152, cert. denied, 327 Conn. 961, 172 A.3d 801 (2017).

Accordingly, we conclude that the court's judgment did not dispose of all counts pertaining to the board. Therefore, the partial summary judgment rendered in favor of the defendants and the board was not a final judgment as to the board and the appeal is dismissed as to it. We now turn to the merits of the plaintiff's claims with respect to the defendants.

II

We begin by setting forth the applicable standard for reviewing a trial court's decision to render summary judgment. "Practice Book § [17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law . . . and the party opposing such a motion must provide an evident[iary] foundation to demonstrate the existence of a genuine issue of material fact. . . . [I]ssue-finding, rather than issue-determination, is the key to the procedure. . . . [T]he trial court does not sit as the trier of fact when ruling on a motion for summary judgment. . . . [Its] function is not to decide issues of material fact, but rather to determine whether any such issues exist. . . . Our review of the decision to grant a motion for summary judgment is plenary. . . . We therefore must decide whether the court's conclusions were legally and logically correct and find support in the record." (Internal quotation marks omitted.) *Washburne* v. *Madison*, 175 Conn. App. 613, 620, 167 A.3d

1029 (2017), cert. denied, 330 Conn. 971, 200 A.3d 1151 (2019).

Our legal principles pertaining to governmental immunity and the identifiable person-imminent harm exception to governmental immunity are well established. "[Section] 52-557n abandons the common-law principle of municipal sovereign immunity and establishes the circumstances in which a municipality may be liable for damages. . . . One such circumstance is a negligent act or omission of a municipal officer acting within the scope of his or her employment or official duties. . . . [Section] 52-557n (a) (2) (B), however, explicitly shields a municipality from liability for damages to person or property caused by the negligent acts or omissions [that] require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law. . . .

"This protection for acts requiring the exercise of judgment or discretion, however, is qualified by what has become known as the identifiable person, imminent harm exception to discretionary act immunity. That exception, which [our Supreme Court has] characterized as very limited . . . applies when the circumstances make it apparent to the [municipal] officer that his or her failure to act would be likely to subject an identifiable person to imminent harm . . . . By its own terms, this test requires three things: (1) an imminent harm; (2) an identifiable victim; and (3) a public official to whom it is apparent that his or her conduct is likely to subject that victim to that harm. . . . If the [plaintiff] fail[s] to establish any one of the three prongs, this failure will be fatal to [her] claim that [she] come[s] within the imminent harm exception." (Citations omitted; footnotes omitted; internal quotation marks omitted.) *Brooks* v. *Powers*, supra, 328 Conn. 264–66.

"In *Haynes* v. *Middletown*, 314 Conn. 303, 101 A.3d 249 (2014), our Supreme Court reexamined and clarified

our jurisprudence with respect to the principle of imminent harm. The court overruled in part its prior holding in *Burns* v. *Board of Education*, 228 Conn. 640, 650, 638 A.2d 1 (1994), to the extent that it appeared to narrow the definition of imminent harm to harms arising from dangerous conditions that were temporary in nature. . . . Instead, it reemphasized its earlier interpretation of imminent harm as stated in its decision in *Evon* v. *Andrews*, 211 Conn. 501, 559 A.2d 1131 (1989), in which it explained that a harm is not imminent if it could have occurred at any future time or not at all . . . and clarified that it was not focused on the duration of the alleged dangerous condition, but on the magnitude of the risk that the condition created. . . . [W]hen the court in *Haynes* spoke of the magnitude of the risk . . . it specifically associated it with the probability that harm would occur, not the foreseeability of the harm. . . . In sum, [our] Supreme Court concluded that the proper standard for determining whether a harm was imminent is whether it was apparent to the municipal defendant that the dangerous condition was so likely to cause harm that the defendant had a clear and unequivocal duty to act immediately to prevent the harm. . . .

"In *Williams* v. *Housing Authority*, [159 Conn. App. 679, 705–706, 124 A.3d 537 (2015), aff'd, 327 Conn. 338, 174 A.3d 137 (2017)] this court construed *Haynes* as setting forth the following four part test with respect to imminent harm. First, the dangerous condition alleged by the plaintiff must be apparent to the municipal defendant. . . . We interpret this to mean that the dangerous condition must not be latent or otherwise undiscoverable by a reasonably objective person in the position and with the knowledge of the defendant. Second, the alleged dangerous condition must be likely to have caused the harm suffered by the plaintiff. A dangerous condition that is unrelated to the cause of

the harm is insufficient to satisfy the *Haynes* test. Third, the likelihood of the harm must be sufficient to place upon the municipal defendant a clear and unequivocal duty . . . to alleviate the dangerous condition. The court in *Haynes* tied the duty to prevent the harm to the likelihood that the dangerous condition would cause harm. . . . Thus, we consider a clear and unequivocal duty . . . to be one that arises when the probability that harm will occur from the dangerous condition is high enough to necessitate that the defendant act to alleviate the defect. Finally, the probability that harm will occur must be so high as to require the defendant to act immediately to prevent the harm." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Washburne* v. *Madison*, supra, 175 Conn. App. 629–30.

"[T]he applicable test for the apparentness prong of the identifiable person-imminent harm exception is an objective one, pursuant to which we consider the information available to the [school official] at the time of [his or] her discretionary act or omission. . . . Under that standard, [w]e do not ask whether the [school official] actually knew that harm was imminent but, rather, whether the circumstances would have made it apparent to a reasonable [school official] that harm was imminent." (Citation omitted; internal quotation marks omitted.) *Strycharz* v. *Cady*, 323 Conn. 548, 589, 148 A.3d 1011 (2016). Furthermore, it is the "*specific* harm that befell the plaintiff" that must be apparent to satisfy the apparentness prong of the identifiable person-imminent harm exception. (Emphasis in original.) *Brooks* v. *Powers*, supra, 328 Conn. 268 n.8.

"[T]he ultimate determination of whether [governmental] immunity applies is ordinarily a question of law for the court . . . [unless] there are unresolved factual issues material to the applicability of the defense . . . [in which case] resolution of those factual issues is

properly left to the jury." (Internal quotation marks omitted.) *Haynes* v. *Middletown*, supra, 314 Conn. 313.

We conclude on the basis of our plenary review of the record that the defendants met their initial burden of establishing the lack of a genuine issue of material fact that the plaintiff was not subject to imminent and apparent harm and, accordingly, that she did not fall within the identifiable person-imminent harm exception to governmental immunity. The evidence the defendants put forth in support of their motion for summary judgment established that the alleged dangerous condition—namely, the continued practice of a stunt after the plaintiff repeatedly had fallen safely and without injury during the same practice while practicing that same stunt—did not subject the plaintiff to a harm that was imminent and apparent.

More specifically, Murphy's and Barletta's affidavits and the excerpts from the plaintiff's deposition, submitted by the defendants in support of summary judgment, tended to show that falling is not that uncommon of a risk during a cheerleading practice. See, e.g., *Maselli* v. *Regional School District No. 10*, 198 Conn. App. 643, 658–59, 235 A.3d 599 (individual was not subject to imminent and apparent harm because getting hit by ball while playing soccer is "not so uncommon of a risk"), cert. denied, 335 Conn. 947, 238 A.3d 19 (2020). According to Murphy and Barletta, an unsuccessful stunt attempt involving a flyer will often involve a fall, but the flyer is trained to utilize a proper technique when they fall so that they are not harmed. Specifically, the plaintiff was trained to fall backward so that the cheerleaders in the positions of the base and back spotter could assist her with her fall by slowing her momentum and helping her land feetfirst on the mats after her stunt attempt. In an excerpt from the plaintiff's deposition, which the defendants attached to their reply memorandum, the plaintiff agreed that, "when you

come down to the ground, even if the stunt hasn't gone well, everyone is still trained to control [the flyer's] coming down to the ground so that [the flyer] [does not] hit all the way down to the mats."

Furthermore, the evidence submitted by the defendants supported Murphy's and Barletta's averments that, "[on] February 8, 2018, there was no indication that [the plaintiff] would fail to complete a stunt attempt, lose her balance [and] fall forward . . . ." In their affidavits, Murphy and Barletta averred that the plaintiff successfully had performed complex stunts in the flyer position previously, including the exact stunt that she had been practicing on February 8, 2018. Prior to the fall that caused her February 8, 2018 injury, Murphy and Barletta averred that the plaintiff had always applied her training and fallen backward so that the base and back spotter cheerleaders could catch her. Accordingly, on the basis of the evidence in the record, the defendants met their initial burden in demonstrating that there was no genuine issue of material fact that the plaintiff was not subject to the imminent and apparent harm of not being properly caught or hitting her head when she fell.

Because the defendants met their initial burden, the plaintiff then needed to present evidence that demonstrated that a genuine issue of material fact existed as to whether she was subject to imminent and apparent harm. On appeal, the plaintiff argues that she met her burden because she put forth evidence that established that (1) she was dropped several times during the practice, (2) immediately before she fell and hit her head she asked Murphy and Barletta for their "help," (3) Barletta said she "knew that was going to happen" before the plaintiff fell and hit her head, and, (4) under the circumstances of the present case, the plaintiff was subject to imminent harm pursuant to our Supreme Court's decision in *Sestito* v. *Groton*, 178 Conn. 520, 423

A.2d 165 (1979). We address the plaintiff's arguments in turn.

A

The plaintiff first argues that there was a genuine issue of material fact that she was subject to imminent and apparent harm because it was undisputed that she had fallen several times prior to falling and hitting her head. The plaintiff alleged that she was "dropped during practice approximately seven times . . . ." In support of her objection to the defendants' motion for summary judgment, she attached portions of her deposition transcript in which she stated that she kept "fall[ing]" and "crumbling . . . ." Therefore, the undisputed facts in the record, viewed in the light most favorable to the plaintiff, tended to establish that Murphy and Barletta had observed several failed stunt attempts, in which the plaintiff was acting as the flyer, during the practice prior to her falling and hitting her head. The repeated failed stunt attempts during the same practice did not tend to establish, however, that continuing to practice the stunt exposed her to a high probability of harm that was apparent to the defendants and necessitated that they act immediately to prevent it.

The plaintiff presented evidence that there had been several failed stunt attempts before she fell and hit her head, but there was no evidence that tended to demonstrate that she had been injured in any of these previous attempts. She submitted no evidence that the bases and back spotter had been unable to catch her or that she hit the mats when she unsuccessfully attempted the stunt. To the contrary, the undisputed facts averred to in Murphy's and Barletta's affidavits evidenced that, although the plaintiff fell during failed stunt attempts prior to her injury, she followed her training and "[fell] backwards into the bases and back spotter cheerleaders" and that this assistance "should be sufficient to

slow [her] momentum . . . .'' Therefore, the plaintiff's previous failed attempts of the stunt, in which she had neither fallen forward nor had fallen and hit her head, did not establish a genuine issue of material fact as to whether it was likely that, by continuing to practice the stunt, the plaintiff would be subject to the imminent and apparent harm of not being properly caught or hitting her head. See, e.g., *Washburne* v. *Madison*, supra, 175 Conn. App. 631 (court properly granted summary judgment in favor of defendants because plaintiff failed to present evidence of material fact that probability of injury from allegedly dangerous condition was high enough to require defendants to act to prevent it).

B

The plaintiff next argues that there was a genuine issue of material fact with respect to whether she was subject to an imminent and apparent harm because she had asked Murphy and Barletta " 'for their help' " and had indicated to them that she was " 'getting worried.' "[15] We are not persuaded that the plaintiff's broad request for " 'help,' " made after the previous failed stunt attempts, would tend to establish that it was apparent to the defendants that harm to the plaintiff was imminent.

The plaintiff attested that, after the repeated failed stunt attempts, she "walked over to [Murphy and Barletta], and [she] begged them for their help because [she] was getting worried." In speaking with her coaches, the plaintiff did not specify that she was worried that she would fall and injure herself while executing the stunt, or that the bases and back spotter would not catch her. The plaintiff's expressed worry did not tend to establish that it was apparent to the defendants

[15] Specifically, the plaintiff told the coaches that she was "getting worried" because she kept "crumbling" and that she and the other cheerleaders were not "working well together."

that an injury was so likely to occur that they needed to act to prevent it. To avoid summary judgment, the plaintiff needed to demonstrate that that there was a genuine issue of material fact as to whether an *injury* was apparent and so likely to occur that the defendants had a clear and unequivocal duty to act immediately to prevent it. See, e.g., *Haynes* v. *Middletown*, supra, 314 Conn. 325 (harm was imminent when dangerous condition was "so likely to cause *an injury* to a student that the officials had a clear and unequivocal duty to act immediately to prevent the harm" (emphasis added)). The plaintiff's general and vague request for help, which was made after the previous failed attempts that had not resulted in injury, did not establish that there was a genuine issue of material fact that the plaintiff was subject to imminent and apparent harm.

C

The plaintiff also argues that there was a genuine issue of material fact that she was subject to imminent and apparent harm because Barletta told the plaintiff that Barletta "knew *that* was going to happen," immediately before the plaintiff fell and hit her head. (Emphasis added.) The plaintiff argues on appeal that this statement strongly supports that the harm at issue, namely, the plaintiff not being properly caught or hitting her head, was imminent and apparent to the defendants. We disagree.

In the plaintiff's deposition, a portion of the transcript of which she attached in support of her objection to the defendant's motion for summary judgment, she was asked to clarify what Barletta was referring to when she stated that she "knew that was going to happen . . . ." The plaintiff clarified that Barletta was referring to the *previous* failed stunt attempts in which the plaintiff had fallen. The plaintiff explained: "I kept crumbling and crumbling and the group was getting exhausted,

and she knew that I was going to fall that last time. And this is right before I went back in and ended up falling and hitting my head." Although this statement supports the plaintiff's claim that it was apparent to Barletta that the plaintiff would not successfully complete the stunt and would "fall," Barletta's statement did not tend to establish that she knew the plaintiff would fall and not be properly caught or hit her head. As previously discussed, the plaintiff needed to present evidence that would tend to establish that the specific harm was imminent and apparent. The specific harm in this case was not the plaintiff falling backward in the manner in which she was trained so that the bases and back spotter could catch her but, rather, the plaintiff falling forward, not being properly caught, and hitting her head. Accordingly, Barletta's statement, which was made in reference to one of the plaintiff's previous falls, did not establish that there was a genuine issue of material fact that the plaintiff was subject to imminent and apparent harm from continuing to practice the stunt.

D

Finally, the plaintiff argues that *Sestito* v. *Groton*, supra, 178 Conn. 520, is analogous to the present case and, therefore, establishes that the harm was imminent and apparent. In *Sestito*, our Supreme Court determined that a jury reasonably could have found that an on duty police officer watched but did not intervene when a physical altercation involving several intoxicated individuals, one of whom the police officer believed could be armed, took place in a parking lot outside of a bar. Id., 522–23. The police officer did not attempt to stop the physical altercation until the decedent was shot by one of the other men involved in the altercation. Id., 523. Our Supreme Court held that, given these egregious facts, a jury reasonably could have concluded that that the harm to the decedent was imminent. See id., 528;

see also, e.g., *Shore* v. *Stonington*, 187 Conn. 147, 154, 444 A.2d 1379 (1982).

Specifically, the plaintiff argues that the present case is analogous to *Sestito* because the defendants witnessed an "ongoing and escalating scene but failed to intervene until after it was too late." The plaintiff's argument fails for two reasons. First, since its holding in *Sestito*, our Supreme Court repeatedly has stated that *Sestito* is confined to its facts. *Borelli* v. *Renaldi*, 336 Conn. 1, 32, 243 A.3d 1064 (2020); *Edgerton* v. *Clinton*, 311 Conn. 217, 240, 86 A.3d 437 (2014). Second, even if our Supreme Court had not confined *Sestito* to its facts, we are not persuaded that the facts in the present case are similar to those in *Sestito*.

The present case is clearly distinguishable from the egregious facts in *Sestito*. As we discussed previously, the plaintiff's seven previous failed attempts at the stunt, prior to her falling and being injured, did not tend to establish a likelihood that the plaintiff would be harmed by continuing to practice the stunt. It was undisputed in the summary judgment record that the plaintiff had always fallen backward into the base and back spotter cheerleaders. Therefore, Murphy and Barletta witnessing the plaintiff's repeated falls did not create an "ongoing and escalating scene . . . ." The plaintiff put forth no facts that tended to establish that continuing to practice the stunt created a likelihood of harm to her. The plaintiff's mere assertion that the scene was ongoing and escalating, without evidentiary support in the record, is not enough to establish a genuine issue of material fact for purposes of summary judgment. *Cole* v. *New Haven*, 337 Conn. 326, 336, 253 A.3d 476 (2020) ("[m]ere assertions of fact . . . are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the

court under Practice Book [§ 17-45][16]" (footnote added; internal quotation marks omitted)).

In sum, the plaintiff failed to establish that there was a genuine issue of material fact as to whether she was subject to imminent and apparent harm. Accordingly, the court properly concluded that the identifiable person-imminent harm exception to governmental immunity did not apply to the present case and properly rendered summary judgment in favor of Veronesi, Murphy, and Barletta.

The appeal is dismissed as to the board; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

ANTONIO PADULA ET AL. *v.* AQUINO ARBORIO ET AL.
(AC 45134)

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

Syllabus

The plaintiffs, A and G, owners of certain real property in Wethersfield, sought a judgment declaring them the owners, by adverse possession, of a certain strip of disputed land lying between their property and property owned by the defendant F. The plaintiffs bought their property for their son, L, and daughter-and-law, P, in January, 2003. F bought the adjacent property for her son, the defendant Q, from the predecessor landowner, S, in January, 2017. The true property line between the properties runs on a diagonal line inclining slightly to the northwest and toward the house and yard of the plaintiffs' property. Near, but not on, the true property line, sits a large hedge, that does not parallel the true property line, but, rather, follows a slight southwest diagonal, creating an elongated triangle of land that is bordered by the hedge on one side and the true property line on the other, creating the disputed area that the plaintiffs sought to acquire from the defendants by adverse

[16] Practice Book § 17-45 provides in relevant part: "(a) A motion for summary judgment shall be supported by appropriate documents, including but not limited to affidavits, certified transcripts of testimony under oath, disclosures, written admissions and other supporting documents. . . ."

possession. Historically, S maintained the hedge by hiring a contractor to trim the hedge approximately once a year. After the plaintiffs purchased their property, S and P had a conversation during which S affirmatively told P that he owned and had been maintaining the hedge. S also noted that L and P had been mowing the lawn in the disputed area and it was agreed that L and P would continue to do that mowing. During this meeting, S never gave P permission to mow the disputed area and P never sought S's permission. In the spring of 2017, Q took measurements of F's property, and realized that the true property line between the properties went through an aboveground pool on the plaintiffs' property. After attempting to discuss the matter with L and P, Q sent a letter to L in April, 2019, asking for the encroachments on F's property to be removed. In May, 2019, the plaintiffs filed their complaint seeking adverse possession of the disputed area. Following a trial, the trial court determined that the plaintiffs had proven their claim of adverse possession by clear and convincing evidence, having adversely possessed the disputed area from 2003 until 2019, and that the defendants failed to timely interrupt the plaintiffs' possession of the disputed area. On the defendants' appeal to this court, *held*:

1. The defendants could not prevail on their claim that the trial court erred in concluding that the plaintiffs, who never actually possessed their property or personally used the disputed area, could establish a claim for adverse possession: a title holder may assert a claim of adverse possession without actually being in personal possession of the property as long as there exists the requisite proof that the title holder intended his or her agents, whether tenants or licensees, to occupy the property in dispute and, in the present case, the trial court reasonably found from the evidence that L and P occupied the property under a right given to them by the plaintiffs, and it was legally insignificant whether they were characterized as tenants with a lease or simply as permitted users of the property; moreover, there was evidence that supported the court's finding that the plaintiffs, as the property owners, intended for L and P to possess the property, including the disputed area, and from this evidence the court inferred that the plaintiffs would not have purchased the property for L and P's use, and that L and P would not have agreed to occupy that property, if they had known that the actual property line did not extend to the line of hedges that appeared to delineate the boundary between the two properties.

2. The trial court erred in part in its determination of the area that the plaintiffs acquired by adverse possession:

   a. Contrary to the defendants' claim, the trial court did not err in failing to bar the plaintiffs from asserting adverse possession of the southeasterly portion of the disputed area that was not delineated by the line of hedges, as the defendants' claim that the disputed area can only be that portion of property that actually abuts the hedgerow was based on a narrow interpretation of the disputed area as set forth in the complaint; the

court properly determined that, based on evidence submitted by the plaintiffs and provided to the defendants prior to trial, the disputed area included a portion of the property line that extended beyond the line of hedges, and, upon review of the operative complaint, the defendants were sufficiently put on notice of the precise contours of the property that the plaintiffs were claiming to have adversely possessed.

b. The trial court's determination that the plaintiffs' adverse possession extended to the midline transecting the hedgerow was unsupported by the evidence and contradicted the court's own factual findings; a review of the record confirmed that the undisputed evidence presented at trial established that S and the defendants at all times maintained both sides of the hedgerow, and, on the basis of the evidence presented and the court's own findings, the court should not have awarded the plaintiffs any part of the hedgerow; accordingly, the court's judgment should have been limited to the property immediately north of the hedgerow, including no part of the hedgerow itself.

3. The defendants could not prevail on their claim that the trial court erred in concluding that the plaintiffs had proven their claim of adverse possession for fifteen years by clear and convincing evidence, as the court's findings and legal conclusions were factually supported and legally sound: the court properly found that S did not give P permission to mow the lawn in the disputed area, as S testified that he did not specify that he was giving permission to mow the lawn and did not explain that he owned that portion of the property, and P testified that she believed that S was asking her for permission to enter that part of the property in order to trim the hedges; moreover, the court concluded that S's once yearly entry into the disputed area to trim the hedges was insufficient to interrupt the plaintiffs' adverse possession of the disputed area or to negate S's ouster from the disputed area, and, similarly, the court concluded that the fact that the defendants occasionally mowed the lawn in the disputed area did not defeat the plaintiffs' claim of adverse possession because such momentary acts did not rise to the point of ouster, and, in reaching this conclusion, the court correctly noted that once a party had been ousted of possession of a disputed area, the occasional use of that area by the ousted party without the permission of the party in possession is not sufficient to constitute a break in the time period required to establish ownership by adverse possession; furthermore, the court correctly observed that the defendants failed to provide written notice to the plaintiffs according to the statute (§ 52-575 (a)) governing adverse possession to dispute the plaintiffs' right of possession and to prevent them from acquiring such a right, and did not provide any notice in writing until their April, 2019 letter, at which point more than fifteen years had already passed.

Argued March 8—officially released May 23, 2023

Procedural History

Action seeking to quiet title to certain real property, brought to the Superior Court in the judicial district of Hartford, where the court, *Budzik*, *J.*, granted the plaintiffs' motion to cite in Faith Arborio as a party defendant; thereafter, the defendants filed a counterclaim; subsequently, the case was tried to the court, *Budzik*, *J.*; judgment for the plaintiffs, from which the defendants appealed to this court. *Reversed in part*; *judgment directed.*

Kent J. Mancini, for the appellants (defendants).

Matthew D. Paradisi, for the appellees (plaintiffs).

Opinion

BISHOP, J. The defendants, Aquino Arborio and Faith Arborio, appeal from the judgment, rendered after a trial to the court, declaring the plaintiffs, Antonio Padula and Giuseppina Padula, to be the owners, by adverse possession, of a certain strip of land lying between the adjacent properties of the parties. On appeal, the defendants claim that (1) the plaintiffs could not prevail on their adverse possession claim because they never personally possessed the property in question, (2) the court incorrectly awarded the plaintiffs an area beyond that which was expressly sought in the complaint, and (3) the court incorrectly concluded that the plaintiffs had possessed the disputed property for the requisite period of fifteen years.[1] We affirm in part and reverse in part the judgment of the court.

[1] "General Statutes § 52-575 (a) establishes a fifteen year statute of repose on an action to oust an adverse possessor." (Footnote omitted.) *O'Connor* v. *Larocque*, 302 Conn. 562, 578–79, 31 A.3d 1 (2011). Specifically, § 52-575 (a) provides in relevant part that "[n]o person shall make entry into any lands or tenements but within fifteen years next after his right or title to the same first descends or accrues or within fifteen years next after such person or persons have been ousted from possession of such land or tenements; and every person, not entering as aforesaid, and his heirs, shall be utterly disabled to make such entry afterwards . . . ."

The court found the following pertinent facts and made the following legal conclusions on the basis of those facts and its application of the relevant law. "In December of 1991 . . . Elizabeth Guild bought the house and property at 139 Southwell Road in Wethersfield (Southwell Road Property). In April of 1997 . . . Thomas Shugrue bought the house and property at [302] Dale Road in Wethersfield (Dale Road Property). The Southwell Road Property and the Dale Road Property share a border running roughly west in a straight line for approximately 180 feet from a concrete survey marker adjacent to Southwell Road. The parties agree that the true property line between the two properties runs on a diagonal line inclining slightly to the northwest and toward the house and yard of the Southwell Road Property. It is also undisputed that approximately [sixty] feet up from Southwell Road and generally near the true property line, there begins a rather large hedge that is approximately [three to four] feet wide at its base and [eight to nine] feet tall. The hedge is mature and provides essentially complete privacy between the backyards of the Dale Road and Southwell Road Properties. To the casual passerby, the hedge would appear to delineate the border between the two properties. Unfortunately, that is not the case.

"It is undisputed that the hedge does not sit on the true property line. Instead, the hedge starts approximately [seven to ten] feet south of the true property line; in other words, at its starting point, the hedge encroaches about [seven to ten] feet into the yard of the Dale Road Property. Making matters worse, from its starting point, the hedge does not parallel the slight northwest diagonal of the true property line. Instead, the hedge follows a slight southwest diagonal (thus further encroaching on the Dale Road Property) for approximately 120 feet until it intersects with the side/rear property line of the Dale Road/Southwell Road

Properties. Thus, if one stands at the concrete survey marker on Southwell Road and draws a line through the middle of the hedge that follows a slight southwest diagonal, and then compares that line to the true property line that follows a slight northwest diagonal, there is created an elongated triangle of land that measures about [eighteen] feet at its base at the side/back of the Dale Road/Southwell [Road] Properties and is bordered by the hedge on one side and the true property line on the other. See Plaintiffs' Exhibit 1 (depicting the disputed area). It is this area that the court will refer to as the 'disputed area' and it is this area that the [plaintiffs] seek to acquire from the [defendants] by adverse possession.

"When [Shugrue] moved into the Dale Road Property in 1997, he purchased the property from an estate. The prior owners of the Dale Road Property had passed away. When [Shugrue] purchased the Dale Road Property, he did not look at any survey map of the property, nor did he ever hire a surveyor to produce a survey map. When [Shugrue] purchased the Dale Road Property, he asked the daughter of the prior owners where the true property line was and [Shugrue] was told that the true property line was at the hedge, plus a 'couple' or a 'few' feet beyond that. [Shugrue] never knew, nor ever sought to determine, exactly where the true property line was.

"While [Shugrue] and [Guild] were neighbors, [Shugrue] maintained the hedge by hiring a contractor to trim the hedge approximately once a year. It was agreed that [Guild] would mow all the grass on her side of the hedge and in the entire disputed area. Although there was somewhat conflicting testimony at trial on this issue, in its role as fact finder, the court concludes that [Shugrue] and [Guild] agreed to this maintenance arrangement without discussing who owned what property, where the true property line was, or whether or not permission was being either sought or given for

access to, or use of, the disputed area. By all accounts, the relationship between [Shugrue] and [Guild] was neighborly. In its role as fact finder, the court concludes that [Shugrue] and [Guild] simply came to a neighborly and practical arrangement on a division of labor without either [individual] discussing who owned what property, or what either [individual's] legal rights were. The court notes that [Shugrue] testified that he decided to trim the hedge because he knew it was on his property, but the court concludes, in its role as fact finder, that [Shugrue] never told [Guild] that was why he was doing the trimming, or that, in doing the hedge trimming, [Shugrue] was intending to assert his ownership of the disputed area in any way. Similarly, the court concludes, in its role as fact finder, that [Shugrue] was amenable to [Guild] mowing the grass in the disputed area as a matter of pure convenience, not because he was giving [Guild] permission to do so, or permission to use the disputed area. Because of the natural and obvious border created by the hedge, the court concludes that [Shugrue] simply abandoned the disputed area to [Guild] as a matter of practicality because the presence of the hedge made the disputed area more naturally part of [Guild's] yard. The court concludes that during the time period that [Shugrue] and [Guild] were neighbors, [Shugrue] never went into the disputed area (except to trim the hedge once a year) and that he was fully aware that [Guild] treated the disputed area as her own. The court concludes that [Shugrue] never gave permission to [Guild] to make use of the disputed area because [they] simply never discussed their legal rights.

"In 1998, [Guild] built an aboveground pool in her backyard at the Southwell Road Property. The plot plans submitted to [the town of] Wethersfield for approval (which show the true property line, but not the hedge) indicate that the pool was to be placed in the center of [Guild's] backyard and entirely on [Guild's]

property. See defendants' Exhibit G. Nevertheless, because there was a tree with overhanging branches on the northern edge of [Guild's] property, and, the court concludes, in the exercise of reasonable inference, common sense, and human experience, because the pool installer mistakenly concluded that the hedge marked the southern edge of [Guild's] backyard, the pool ended up being placed somewhat off-center in the backyard and closer to the hedge. The result was that the pool was placed such that it was bisected by the true property line, leaving about [eight] feet of the pool encroaching into the Dale Road Property. [Shugrue] testified that he knew that [Guild] had built the pool, that he saw where it was located, but that he never made any objection to its location or gave [Guild] permission to use the area of his property that the pool was encroaching upon.

"In January of 2003, [Guild] sold the Southwell Road Property to [the plaintiffs]. [The plaintiffs] do not use the Southwell Road Property as their home. Instead, [the plaintiffs], who are husband and wife, purchased the Southwell Road Property for their son, Leone Padula (Leo), and his wife, Anna Padula.[2] Although [the plaintiffs] are the record owners of the Southwell Road Property, the property has always been occupied by Leo and Anna as their home. Regardless, the Padulas are a close-knit family and [the plaintiffs], who live nearby, visit Leo and Anna frequently.

"When the [the plaintiffs] were considering purchasing the Southwell Road Property, Antonio and Anna visited the property and noted the large hedge in the backyard. Anna very much considered the privacy offered by the hedge to be an important asset of the

[2] Leo and Anna were not named as plaintiffs in this case and references to the plaintiffs and Leo and Anna, collectively, or a combination thereof, are to the Padulas.

property. Nevertheless, there is no evidence that any of the Padulas sought to confirm that the hedge was on [the plaintiffs'] property. The [plaintiffs] simply assumed that the hedge marked the true property line because the hedge appeared to be such an obvious natural border between the Dale Road and Southwell Road Properties.

"After some interior renovations, Leo and Anna moved into the Southwell Road Property in the spring of 2003. By the exercise of reasonable inference, human experience, and common sense, the court finds as a factual matter that [the plaintiffs] intended to convey to [Leo and Anna] the entirety of the Southwell Road Property for their use and possession, including the disputed area.

"In the early spring of 2003, Anna and [Shugrue] met by happenstance over a small wooden fence separating their properties and located at about the point where the hedge begins. After introducing themselves, the conversation turned to yard work. [Shugrue] affirmatively told Anna that he owned the hedge, that he had been maintaining the hedge historically, and that he intended to continue maintaining the hedge. [Shugrue] also noted that the Padulas had been mowing the lawn in the disputed area during that spring and it was agreed that the Padulas would continue to do that mowing. Again, although there was somewhat conflicting testimony at trial on this point, the court concludes, in its role as fact finder, that during this meeting between [Shugrue] and Anna, [Shugrue] never gave Anna or the Padulas permission to mow the disputed area and Anna never sought [Shugrue's] permission. Although the court credits [Shugrue's] testimony that he happened to tell Anna that he owned the hedge, the court concludes, in its role as fact finder, that [Shugrue] did not tell Anna that he owned any portion of the disputed area. Similar to his arrangement with [Guild], the court concludes that

[Shugrue] and Anna were simply seeking to reach a neighborly understanding as to who was going to do what yard work and that neither party discussed [n]or made any reference to their legal rights (aside from [Shugrue] mentioning that he owned the hedge).

"After Anna and [Shugrue's] conversation and still in the spring of 2003, the Padulas began an extensive renovation project in the yard at the Southwell Road Property. The Padulas removed soil and grass in the front portion of the disputed area, installed a sprinkler system, and laid down new sod in the disputed area. The Padulas dug out and removed an old tree and planted new arborvitae trees in the disputed area to provide added privacy to the backyard and pool area. The Padulas substantially widened and repaved their driveway, expanding it some [four] feet into the disputed area where, previously, there had been no such encroachment. The Padulas expanded and restoned their back patio, expanding one edge of the new patio about [six] inches into the disputed area. The Padulas removed the wooden fence over which [Shugrue] and Anna had talked and replaced it with a new vinyl fence. The Padulas also did some repairs to the mechanicals of the pool, which remained in its original location and continued to encroach about [eight] feet or so into the disputed area. The Padulas' project took about three months to complete and included the use of 'Bobcat' machines to remove soil and move stones and compacting machines necessary to level and compact soil in the disputed area. [Shugrue] testified that he was fully aware of the Padulas' extensive renovation project, but that he never registered any objection to the Padulas' open and obvious construction activities in the disputed area. Nor did [Shugrue] ever give the Padulas any permission to engage in their renovation project. The court also finds that, over the years of [the plaintiffs'] ownership of the Southwell Road Property, the Padulas made

frequent, continuous, open, obvious, and exclusive use of their backyard, including the disputed area, for family events and gatherings and all of the normal uses for which residential homeowners use their yards.

"In January of 2017, [Shugrue] sold the Dale Road Property to . . . Faith Arborio. Like [the plaintiffs], Faith did not live at the Dale Road Property. Instead, sometime in January, 2017, Faith's son, Aquino Arborio, moved into the Dale Road Property with his family. Aquino has no formal lease with his mother, but [he] pays her an agreed upon monthly amount as rent.

"In the early spring of 2017, Aquino decided to take some measurements of the Dale Road Property. Aquino wanted to expand the patio area along the property line with the Southwell Road Property and so [he] wanted to know exactly how much room he had along the mutual property line. Aquino enlisted his twin brother, Anthony [Arborio], to help make the measurements. Using a measuring tape, maps, and other documents they had acquired from the town of Wethersfield, the brothers set about making their measurements. Aquino and Anthony first located the concrete marker adjacent to Southwell Road. The brothers also used a metal detector to find a metal property marker buried nearby. The brothers then went to the side/back of the Dale Road/Southwell Road Properties and, measuring off the correct distance using the town maps, located a concrete property marker in that area. Aquino and Anthony had to dig down into the soil to find and uncover the concrete marker. Tracing a straight line from the concrete marker at the side/back of the Dale Road/Southwell Road Properties and to the stone marker adjacent to Southwell Road, Aquino and Anthony quickly realized that the property line between the Dale Road/Southwell Road Properties went right through the Padulas' pool. To confirm their measurements, the brothers went back the next day and measured again. They

reached the same results. To mark their findings, the brothers left a long orange 'snow stake' in the side/back of the property to mark where they had concluded the true property line was.

"In the early evening of the same day that he and his brother took the second set of measurements, Aquino knocked on the Padulas' front door to tell them what he had found. Aquino spoke with [Leo and Anna] at their front door about [his] measurements and the fact that the true property line appeared to be more than a few feet north of the hedges and appeared to go right through the Padulas' pool. Aquino left some of the town documents he had used to make his measurements with the Padulas to review. The Padulas indicated to Aquino that they needed to discuss the matter with Antonio Padula (as the record owner) before formally responding, but otherwise indicated they wanted to reach an amicable solution. Aquino also informed his mother (as the record owner) of what he had found. The court notes that the [plaintiffs] dispute that Aquino met with [Leo and Anna] in the spring of 2017, or that the [defendants] informed the Padulas in any way prior to April 27, 2019, that there were encroachment issues along their mutual property line. Nevertheless, in its role as fact finder, the court credits the testimony of Aquino and Anthony Arborio on this issue and concludes that such a meeting did occur.

"After the initial meeting with [Leo and Anna] in the spring of 2017, [Aquino] made several informal attempts to engage the Padulas in a discussion about the property line and the encroachments that Aquino had discovered. Occasionally, Aquino would bring up the matter when he happened to see one of the Padulas outside their house. Each time the matter was brought up, the Padulas deflected Aquino's inquiries, stating that Antonio Padula was not available to discuss the matter for one reason or another, but that the Padulas would respond

in due course. The Padulas dispute that these interactions occurred. Nevertheless, in its role as fact finder, the court concludes that Aquino did attempt to engage the Padulas about the property line dispute as described [herein].

"By the beginning of 2019, Faith Arborio had decided that the encroachment issue needed to be brought to a resolution. Additionally, by early 2019, Aquino had decided that he wanted to tear down the hedge and install a fence to give him more room for a patio along the parties' mutual property line. Aquino anticipated starting the work in the spring of 2019. Thus, on April 27, 2019, Aquino sent a letter [(April 27, 2019 letter)] to [Leo] telling [him] of the encroachment that Aquino had discovered in 2017 and asking the Padulas to remove those encroachments. In its role as fact finder, the court finds that [the] April 27, 2019 letter was the first written notice from the [defendants] to the Padulas informing the Padulas of the property line and encroachment dispute. The court also finds that the April 27, 2019 letter was not recorded on the land records of the town of Wethersfield, nor was the April 27, 2019 letter served on the Padulas in accordance with General Statutes §§ 52-575, 47-39, or 47-40.[3]

[3] General Statutes § 52-575 (a) provides in relevant part that no entry into the land shall be sufficient "unless within such fifteen-year period, any person or persons claiming ownership of such lands and tenements and the right of entry and possession thereof against any person or persons who are in actual possession of such lands or tenements, *gives notice in writing to the person or persons in possession of the land or tenements of the intention of the person giving the notice to dispute the right of possession of the person or persons to whom such notice is given and to prevent the other party or parties from acquiring such right, and the notice being served and recorded as provided in sections 47-39 and 47-40 shall be deemed an interruption of the use and possession and shall prevent the acquiring of a right thereto by the continuance of the use and possession for any length of time thereafter*, provided an action is commenced thereupon within one year next after the recording of such notice. . . ." (Emphasis added.)

"On May 6, 2019, [Aquino] met with [Leo] and showed him some additional maps and information obtained from the town of Wethersfield demonstrating the encroachments in the disputed area. On May 10, 2019, Aquino gave Leo a copy of a formal survey of the Dale Road and Southwell Road Properties commissioned by the [defendants]. This survey, conducted by Harry E. Cole & Son, showed the true property line between the Dale Road and Southwell Road Properties, including encroachments from the Padulas' pool, driveway, and patio. On May 15, 2019, Leo responded to Aquino by texting him a copy of his attorney's business card. On May 28, 2019, the [plaintiffs] filed the initial complaint in this case seeking adverse possession of the disputed area. On December 18, 2019, the [defendants] filed a counterclaim against the [plaintiffs] generally sounding in trespass."[4] (Footnotes added; footnotes omitted.)

The court also made the following factual findings in footnotes throughout its memorandum of decision. "There was no evidence as to who planted the hedge, or when it was first planted, but it is undisputed that the hedge has been in its present location since at least when [Guild] first purchased the Southwell Road Property in 1991."

"The court finds that the hedge itself is not part of the disputed area because [Shugrue] always made it clear that he owned the hedge itself and the Padulas never exercised any possession of the hedge itself. In other words, the [defendants] own the hedge. The southernmost border of the disputed area runs from the survey marker on Southwell Road through the middle of the hedge, or the middle of its base trunks, as depicted on plaintiffs' exhibit 1. The court also finds that

[4] In finding for the plaintiffs on the claim for adverse possession, the court also denied the defendants' counterclaim for trespass. The defendants have not appealed from the denial of their counterclaim.

the [plaintiffs] own the arborvitae trees [the Padulas] planted."

"Similarly, there was much testimony at trial as to who mowed the disputed area after 2017, when the court concludes the [defendants] informed the Padulas of the encroachment issues. In its role as fact finder, the court concludes that, after the spring of 2017, *both* parties were mowing the disputed area, at least to some degree, in an attempt to bolster their rights to the area." (Emphasis in original.)

"In its role as fact finder, the court finds that on April 24, 2019, Harry E. Cole & Son placed survey stakes in the disputed area for the purpose of completing their survey of the Dale Road and Southwell Road Properties and that this was done at the direction of the [defendants]. The court declines to resolve the parties' dispute as to who may have removed the survey stakes because of a lack of persuasive evidence."

On the basis of its findings and its application of relevant law, the court determined that the plaintiffs had proven their claim of adverse possession by clear and convincing evidence, and, more specifically, that they adversely possessed the disputed area from 2003 until 2019, and that the defendants failed to timely interrupt the plaintiffs' possession of the disputed area. Accordingly, the court rendered judgment for the plaintiffs on their adverse possession claim. This appeal followed.

Before our discussion of the defendants' specific claims, we note the basic tenets of adverse possession. "[T]o establish title by adverse possession, the claimant must oust an owner of possession and keep such owner out without interruption for fifteen years by an open, visible and exclusive possession under a claim of right with the intent to use the property as his [or her] own

and without the consent of the owner." (Internal quotation marks omitted.) *O'Connor* v. *Larocque*, 302 Conn. 562, 581, 31 A.3d 1 (2011); see also General Statutes § 52-575 (a).

"[T]he open and visible element requires a fact finder to examine the extent and visibility of the claimant's use of the record owner's property so as to determine whether a reasonable owner would believe that the claimant was using that property as his or her own." (Internal quotation marks omitted.) *Brander* v. *Stoddard*, 173 Conn. App. 730, 747, 164 A.3d 889, cert. denied, 327 Conn. 928, 171 A.3d 456 (2017).

"[I]n general, exclusive possession can be established by acts, which at the time, considering the state of the land, comport with ownership . . . such acts as would ordinarily be exercised by an owner in appropriating land to his [or her] own use and the exclusion of others." (Internal quotation marks omitted.) *Briarwood of Silvermine, LLC* v. *Yew Street Partners, LLC*, 209 Conn. App. 271, 279, 267 A.3d 905 (2021). "[S]hared dominion over property defeats a claim of adverse possession because the exclusivity element of adverse possession is absent." (Internal quotation marks omitted.) *Roberson* v. *Aubin*, 120 Conn. App. 72, 76–77, 990 A.2d 1239 (2010). The claimant's possession, however, "need not be absolutely exclusive; it need only be a type of possession which would characterize an owner's use. . . . It is sufficient if the acts of ownership are of such a character as to openly and publicly indicate an assumed control or use such as is consistent with the character of the premises in question. . . . [A] claimant's mistaken belief that [s]he owned the property at issue is immaterial in an action for title by adverse possession, as long as the other elements of adverse possession have been established. . . . In other words, a mistaken belief as to boundary does not bar [a] claim of right or negate [the] essential element of hostility in a claim of adverse

possession." (Citations omitted; internal quotation marks omitted.) *Briarwood of Silvermine, LLC* v. *Yew Street Partners, LLC*, supra, 279–80; see also *Dowling* v. *Heirs of Bond*, 345 Conn. 119, 145, 282 A.3d 1201 (2022) ("a claim of adverse possession is equally valid whether the party making that claim used the property with the knowledge that it was owned by another or, instead, mistakenly believed that he owned the property").

"That having been said, consideration of intent is by no means irrelevant to a claim of adverse possession because the claimant must establish that he or she possessed the land under a claim of right . . . . [This] means nothing more than [using the land] . . . without recognition of the right of the landowner, and that phraseology more accurately describes it than to say that it must be under a claim of right. . . . To establish that the claimant used the land under a claim of right, the intent of the possessor to use the property as his own must be shown." (Citations omitted; internal quotation marks omitted.) *Dowling* v. *Heirs of Bond*, supra, 345 Conn. 145. As to permissive use, "prior permission may undermine the existence of a claim of right; use of the land by the express or implied permission by the true owner is not adverse and, therefore, cannot ripen into adverse possession. . . . [O]ne who enters into the possession of land in subordination to the title of the real owner . . . is estopped from denying that title while he holds actually or presumptively under it. . . . As with a prescriptive easement, implied permission by the true owner is not adverse." (Citations omitted; emphasis omitted; internal quotation marks omitted.) Id., 146.

Finally, as to the time requirement for adverse possession, "the claimant must oust an owner of possession and keep such owner out without interruption for fifteen years . . . ." (Internal quotation marks omitted.)

O'Connor v. *Larocque*, supra, 302 Conn. 581. "When a party is once dispossessed it is not every entry upon the premises without permission that would disturb the adverse possession." (Internal quotation marks omitted.) *Boccanfuso* v. *Green*, 91 Conn. App. 296, 312, 880 A.2d 889 (2005). Indeed, after having been ousted from possession of the land, no entry into the land shall be sufficient unless, within such fifteen year period, the person or persons claiming ownership "gives notice in writing to the person or persons in possession of the land . . . of the intention of the person giving the notice to dispute the right of possession of the person or persons to whom such notice is given and to prevent the other party or parties from acquiring such right, and the notice being served and recorded as provided in sections 47-39 and 47-40 shall be deemed an interruption of the use and possession and shall prevent the acquiring of a right thereto by the continuance of the use and possession for any length of time thereafter . . . ." General Statutes § 52-575 (a).

"A finding of adverse possession is to be made out by clear and positive proof. . . . [C]lear and convincing proof . . . denotes a degree of belief that lies between the belief that is required to find the truth or existence of the [fact in issue] in an ordinary civil action and the belief that is required to find guilt in a criminal prosecution. . . . [The burden] is sustained if evidence induces in the mind of the trier [of fact] a reasonable belief that the facts asserted are highly probably true, that the probability that they are true or exist is substantially greater than the probability that they are false or do not exist. . . . The burden of proof is on the party claiming adverse possession." (Internal quotation marks omitted.) *Brander* v. *Stoddard*, supra, 173 Conn. App. 743–44.

I

The defendants' first claim is that the court erred in concluding that the plaintiffs, who never actually

possessed the Southwell Road Property or personally used the disputed area between the Southwell Road Property and the abutting Dale Road Property, could establish a claim for adverse possession. We disagree.

On appeal, "our scope of review is limited. . . . Because adverse possession is a question of fact for the trier . . . the [trial] court's findings as to this claim are binding upon this court unless they are clearly erroneous in light of the evidence and the pleadings in the record as a whole. . . . We cannot retry the facts or pass on the credibility of the witnesses. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed . . . ." (Internal quotation marks omitted.) *Caminis* v. *Troy*, 300 Conn. 297, 306, 12 A.3d 984 (2011).

At the outset, we note that a titleholder may assert a claim of adverse possession without actually being in personal possession of the property so long as there exists the requisite proof that the title owner intended his or her agents, whether tenants or licensees, to occupy the property in dispute. "What one may do personally in the matter of taking and holding possession of real estate for adverse possession purposes may be done by or through another. Thus, the requirement of actual possession of property necessary to acquire title by adverse possession need not be met by acts of the adverse claimant but may be met through acts of another, who actually possesses and occupies the land for, and in subordination to, the adverse claimant. Accordingly, the requirement of actual possession may be met or kept fresh through possession on behalf of the adverse claimant by an agent, licensee, relative, or tenant. The fact that a permittee of an adverse claimant in possession of real estate pays no rent to the latter

does not as a matter of law destroy the efficacy of such possession for the benefit of the claimant." (Footnotes omitted.) 3 Am. Jur. 2d 108–109, Adverse Possession § 20 (2013); see also *Hightower* v. *Pendergrass*, 662 S.W.2d 932, 937 (Tenn. 1983) ("[A]dverse possession through a licensee is the same as adverse possession through and by the claimant. What a claimant can do himself, he can do by an agent licensee or tenant."). Nevertheless, it is significant that the actual possessor of the property must be occupying the land on behalf of the titleholder, and, therefore, proof of the intent of the titleholder as to possession of the disputed area is a necessary element of a claimant's proof. See *Deregibus* v. *Silberman Furniture Co.*, 124 Conn. 39, 41–42, 197 A. 760 (1938) (in evaluating whether landlord, as adverse claimant, could tack on tenant's use of property for purposes of prescriptive easement, court looked at whether disputed area was considered by both parties to be included in lease); see also *Dowling* v. *Heirs of Bond*, supra, 345 Conn. 145 ("the intent of the possessor to use the property as his own must be shown" (internal quotation marks omitted)).

In *Deregibus* v. *Silberman Furniture Co.*, supra, 124 Conn. 39, our Supreme Court concluded: "While a tenant cannot effect a disseisin in his landlord's favor or originate adverse possession or user unless the lease includes the land or easement, the inclusion need not necessarily be expressed; it suffices if it is impliedly included. . . . Whether or not the easement here in question was within the leases was a question of fact, to be determined in the light of the circumstances, including the use made of it. . . . The facts now found as to such circumstances and use are sufficient to establish that the right of way was considered by both parties to the leases to be included in them. Not only is it found that the plaintiff's predecessors in title and landlords would not have bought the property without the way

as a necessary appurtenant easement and knew and assented to the use of it by the plaintiff and other tenants, but it is also an inescapable inference from the facts found as to the purposes and manner of use of the premises by the tenants that they would not have rented and occupied them had they not understood that this way, essential to those purposes and user, was included and within the implied terms of the leases." (Citations omitted.) Id., 41–42.

Applying the reasoning and holding of *Deregibus*, the trial court in the present case found from the evidence that the plaintiffs would not have purchased the property if the hedges did not delineate the boundary between the two properties and, similarly, that Leo and Anna would not have possessed the property without the same understanding. Moreover, the court found that the plaintiffs intended for Leo and Anna to occupy the entirety of the Southwell Road Property, including the disputed area, which they assumed by the appearance of the property to be included in their purchase.

The defendants make essentially two arguments in support of their claim. First, they contend that *Deregibus* applies only where there is a lease in place between the owners and occupants, and, in this case, there was no evidence of a lease between the plaintiffs and Leo and Anna. Second, they contend that the court made two clearly erroneous factual findings: (1) that the plaintiffs would not have purchased the Southwell Road property if they did not believe that the disputed area was part of what they were purchasing, and (2) that the plaintiffs intended to convey to Leo and Anna the entirety of the Southwell Road Property for their use and possession including the disputed area. We are not persuaded by either argument.

As to the first argument, although we acknowledge that the factual underlayment of *Deregibus* involved a

tenancy, that case did not turn on the existence of a landlord-tenant relationship. The teaching of *Deregibus*, as it applies to the case at hand, is that the use of the disputed land by Leo and Anna cannot be considered as adverse to the titleholder unless the possession of that disputed land was intended by the purchasers of the property, in this case, the plaintiffs. Although the defendants do not dispute that principle, they claim that *Deregibus* does not apply because, here, there was no lease between the plaintiffs, as the owners of the property, and Leo and Anna. In our view, however, that is a distinction without a difference. As we explain herein, the trial court reasonably found from the evidence that Leo and Anna occupied the Southwell Road Property under a right given to them by the plaintiffs. As noted, it is legally insignificant whether they are characterized as tenants or simply as permitted users. See 3 Am. Jur. 2d, supra, § 20, pp. 108–109. In sum, what a claimant can do himself, he can do by an agent licensee or tenant.

As to the second argument, our review of the record leads us to conclude that the court's factual findings are supported by the evidence. Specifically, the evidence that the plaintiffs, as the owners, intended for Leo and Anna, their son and daughter-in-law, to possess the Southwell Road Property, including the disputed area, consisted of testimony from Anna. Anna testified that the plaintiffs intended, from the very beginning, to purchase the Southwell Road Property for her and Leo to reside at. Anna also testified that when she and her father-in-law, the plaintiff Antonio Padula, visited the property before the purchase, she noted hedges on both sides of the property and a row of trees in the back, enclosing the whole yard. She stated: "It was very private and I like that. And I knew my husband would like that . . . ." From this evidence, the court inferred that the plaintiffs would not have purchased the property

for Leo and Anna's use, and that Leo and Anna would not have agreed to occupy that property, if they had known that the actual property line did not extend to the line of hedges that appeared to delineate the boundary between the Southwell Road Property and the Dale Road Property. Although we acknowledge that the evidence is circumstantial as to the value placed by the plaintiffs in the apparent privacy of the Southwell Road Property caused, in large part, by the location of the hedgerow defining the apparent boundary between the Southwell Road and Dale Road Properties, we conclude that the court's findings, by inference, that the plaintiffs would not have purchased the property and that Leo and Anna would not have occupied the property without this feature of privacy were supported by the evidence, and, therefore, they were not clearly erroneous.

II

The defendants next claim that the court erred in awarding the plaintiffs an area beyond that which was expressly sought in the operative complaint. There are two parts to this claim. The defendants first assert that the plaintiffs claimed, by adverse possession, only the disputed property that was delineated by the hedgerow, and yet the court awarded the plaintiffs property that extended beyond the line of hedges into the northeasterly portion of the defendants' property. The defendants also assert that the plaintiffs sought no part of the hedgerow itself, and yet the court awarded one half of the hedgerow to the plaintiffs. We agree, in part, with the defendants' claim.

In reviewing this claim, we are mindful that, because the interpretation of pleadings is always a question of law, our review of the trial court's interpretation of the pleadings is plenary. *Flannery* v. *Singer Asset Finance Co., LLC*, 312 Conn. 286, 299, 94 A.3d 553 (2014).

The operative complaint in this matter is dated August 22, 2019. In the complaint, the plaintiffs alleged in relevant part that, "[a]t all times set forth herein, the southerly portion of 139 Southwell Road abutted up against a parcel of real property known as 302 Dale Road. . . . At the time the plaintiffs purchased 139 Southwell Road, there was a large hedgerow and fence separating 139 Southwell Road from 302 Dale Road. . . . At the time the plaintiffs took title to 139 Southwell Road in 2003, they did so with the understanding that the aforesaid hedgerow accurately demarked the property line between 139 Southwell Road and 302 Dale Road." In addition, the plaintiffs alleged that they "have adversely possessed *all of the property north of the hedgerow* separating 139 Southwell Road and 302 Dale Road," and, in their prayer for relief, requested a judgment declaring them the legal owners of that property. (Emphasis added.)

On the first day of trial, prior to the start of evidence, the defendants' counsel argued that the plaintiffs intended to present evidence that was "far in excess of the pleadings . . . ." The defendants' counsel objected to the admission of plaintiffs' exhibit 1, a property survey that he had received during the previous week, insofar as it depicted the disputed area's "adverse possession line" as running through the middle of the hedgerow and to the south of the edge of the hedgerow. He argued that such evidence should not be considered because, in the plaintiffs' operative complaint, they had claimed only the property "north of the hedgerow."

The court reserved its decision on the defendants' objection, explaining that it would allow the plaintiffs to present such evidence and, after hearing the evidence, it would decide whether the plaintiffs were improperly expanding their claim beyond the pleadings and whether it would cause unfair surprise to the defendants.

In its memorandum of decision, the court did not expressly rule on the defendants' objection. Nevertheless, it defined the disputed area as depicted in plaintiffs' exhibit 1, and concluded that the plaintiffs had proven, by clear and convincing evidence, that they acquired that area by adverse possession.

A

The defendants first contend that the plaintiffs should have been barred from asserting adverse possession of the southeasterly portion of the disputed area that is not delineated by the line of hedges. We disagree.

During the trial, there were surveys and numerous photographs of the parties' properties that were admitted into evidence. Generally, they show a line of hedges beginning at the rear of the parties' properties and running in a southwesterly direction but ending at a point approximately sixty feet before the properties reach the street where a survey marker signifies the legal boundary between properties. Additionally, beginning at the end of the row of hedges and extending toward the street and the legal boundary marker, there is a fence that spans the area from the edge of the hedgerow to a group of arborvitae trees planted by Anna. Accordingly, the disputed area, as found by the court, is not marked solely by the hedgerow but includes the fence and arborvitaes.

The defendants' claim that the disputed area can only be that portion of property that actually abuts the hedgerow is based on a narrow interpretation of the disputed area as set forth in the plaintiffs' complaint. The court, however, did not as narrowly define the area of dispute. Rather, the court determined that the southernmost border of the disputed area runs from the survey marker on Southwell Road through the middle of the hedge, or the middle of its base trunks, as depicted on plaintiffs' exhibit 1 and, by implication, the disputed area defined

by the court includes the property north of the fence and arborvitaes as well. In short, the court considered as part of the disputed area a portion of the property line that extends beyond the line of hedges for about sixty feet to the street line. Indeed, as previously noted, there was testimony that the Padulas planted arborvitaes, expanded their driveway, and maintained the lawn and plantings in this area for the requisite period of time in the same manner as they did the remainder of the disputed area.

We are mindful that "pleadings must be construed broadly and realistically, rather than narrowly and technically." (Internal quotation marks omitted.) *Manere* v. *Collins*, 200 Conn. App. 356, 366, 241 A.3d 133 (2020). Upon our review of the operative complaint in this matter, we believe that the defendants were sufficiently put on notice of the precise contours of the property that the plaintiffs were claiming to have adversely possessed. Moreover, *KDM Services, LLC* v. *DRVN Enterprises, Inc.*, 211 Conn. App. 135, 271 A.3d 1103 (2022), on which the defendants rely, is readily distinguishable from the present case. In *KDM Services, LLC*, this court concluded that the trial court abused its discretion by allowing the plaintiff to amend its complaint *after trial* to conform to the evidence. Id., 143. This court reasoned that the amended complaint alleged " 'an entirely new and different factual situation,' " and the special defenses asserted by the defendant necessarily were addressed to the original complaint, and it was not given the opportunity to defend against the amended complaint by filing amended special defenses, conducting discovery, or calling witnesses at trial to rebut the plaintiff's claim. Id., 142. In the present case, plaintiffs' exhibit 1, which the court used to demark the disputed area and which made clear that the alleged disputed area included the portion of the property at issue, had

been provided to the defendants *before trial*. In reserving its ruling on the defendants' objection to plaintiffs' exhibit 1, the court made clear, prior to the start of evidence, the possibility that it might consider the disputed area as depicted by that exhibit. Thus, unlike the defendant in *KDM Services, LLC*, the defendants here had the opportunity to defend against and present evidence to rebut the plaintiffs' claim of adverse possession as to that area. Accordingly, on balance, we believe that the court fairly delineated the southeasterly portion of the disputed area that does not include the hedgerow.

B

The defendants next contend that the court should not have awarded the plaintiffs any part of the hedgerow because (1) in the operative complaint, the plaintiffs claimed only the property immediately north of the hedgerow and no part of the hedgerow itself, and (2) such an award is contrary to the court's factual findings. We agree with the defendants that the court's determination that the plaintiffs' adverse possession extends to the midline transecting the hedgerow is unsupported by the evidence and contradicts the court's own factual findings.

In its memorandum of decision, the court acknowledged that "[t]he southernmost border of the disputedarea runs from the survey marker on Southwell Road through the middle of the hedge, or the middle of its base trunks, as depicted on plaintiffs' exhibit 1," but found that "*the hedge itself is not part of the disputed area because* [*Shugrue*] *always made it clear that he owned the hedge itself and the Padulas never exercised any possession of the hedge itself*. In other words, the [defendants] own the hedge." (Emphasis added.) Ultimately, however, the court concluded that the plaintiffs

had acquired the entire disputed area by adverse possession.[5]

Our review of the record confirms that the undisputed evidence presented at trial established that the defendants and their predecessor, Shugrue, at all times maintained both sides of the hedgerow. On the basis of the evidence presented, and the court's own findings, we agree with the defendants that the court should not have awarded the plaintiffs any part of the hedgerow. Accordingly, we conclude that the court's judgment should have been limited to the property immediately north of the hedgerow, including no part of the hedgerow itself.

III

The defendants' final claim is that the court erred in concluding that the plaintiffs had proven their claim of adverse possession for fifteen years by clear and convincing evidence. We disagree.

The defendants challenge both the court's factual findings and legal conclusions. As set forth previously, "[b]ecause a trial court is afforded broad discretion in making its factual findings, those findings will not be disturbed by a reviewing court unless they are clearly erroneous in light of the evidence and the pleadings in the record as a whole. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed . . . ." (Emphasis omitted; internal quotation marks omitted.) *O'Connor* v. *Larocque*, supra, 302 Conn. 574–75. The legal conclusions that the court drew from those facts are subject to plenary

[5] The parties agree that the court awarded the plaintiffs the entire disputed area, as depicted in plaintiffs' exhibit 1, including one half of the hedgerow.

review. See *Aramony* v. *District of Chapman Beach*, 144 Conn. App. 514, 530, 72 A.3d 1252 (2013) ("[a]pplication of the pertinent legal standard to the trial court's factual findings is subject to our plenary review" (internal quotation marks omitted)); see also *O'Connor* v. *Larocque*, supra, 573 ("[I]t is the province of the trial court to find the facts upon which [such a] claim is based. Whether those facts make out a case of adverse possession is a question of law reviewable by this court." (Internal quotation marks omitted.)).

The court's factual findings in support of its conclusion that the plaintiffs adversely possessed the disputed area for the requisite fifteen year period are set forth in the court's memorandum of decision. The court stated: "In the spring of 2003, the undisputed evidence is that the Padulas began an extensive renovation project in their yard, including the disputed area. The Padulas removed soil and grass in the front portion of the disputed area, installed a sprinkler system, and laid down new sod. The Padulas dug out and removed an old tree and planted new trees in the disputed area. The Padulas widened and repaved their driveway, expanding it into the disputed area. The Padulas restoned their back patio and expanded it into the disputed area. The Padulas removed a fence along the property line (and in the disputed area) and replaced it with a new one. The Padulas also did repairs to the mechanicals of the pool, which remained encroaching into the disputed area. The Padulas' project took three months and included the use of large machines to move and compact soil and stones in the disputed area. All of this activity was open, obvious, and visible to [Shugrue], as he readily admitted at trial. All of this activity, the court concludes, exhibits an open and obvious intent by the Padulas to exclusively possess and use the disputed area as if it were their own property. Yet [Shugrue] never objected to the Padulas' project,

or sought to give them permission to use his land, or sought to assert his rights to the disputed area in any way. Moreover, after the renovation project was completed in the spring [of] 2003, the Padulas continuously and exclusively used the pool and their entire yard (including the disputed area) for family gatherings and, on a daily basis, all the normal uses for which residential homeowners use their yards in an open, obvious, and visible manner and to the exclusion of [Shugrue]. The court concludes that the clear and convincing evidence presented at trial demonstrates that, by the spring of 2003, [Shugrue] had wholly abandoned the disputed area to the Padulas to use as their own yard." (Footnote omitted.) The court then concluded that the defendants did not effectively interrupt the plaintiffs' adverse possession of the property because they never provided the plaintiffs with a written notice that conformed to § 52-575 reclaiming the property within fifteen years of when the adverse possession began. In particular, the court found: "There is no evidence that there was any written notice to the [plaintiffs] from the [defendants] within the fifteen year time period required by § [52-575]. The first written notice of the encroachment issue from the [defendants] to the [plaintiffs] did not come until April 27, 2019—after the fifteen year time period (which first began to run in the spring of 2003) had run to its conclusion in the spring of 2018. Regardless, even if the April 27, 2019 letter could be considered timely, there is no evidence that the April 27, 2019 letter was ever served on the [plaintiffs], or that it was ever recorded on the land records of the town of Wethersfield. See General Statutes § [52-575]." (Footnote omitted.) The court also found that the defendants' mowing of the disputed area did not constitute an ouster of the plaintiffs' adverse possession.

The defendants first contend that the court's factual findings were clearly erroneous insofar as the court

found that Shugrue did not give Anna permission to mow the lawn in the disputed area. We disagree. In support of its finding, the court explained that, "[a]lthough the court credits [Shugrue's] testimony that he happened to tell Anna that he owned the hedge, the court concludes, in its role as fact finder, that [Shugrue] did not tell Anna that he owned any portion of the disputed area. Similar to his arrangement with [Guild], the court concludes that [Shugrue] and Anna were simply seeking to reach a neighborly understanding as to who was going to do what yard work and that neither party discussed [n]or made any reference to their legal rights (aside from [Shugrue] mentioning that he owned the hedge)."

We conclude that the court's findings are supported by the record. Specifically, Shugrue testified that, in his conversation with Anna, he did not specify that he was giving the Padulas "permission" to mow the lawn, and he did not explain to Anna that he owned that portion of the property. Indeed, Anna testified that, from her perspective, Shugrue did not give her permission to mow the lawn in the disputed area and, in fact, she believed that Shugrue was asking *her* for permission to enter that part of the property in order to trim the hedges. Thus, the court's findings were not clearly erroneous.

The defendants next contend that, as a matter of law, the court's findings that they discussed the possible encroachments with the Padulas in 2017 and concurrently mowed the lawn in the disputed area precluded the court from concluding that the plaintiffs had proven their claim of adverse possession by clear and convincing evidence. As to the exclusivity of the plaintiffs' use, the court concluded that Shugrue's once yearly entry into the disputed area to trim the hedges was insufficient to interrupt the Padulas' adverse possession of the disputed area or to negate Shugrue's ouster from

the disputed area. Similarly, the court concluded that the fact that the defendants occasionally mowed the lawn in the disputed area did not defeat the plaintiffs' claim of adverse possession because such momentary acts did not rise to the point of ouster.

In reaching this conclusion, the court correctly noted that once a party has been ousted of possession of a disputed area, the occasional use of that area by the ousted party without the permission of the party in possession is not sufficient to constitute a break in the time period required to establish ownership by adverse possession. See *Ahern* v. *Travelers Ins. Co.*, 108 Conn. 1, 7, 142 A. 400 (1928) ("[w]hen a party is once dispossessed it is not every entry upon the premises without permission that would disturb the adverse possession" (internal quotation marks omitted)); *Boccanfuso* v. *Green*, supra, 91 Conn. App. 312 (same). In addition, the court correctly observed that the defendants failed to provide written notice to the plaintiffs in accordance with § 52-575 (a),[6] to dispute the right of possession and to prevent them from acquiring such a right, and, indeed, did not provide *any* notice in writing until their April 27, 2019 letter, at which point more than fifteen years already had passed. Accordingly, we conclude that the court's findings and conclusions are factually supported and legally sound.[7]

The judgment is reversed only with respect to the delineation of the property regarding the hedgerow itself, and the case is remanded with direction to render judgment consistent with this opinion; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

[6] See footnote 3 of this opinion.

[7] Because we conclude that the trial court properly determined that the plaintiffs had proven their claim of adverse possession for fifteen years by clear and convincing evidence, we need not address the plaintiffs' alternative ground for affirmance, in which the plaintiffs contend that the court should have tacked on a previous owner's prior use of the disputed area.

KOHL'S DEPARTMENT STORES, INC. *v.* TOWN OF ROCKY HILL (AC 45303)

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

Syllabus

The plaintiff appealed to the Superior Court from four years of assessments of its personal property by the Board of Assessment Appeals for the defendant town. The personal property consisted of, inter alia, retail fixtures located at the plaintiff's store in the town. At trial, the town objected to the admission of the conclusions of value in the testimony and appraisal reports of the plaintiff's expert, K, claiming that they were speculative, unreliable, and inadmissible. The trial court overruled the objection, and K testified and presented evidence as to the valuation studies he performed on the plaintiff's fixtures. He also testified regarding the method he used to calculate the true and actual value of the plaintiff's property. In response, the town presented the testimony of its assessor, who indicated that he had valued the property by applying the uniform depreciation schedule set forth in the applicable statute (§ 12-63 (b) (6)) to the original acquisition costs. The town also presented its own expert, who testified regarding the purpose and implementation of the depreciation schedule. The trial court found that the plaintiff was aggrieved and that the town's valuation should be adjusted. It determined the true and actual values of the fixtures after depreciation by applying a 20 percent upward adjustment to K's valuation. On the town's appeal to this court, *held*:

1. The town's claim that the trial court abused its discretion by admitting and relying on K's opinions as to the true and actual value of the plaintiff's property was not persuasive because the trial court reasonably could have concluded that K's opinions were not speculative and that any uncertainties in the essential facts on which they were predicated went to their weight and not to their admissibility:

a. The town's argument that K's testimony and reports were speculative because K relied on a market sales approach when no market existed for the plaintiff's fixtures was unavailing: K testified extensively as to the existence of a used fixture market, and the town took his testimony out of context when it claimed that K had admitted at trial that there was no established market for the plaintiff's used fixtures; moreover, the town mischaracterized K's testimony with respect to the customization of the plaintiff's fixtures, as he never stated that the plaintiff's fixtures were so customized that they could not be sold in the used fixture market, he made clear that his references to the customization of the fixtures related only to their design elements, and he rejected the town's

contention that there was no market for the plaintiff's fixtures; accordingly, the trial court reasonably could have understood K's testimony to be that the plaintiff's fixtures were not so customized that there was no market for them and that he did not believe that the level of customization of the fixtures affected their value.

b. The town's argument that K's opinions of value were unreliable and inadmissible because they depended on flawed data was not persuasive: K testified that he used his best appraisal judgment to evaluate the range of resale prices provided to him by experienced and reliable used fixture dealers to produce a credible number for the value of the plaintiff's fixtures in the used fixture market for each applicable year, that his appraisal report was produced in accordance with professional standards and his valuation approach was approved by the largest multidisciplinary appraisal organization in the world, that, according to that organization, the best way to determine an overall depreciation factor was to determine what the used market was bearing for a particular asset, and that it was customary to interview used fixture dealers in making such a determination; moreover, given K's testimony and the fact that the town had the opportunity on cross-examination to challenge his reliance on such information, it was not an abuse of discretion for the trial court, as the sole arbiter of the credibility of witnesses, to find that the dealers K had interviewed were sufficiently reliable, that the data stemming from such interviews was customarily relied on by experts in the personal property appraisal field, and that K had sufficient experience to evaluate the information; accordingly, the fact that K's depreciation factor utilized the dealers' asking prices did not render his opinions speculative or unreliable.

2. The trial court's findings that the plaintiff had established aggrievement by proving that the town's valuations were excessive and that K's values adjusted upward by 20 percent reflected the true and actual value of the plaintiff's property were not clearly erroneous because they were supported by the evidence in the record:

a. The town's claim that, assuming K's valuation opinions were admissible, they were not sufficient to prove aggrievement because they did not take into account the installation and transportation costs of the plaintiff's fixtures, as required by § 12-63 (b) (2), was not persuasive: although the trial court noted that it did not accept K's opinion in its entirety, in part because he failed to properly account for the costs of installation and transportation, it nonetheless found, on the basis of its evaluation of all of the evidence, that, even when properly accounting for such costs, the town's methodology overstated the value of the plaintiff's fixtures and needed to be adjusted; moreover, there was sufficient evidence in the record to support the trial court's finding, including K's explanation of why the town's application of the depreciation table set forth in § 12-63 (b) (6) did not result in the calculation of the true and actual value of the plaintiff's fixtures, K's opinion of the true and actual

value of the fixtures, and K's thorough explanation of his methodology for concluding that the town's values were overstated; accordingly, it was reasonable for the trial court to conclude that the town's use of the § 12-63 (b) (6) uniform depreciation schedule did not appropriately factor in the economic obsolescence of the fixtures, thus overvaluing them, even after correcting K's opinion for deficiencies.

b. The town's argument that the trial court's findings of the true and actual value of the fixtures were clearly erroneous because its 20 percent increase in K's figures was arbitrary was not persuasive: a review of the record reveals that, in arriving at its conclusions as to the values of the fixtures, the trial court carefully weighed the opinions of the appraisers, the claims of the parties, and its own general knowledge of the elements relevant to establishing value and determined that, although K sufficiently demonstrated that the town had overvalued the plaintiff's property, his valuation method did not fully take into account certain matters as outlined by the town; moreover, the trial court was not required to specify the factors it considered in making its upward adjustment or to specify the valuation method it used, and its decision was not reviewable because the adjustment did not misapply, overlook, or give a wrong or improper effect to any test or consideration that the trial court had a duty to regard, rather, the court exercised its broad discretion in coming to an independent conclusion as to the value of the property; furthermore, in light of the disagreements between the expert appraisers, the trial court reasonably could have concluded that a compromise figure best reflected the true and actual value of the fixtures; additionally, the trial court was not required to make its adjustment with exacting precision, and this court could not say that the adjustment made did not represent at least a reasonable approximation of the value of the plaintiff's property.

Argued February 7—officially released May 23, 2023

Procedural History

Appeal from the decision of the defendant's Board of Assessment Appeals rejecting the valuation of certain of the plaintiff's personal property declarations, brought to the Superior Court in the judicial district of New Britain, Tax Session, where the appeal was tried to the court, *Hon. Henry S. Cohn*, judge trial referee; judgment for the plaintiff, from which the defendant appealed to this court. *Affirmed.*

Michael R. McPherson, with whom, on the brief, was *Morris R. Borea*, for the appellant (defendant).

Gregory F. Servodidio, with whom, on the brief, was *Michael J. Marafito*, for the appellee (plaintiff).

Opinion

BRIGHT, C. J. This appeal arises from a municipal tax appeal filed by the plaintiff, Kohl's Department Stores, Inc., pursuant to General Statutes § 12-117a,[1] against the defendant, the town of Rocky Hill (town), challenging its assessments of personal property located at 1899 Silas Deane Highway (store) for the years 2014, 2015, 2016, and 2017. The town appeals from the judgment of the trial court sustaining the plaintiff's appeal and ordering the reduction of the town's tax assessments levied against the plaintiff's personal property. The town claims that the court (1) abused its discretion by admitting into evidence the valuations of the plaintiff's expert appraiser and (2) made clearly erroneous findings that the plaintiff was aggrieved and as to the true and actual value of its personal property. We affirm the judgment of the trial court.

The present case returns to us following our remand in *Kohl's Dept. Stores, Inc.* v. *Rocky Hill*, 195 Conn. App. 831, 227 A.3d 1040, cert. denied, 335 Conn. 917,

[1] General Statutes § 12-117a provides in relevant part: "(a) (1) Any person . . . claiming to be aggrieved by the action of the board of tax review or the board of assessment appeals, as the case may be, in any town or city may, within two months from the date of the mailing of notice of such action, make application . . . to the superior court for the judicial district in which such town or city is situated . . . .

(b) The court shall have power to grant such relief as to justice and equity appertains, upon such terms and in such manner and form as appear equitable . . . . If the assessment made by the board of tax review or board of assessment appeals, as the case may be, is reduced by said court, the applicant shall be reimbursed by the town or city for any overpayment of taxes . . . ."

Although § 12-117a has been amended since the events underlying the present case; see Public Acts 2022, No. 22-146, § 19; Public Acts 2022, No. 22-118, § 468; those amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

230 A.3d 643 (2020). The following facts, as set forth by this court in the town's prior appeal, and procedural history are relevant to our resolution of this appeal. "As required by law,[2] the plaintiff prepared and filed

[2] By statute, all resident taxpayers in the state of Connecticut are required to file an annual declaration of their taxable tangible personal property located in the state. See General Statutes § 12-40 (requiring assessor to give public notice to all persons liable to pay taxes that they are required to file declaration of their taxable personal property). In addition to resident taxpayers filing their personal property declaration, the local assessor must send a declaration form to nonresident property owners having taxable personal property located in the town to list all of their personal property and to assign a value for each item listed. See General Statutes § 12-43 (a) ("[e]ach owner of tangible personal property located in any town . . . who is a nonresident of such town, shall file a declaration of such personal property with the assessors of the town in which the same is located on such assessment day").

Pursuant to General Statutes § 12-62a (b), all property within a municipality is liable for taxation at a uniform rate of 70 percent of its "present true and actual value . . . ." In determining the present true and actual value, "an assessor shall use generally accepted mass appraisal methods which may include, but need not be limited to, the market sales comparison approach to value, the cost approach to value and the income approach to value." General Statutes § 12-62 (b) (2). "If such property is purchased, its true and actual value shall be established in relation to the cost of its acquisition, including transportation and installation, and shall reflect depreciation in accordance with the schedules set forth in subdivisions (3) to (6), inclusive, of this subsection. . . ." General Statutes § 12-63 (b) (2).

Both the assessor and the taxpayer, however, are free to challenge the efficacy of the depreciation scales set forth in § 12-63 (b) as applied to particular property. Section 12-63 (b) (11) provides that, "[i]f the assessor determines that the value of any item of personal property, other than a motor vehicle, produced by the application of the schedules set forth in this subsection does not accurately reflect the present true and actual value of such item, the assessor shall adjust such value to reflect the present true and actual value of such item." Similarly, § 12-63 (b) (12) provides that "[n]othing in this subsection shall prevent any taxpayer from appealing any assessment made pursuant to this subsection if such assessment does not accurately reflect the present true and actual value of any item of such taxpayer's personal property." Although § 12-63b (a) specifies three different methods of valuation to determine the true and actual value of real property, no such approved methods of valuation are specified for determining the true and actual value of personal property of the kind at issue in the present case.

Although § 12-63 has been amended since the events underlying the present case; see Public Acts 2022, No. 22-118, § 500; that amendment has no

personal property declarations with the town as of October 1, 2014, October 1, 2015, October 1, 2016, and October 1, 2017, in which it declared the value of its retail fixtures, equipment, furniture, signage, and other items of personal property located in the store [fixtures]. Its declarations varied from the town's [determinations of values] with regard to the depreciation schedules used by each party to assess the value of the plaintiff's personal property.[3] The assessor rejected the plaintiff's valuation, as did the Rocky Hill Board of Assessment Appeals (board).[4] After the plaintiff's unsuccessful appeal to the board, it filed a complaint with the trial court, [challenging] the assessment[s] made by the assessor and the subsequent action of the board, pursuant to . . . [§] 12-117a . . . . In its complaint, the plaintiff asserted that the assessor improperly had overvalued and overassessed the true and actual value of its personal property located in its store. The dispute centered on the different depreciation schedules employed by the parties, which resulted in dissimilar values for each year in question.

"The personal property in dispute consisted of [fixtures] used by the plaintiff in its store to display merchandise. To value the [fixtures], the assessor utilized

bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

[3] "The plaintiff and the town calculated the following depreciated valuations of the plaintiff's business personal property:

	"Town's Value	Plaintiff's Amended Value
"October 1, 2014	$632,457	$546,300
"October 1, 2015	$856,629	$678,700
"October 1, 2016	$911,345	$589,600
"October 1, 2017	$847,500	$512,400"

Kohl's Dept. Stores, Inc. v. *Rocky Hill*, supra, 195 Conn. App. 834 n.5.

[4] "Pursuant to General Statutes § 12-111, a taxpayer claiming to be aggrieved by the assessor of the municipality may file an appeal with the municipal board of assessment appeals for relief. Here, the plaintiff filed its appeal with the board." *Kohl's Dept. Stores, Inc.* v. *Rocky Hill*, supra, 195 Conn. App. 834–35 n.6.

the depreciation schedule set forth in [General Statutes] § 12-63 (b) (6). The plaintiff, however, retained an outside appraisal company, Valcon Partners, Ltd. (Valcon). Douglas R. Krieser was an appraiser for Valcon. Krieser developed a depreciation schedule based on a study he conducted that related to the value of used retail [fixtures] . . . .

"The matter was tried to the court, *Hon. Arnold W. Aronson*, judge trial referee, on November 29 and 30, 2017. At trial, Krieser testified about his approach to the valuation of the [fixtures], in which he considered three components to be essential in the depreciation calculation: physical deterioration, functional obsolescence, and economic obsolescence. Krieser relied on information he had received from out-of-state fixture furniture dealers in the business of reselling used [fixtures]. He provided these dealers with a sample of the fixtures used in one of the plaintiff's typical stores and instructed them to use their experience and sales history and to consider relevant economic factors to estimate what the fixtures would sell for in a transaction between a typical buyer and seller. . . .

"In response, the town offered no evidence as to the value of the [fixtures]; rather, the assessor testified that he took the historic costs of the [fixtures], a calculation not in dispute, and applied to that cost the depreciation schedule set forth in § 12-63 (b) (6). Although he acknowledged that he was not aware if the town had enacted an ordinance adopting the statutory schedule, the assessor testified that, as a matter of fact, he assesses all personal property in the town in the same way, by taking the original cost of an asset and applying a uniform depreciation schedule to that asset.

"Following trial, the court issued its memorandum of decision sustaining the plaintiff's appeal. At the outset of its analysis, the court stated that, pursuant to

§ 12-63 (b) (2), the depreciation schedule set forth in § 12-63 (b) (6) can be used by a municipal assessor only if the municipality has, by ordinance, adopted the provisions of that section. The court found that the town had not adopted any such ordinance. . . . [O]n the basis of the Valcon evidence and the lack of any appraisal from the town, the court found that the plaintiff was aggrieved by the tax assessment[s]." (Footnotes added; footnotes in original; footnotes omitted.) Id., 834–37.

The town thereafter appealed to this court, claiming that the trial court's "refusal to consider the assessor's use of the statutory depreciation schedule was incorrect and that this legal determination likely influenced the court's finding of aggrievement and its ultimate determination of valuation." Id., 837. This court agreed and held that a municipal tax assessor may use the depreciation schedule provided in § 12-63 (b) (6) for purposes of assessing personal property even if the municipality has not adopted it by ordinance. Id., 841. Because the trial court did not consider the factual question of whether application of the statutory depreciation schedule resulted in a true and actual valuation of the plaintiff's fixtures, this court reversed the judgment and remanded the case for a new trial. Id., 841–43.

On remand, the town filed a motion in limine pursuant to Practice Book § 15-3, seeking to preclude the plaintiff from introducing into evidence at trial Krieser's opinions as to the value of the plaintiff's personal property. The town argued that Krieser had "impermissibly based his valuation on market values of used custom fixtures for which there is no market" and "relied on the speculative 'asking price' obtained from used furniture dealers who did not even consider the fixtures' custom features." Accordingly, the town claimed that Krieser's opinions as to the true and actual value of the property were speculative, unreliable, and inadmissible. The

court, *Klau*, *J.*, denied the motion "without prejudice to the [town] raising the arguments set forth in the motion (regarding the speculative nature of the testimony) when the plaintiff's expert testifies."

A new trial took place on October 26 and 27, 2021. At the outset, the parties stipulated that the sole issue to be determined by the court was the present true and actual values[5] of the fixtures listed under category 16 of the plaintiff's declarations for the tax years 2014 through 2017. The parties also agreed that the plaintiff's original acquisition costs for the fixtures were not contested.

The plaintiff again presented Krieser as its expert witness to testify about his approach to the valuation of the plaintiff's fixtures and offered as evidence Krieser's appraisal reports that contained a summary of his valuation theory, process, and conclusions.[6] The town objected to the admission of Krieser's conclusions of value in both his testimony and appraisal reports, raising the same arguments as those made in its motion in limine. The court overruled the objection and admitted the testimony and reports. Krieser explained that he performed valuation studies of the plaintiff's fixtures for the relevant years and calculated the true and actual

[5] The phrase "true and actual value" is synonymous with "fair market value." See General Statutes § 12-63 (a). As our Supreme Court "explained more than fifty years ago, [t]he expressions actual valuation, actual value, market value, market price and . . . fair value are synonymous. Usually, these expressions mean the figure fixed by sales in ordinary business transactions, and they are established when other property of the same kind in the same or a comparable location has been bought and sold in so many instances that a value may reasonably be inferred. . . . In other words, the best test is ordinarily that of market sales. . . . [When] evidence of such sales is not available, other means must be employed to ascertain the present true and actual valuation. . . . No one method is controlling; consideration should be given to them all, if they have been utilized, in arriving at the value of the property." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Redding Life Care, LLC* v. *Redding*, 308 Conn. 87, 112–13, 61 A.3d 461 (2013).

[6] The plaintiff also introduced, without objection, digital photographs of the fixtures, which Krieser had taken during his investigation.

value of the property by creating a single percentage factor comprised of two elements: (1) a trend factor that appreciated the asset to reflect the present replacement cost; and (2) a depreciation factor based on market research to reflect the physical and economic obsolescence of the property over time. Krieser multiplied the two factors together to produce a combined factor that he applied to the original acquisition costs of the plaintiff's fixtures, as determined by the plaintiff's fixed asset records, to determine the relevant true and actual values of the fixtures for tax purposes.[7] In calculating the true and actual values of the fixtures, Krieser determined that the property was in "fair" condition, as opposed to "excellent," "good," or "poor" condition, which impacted the depreciation factor.

In response to Krieser's testimony and reports, the town presented the testimony of its assessor, Stuart Topliff, who recounted his valuation method in which he applied the uniform depreciation schedule set forth in § 12-63 (b) (6) to the fixtures' original acquisition costs.[8] The town also presented Steven Kosofsky, an

[7] Krieser concluded that the true and actual value of the fixtures after depreciation was $417,003.14 for 2014, $566,859.98 for 2015, $479,099.26 for 2016, and $407,866.86 for 2017.

[8] General Statutes § 12-63 (b) (6) provides: "The following schedule of depreciation shall be applicable with respect to all tangible personal property other than that described in subdivisions (3) to (5), inclusive, and subdivision (7) of this subsection:

"Assessment Year Following Acquisition	Depreciated Value As Percentage Of Acquisition Cost Basis
"First year	Ninety-five per cent
"Second year	Ninety per cent
"Third year	Eighty per cent
"Fourth year	Seventy per cent
"Fifth year	Sixty per cent
"Sixth year	Fifty per cent
"Seventh year	Forty per cent
"Eighth year and thereafter	Thirty per cent"

assessor for the town of Newington, as an expert witness. Kosofsky testified as to the condition of the fixtures at the time of appraisal, describing them as being in "good" condition in contrast to Krieser's classification of them as being in "fair" condition. Kosofsky also testified as to the purpose, function, development, and implementation of the depreciation schedule set forth in § 12-63 (b) (6). In addition, the town introduced digital photographs of the plaintiff's fixtures that Kosofsky had taken in 2016.

On February 3, 2022, the court, *Hon. Henry S. Cohn*, judge trial referee, sustained the plaintiff's appeal pursuant to § 12-117a. On the basis of the evidence presented, the court found that the plaintiff was aggrieved and that the town's valuation should be adjusted. The court thereafter set forth its conclusions as to the true and actual values of the fixtures as installed.[9] The court declined to adopt fully Krieser's valuation conclusions because it found that (1) the photographic evidence supported a conclusion that the fixtures were in "good" rather than "fair" condition, (2) Krieser relied too heavily on values set by used fixture dealers, and (3) Krieser had not fully considered transportation and installation

[9] In its posttrial brief, the town maintained that the highest and best use of the property was continued use as retail fixtures in the plaintiff's store. At trial, Krieser testified that the highest and best use of the property was continued use in *any* retail establishment. "A property's highest and best use is commonly accepted by real estate appraisers as the starting point for the analysis of its true and actual value. . . . [U]nder the general rule of property valuation, fair [market] value, of necessity, regardless of the method of valuation, takes into account the highest and best value of the land. . . . The highest and best use conclusion necessarily affects the rest of the valuation process because, as the major factor in determining the scope of the market for the property, it dictates which methods of valuation are applicable." (Internal quotation marks omitted.) *Digital 60 & 80 Merritt, LLC* v. *Board of Assessment Appeals*, 211 Conn. App. 559, 574–75, 274 A.3d 952, cert. denied, 343 Conn. 926, 275 A.3d 1212 (2022). The court concluded that it was determining the true and actual value of the plaintiff's fixtures "as installed . . . at this store."

costs in his valuation as required by § 12-63 (b) (2). Accordingly, "[b]ased on [its] review of the record, the court [made] an [upward] adjustment of 20 percent to Krieser's valuation." The court thus found the following true and actual values after depreciation for the fixtures: $500,403.82 for 2014; $578,231.96 for 2015; $574,919.71 for 2016; and $489,440.75 for 2017.

The town filed the present appeal on February 14, 2022. On February 24, 2022, the town filed a motion for articulation, requesting that the court state the legal and factual bases for the court's (1) order at trial overruling the town's objection to Krieser's opinions of value and (2) findings of true and actual value in its memorandum of decision. The trial court granted that motion and issued an articulation, in which it stated that it overruled the town's objection to Krieser's valuation because the court "concluded that [Krieser] was qualified, that his testimony was reliable, not speculative, and that it would be of assistance to the court." The court further explained that, in determining the present true and actual value of the property, "[t]he court relied on the plaintiff's expert testimony, concluding that the town's formula in this instance was too limiting in finding true value. . . . The court did not completely rely on the plaintiff's value, however.

"As the . . . town has acknowledged in its motion for articulation, the court determined that the plaintiff's expert's opinion on depreciation did not fully take into account certain matters as outlined by the [town]. . . . The court relied on the record as developed at trial to establish [value] adjusting the plaintiff's value by 20 percent." (Citations omitted.) Finally, the court clarified that "[t]he basis for [its] proceeding to [true and actual] value is because [it] held that the record established that the plaintiff had proven aggrievement. The [town's]

value was excessive, thus allowing for a finding of aggrievement." Additional facts will be set forth as necessary.

I

On appeal, the town first claims that the court abused its discretion by admitting Krieser's opinions as to the true and actual value of the plaintiff's property. In particular, the town argues that Krieser's testimony and appraisal reports were inadmissible "because they lack a sufficient basis in fact." (Emphasis omitted.) Specifically, the town argues that (1) Krieser's appraisal was based on the resale value of the plaintiff's fixtures when no market for those fixtures existed and (2) Krieser relied on unsupported and speculative information in arriving at the resale values of the fixtures. We are not persuaded by either argument.

We begin with our standard of review. "We review a trial court's decision [regarding the admission of] expert testimony for an abuse of discretion. . . . We afford our trial courts wide discretion in determining whether to admit expert testimony and, unless the trial court's decision is unreasonable, made on untenable grounds . . . or involves a clear misconception of the law, we will not disturb its decision. . . . To the extent the trial court makes factual findings to support its decision, we will accept those findings unless they are clearly improper." (Internal quotation marks omitted.) *Dept. of Social Services* v. *Freeman*, 197 Conn. App. 281, 289–90, 232 A.3d 27, cert. denied, 335 Conn. 922, 233 A.3d 1090 (2020). "Under [an abuse of discretion] standard, we must make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion. . . . [Our] review of such rulings is limited to the questions of whether the trial court correctly applied the law and reasonably could have reached the conclusion that it did." (Internal

quotation marks omitted.) *King* v. *Hubbard*, 217 Conn. App. 191, 201–202, 288 A.3d 218 (2023).

"Expert testimony should be admitted when: (1) the witness has a special skill or knowledge directly applicable to a matter in issue, (2) that skill or knowledge is not common to the average person, and (3) the testimony would be helpful to the court or jury in considering the issues. . . . An expert may testify in the form of an opinion and give reasons therefor, *provided sufficient facts are shown as the foundation for the expert's opinion*. . . . Thus, [t]o render an expert opinion the witness must be qualified to do so and there must be a factual basis for the opinion. . . . Accordingly, this court has stated, [t]he essential facts on which an expert opinion is based are an important consideration in determining the admissibility of the expert's opinion. . . .

"In a case in which the factual basis of an [expert witness'] opinion is challenged the question before the court is whether the uncertainties in the essential facts on which the opinion is predicated are such as to make an opinion based on them without substantial value. . . . For example, this court has determined that the opinions of a purported expert witness, whose testimony was based on speculation and who lack[ed] [sufficient] personal knowledge . . . of the facts on which he based his opinions . . . were without substantial value." (Citations omitted; emphasis altered; internal quotation marks omitted.) *Gianetti* v. *Neigher*, 214 Conn. App. 394, 440, 280 A.3d 555, cert. denied, 345 Conn. 963, 285 A.3d 390 (2022).

The following additional facts are relevant to this claim. At trial, Krieser testified as to his background and qualifications, stating that he has more than three decades of experience as an appraiser; owns the appraisal firm Valcon; is a member of the American

Society of Appraisers—in which he has served in various positions such as President and Chairman of the Board of Governors; and has taken numerous professional development courses through the American Society of Appraisers[10] and the Royal Institute of Chartered Surveyors.[11] In light of this experience, the town conceded at trial that Krieser was qualified to testify as an expert in personal property appraisals.

Krieser thereafter described the various steps he took in preparation of the appraisals, including inspecting the fixtures in person, conducting in-depth market research on retail fixtures, and obtaining the fixed asset records of the fixtures at the store that detailed the original acquisition costs of the fixtures—including cost of installation, transportation, and engineering. On the basis of his investigation, Krieser designed a combined cost approach[12] and market data approach[13] to calculate

[10] "The American Society of Appraisers is the largest multidisciplinary appraisal organization in the world."

[11] The Royal Institute of Chartered Surveyors is "a globally recognised professional body" that promotes and enforces "the highest professional standards in the development and management of land, real estate, construction and infrastructure." The Royal Institute of Chartered Surveyors, About RICS, available at https://www.rics.org/about-rics (last visited May 11, 2023).

[12] "Under the cost approach, the appraiser estimates the current cost of replacing the subject property with adjustments for depreciation, the value of the underlying land and entrepreneurial profit. . . . This approach is particularly useful in valuing new or nearly new improvements and properties that are not frequently exchanged in the market." (Citation omitted; internal quotation marks omitted.) *Sun Valley Camping Cooperative, Inc.* v. *Stafford*, 94 Conn. App. 696, 702 n.10, 894 A.2d 349 (2006).

[13] "The comparable sales approach is also known as the market data approach or sales comparison approach. . . . It is a process of analyzing sales of similar recently sold properties in order to derive an indication of the most probable sales price of the property being appraised. The reliability of this technique is dependent upon (a) the availability of comparable sales data, (b) the verification of the sales data, (c) the degree of comparability or extent of adjustment necessary for time differences, and (d) the absence of non-typical conditions affecting the sales price. . . . After identifying comparable sales, the appraiser makes adjustments to the sales prices based on elements of comparison." (Citations omitted; internal quotation marks omitted.) *Sun Valley Camping Cooperative, Inc.* v. *Stafford*, 94 Conn. App. 696, 702 n.8, 894 A.2d 349 (2006).

the true and actual values of the plaintiff's fixtures. Specifically, Krieser created a combined factor comprised of two elements: (1) a trend factor that appreciated the property to reflect the present replacement cost and (2) a depreciation factor, based in part on a market data approach, to reflect the physical and economic obsolescence of the property over time. Krieser then applied the combined factor to the original acquisition cost of the fixtures to calculate their true and actual value.

In calculating the trend factor, Krieser first determined the original acquisition costs of the plaintiff's fixtures as reported in the plaintiff's fixed asset records. Krieser then consulted information available through the Bureau of Labor Statistics to determine the replacement cost of the plaintiff's fixtures. From those two values he calculated a percentage by which the property had increased in value over time.

In calculating the depreciation factor, Krieser stated that there are "three types of depreciation that we have to take into account. First is physical deterioration . . . that really has to do with wear and tear on the asset itself. The second one is functional obsolescence which has to do with a cause or an obsolescence that's inherent to the object itself. . . . Then there's economic obsolescence which is a driver from the outside of value. . . . So, what I needed to do is . . . figure out how to incorporate all three of those factors into my valuation. . . . [T]he way that I chose to incorporate all three of those into one factor was to develop a market based depreciation curve."

To create that curve, Krieser consulted several companies operating as used fixture dealers that he deemed credible and reliable. Krieser provided the dealers with diagrams of the fixtures available at the plaintiff's store, information on what materials they were made of, and

their particular functions. Krieser requested that the dealers focus on the functionality of a given fixture, rather than on its design elements. The dealers then provided Krieser with the prices that they would sell the fixtures for if the fixtures were in excellent, good, fair, or poor condition. Krieser used the prices in conjunction with other market research data to develop the depreciation factor—the percentage by which a given fixture depreciates in value over time. Krieser acknowledged that the dealers did not provide him with comparable sales information for the plaintiff's fixtures, nor was Krieser aware of how exactly the dealers derived their asking prices.

Krieser then multiplied the trend factor and the depreciation factor together to come up with the combined factor that he applied to the fixtures' original acquisition costs, as documented in the plaintiff's fixed asset records, to calculate the present true and actual values of the plaintiff's fixtures. A combined factor was determined for each valuation year as well as for each year going back to 2005, the year the fixtures were first purchased, as the trend and depreciation factors differed from year to year.

A

The town first argues that Krieser's testimony as to his opinions of value and his valuation reports were speculative because he "relied on a market sales approach where *no* market exists" for the plaintiff's fixtures. (Emphasis in original.) In particular, the town argues that "Krieser admitted at trial that there is no established market for [the plaintiff's] used fixtures," and, accordingly, that "Krieser's 'combined' depreciation factor hinges on a fictitious 'market' sales analysis of [the plaintiff's] used custom fixtures for which no market exists." On the basis of our review of the record, we conclude that the town's argument fails.

At the outset we note that Krieser testified extensively to the existence of a used fixture market. For example, in recounting what steps he took to prepare for his appraisal of the plaintiff's property, Krieser stated that he interviewed several used fixture dealers who owned companies that regularly purchased and sold used retail fixtures. Krieser also testified at length about the impact that the Great Recession had on the retail marketplace, stating that "one of the key drivers of the value of a store fixture and, again, when I use the word 'fixture,' I'm not talking about a light fixture or a plumbing fixture or something, we're talking about a display fixture for the retail marketplace. [In 2008], [t]here [were] so many store closings that the used fixture market was flooded with used [fixtures] and . . . at the same time that the fixture market was flooded with used fixtures, the purchasers of the used fixtures . . . were dwindling."

Moreover, the town takes Krieser's testimony out of context in claiming that "Krieser admitted at trial that there is no established market for [the plaintiff's] used fixtures." Specifically, the town points to the following exchanges on cross-examination between its counsel and Krieser:

"Q. . . . As far as you know, no major retailer buys used fixtures. Isn't that right?

"A. No major retailer today purchases used fixtures. That is a correct statement.

"Q. All right. And the used market for custom fixtures, like we're talking about here, the [plaintiff's] types of fixtures, the used market for custom fixtures is zero. Isn't that right?

"A. When we're talking, again, about customized fixtures, we're talking about the way that asset looks, the colorization and maybe the shape of the asset and,

again, you got to remember what was going on at the time frame that we're discussing here back in 2014 to 2017, the entire market for used fixtures was severely depressed and I was told by the dealers that the more standardized a fixture is, the more chance of it actually selling in the used marketplace.

"So, for example, a gondola rack, which is something that you see at every convenience store and a lot of supermarkets, that's as basic as you get and those were selling pretty well throughout the process, now they sold for less money, but they actually sold.

* * *

"Q. And—all right. Now, didn't you testify at the first trial that the used market for custom fixtures was zero?

"A. The used market for a fixture that is so customized that it cannot be used for anything other than a particular product in a particular store is likely nothing or very minimal, that is true."

On the basis of these exchanges, the town argues that, although there may be a market for standard used fixtures, Krieser acknowledged the lack of one for customized fixtures, while also acknowledging that the plaintiff's fixtures were customized. Thus, according to the town, Krieser based his appraisals on a market he admitted does not exist.

The town, however, mischaracterizes Krieser's testimony with respect to the customization of the plaintiff's fixtures. At no point in his testimony did Krieser state that the plaintiff's fixtures are so customized that they could not be sold in the used fixture market. Krieser expressly stated that when he discusses the customized aspects of the plaintiff's fixtures, he is referencing their design elements and not their functionality. For example, Krieser testified that, "[w]hen we're talking . . . about customized fixtures, we're talking about the way

that the asset looks, the colorization and maybe the shape of the asset . . . ." In addition, the following exchange between the plaintiff's counsel and Krieser on direct examination makes clear that Krieser's references to customization relate only to the design elements of a given fixture:

"Q. How did this notion of customized fixtures play into your [market based] analysis?

"A. So, every particular—every store, whether it's a [plaintiff's store] or a JCPenney or a Macy's or some other retail store, has a particular look when you go into the store and that look could be the color of the panels on the cabinets, whether the rack has, you know, chrome or whether it's flat colored or however that is. . . . So when I was talking to the dealers, I wanted them to look at the configuration of the fixtures so they knew kind of what kind of fixtures we're talking about, but I asked them to look at the functionality of what the rack—what the fixture does and what they felt that [the fixture] would be worth in the used marketplace if they had that sitting on their showroom floor.

"Q. I see. And, therefore, the information you got back from the dealers reflected their consideration of the [the plaintiff's fixtures] but maybe not the—all of the design elements or colors or things of that nature. . . .

"A. That is correct. So, we looked at what the functionality was, whether the—whether the, you know, the color of the panel was oak or maple or clear. That was the kind of customization we asked them to kind of put to the side and say well, it's a—it's a rack that could be used for hanging or folding, it's a shoe display. You know, every store has a shoe display, every store has a display that displays jewelry, so take a look at it from that standpoint of what would a cabinet like that go for in your store if you had that for sale."

Further, the following colloquy between the town's counsel and Krieser demonstrates that Krieser rejected the town's contention that there is no market for the plaintiff's fixtures:

"Q. So you'd agree, there really is no market for custom fixtures.

"A. [There is] a market for [fixtures] and the more customized a fixture is, the less likely it is going to sell in the marketplace. . . .

"Q. And when you provided the information to the used furniture—the used fixture dealers, you told them to disregard the custom features, did you not?

"A. In that comment of disregard the custom features, what I was implying to them and what we discussed was looking at the functionality of those, whether it is a rack for hanging clothes, whether it is a rack for putting clothes on a shelf, whether it is a jewelry display case, to look at the functionality of that asset, not so much that it was white versus beige or oak versus maple, just to look at the specifics and what the functionality was and to look at it from that standpoint.

"Q. All right. And so, these used furniture—these used fixture dealers that have no experience selling custom fixtures, the only experience they have is selling used fixtures. In other words, they didn't have any sales for the custom ones, right, and they had no experience selling them, right?

"A. I wouldn't know that. Every—every store has its own look and its own feel and some customization and so the fixture market is very broad and the fixture market itself has a lot of variabilities. So, I cannot say with any certainty that they have never sold a customized fixture because to an extent, almost all [fixtures are] somewhat customized."

Taken as a whole, the court reasonably could have understood Krieser's testimony to be that the plaintiff's fixtures were not so customized that there was no market for them. Rather, he requested the fixture resellers to focus on the function of the fixtures and not the superficial customized characteristics such as color or finish when determining their resale values. The court also reasonably could have understood Krieser's testimony to be that all used fixtures have some degree of customization because every store has its own look, and he did not believe that that level of customization affected the value of the fixtures.

It is axiomatic that, "[i]n a case tried before a court, the trial judge is the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony. . . . The credibility and the weight of expert testimony is judged by the same standard, and the trial court is privileged to adopt whatever testimony [it] reasonably believes to be credible. . . . On appeal, we do not retry the facts or pass on the credibility of witnesses." (Internal quotation marks omitted.) *Nutmeg Housing Development Corp.* v. *Colchester*, 324 Conn. 1, 10, 151 A.3d 358 (2016). Considering Krieser's entire testimony, we conclude that the court did not abuse its discretion in admitting his testimony and reports and basing its valuation of the plaintiff's fixtures on Krieser's combined cost and market based approach.

B

The town also argues that Krieser's "opinions of value are unreliable and, thus, inadmissible because they *depend* on flawed data, i.e., the fabricated sale prices for used custom fixtures." (Emphasis in original.) In particular, the town argues that the used fixture dealers that Krieser relied on to calculate his depreciation factor "arbitrar[ily]" based their sales price opinions on "nothing more than their personal expertise." The town

thus contends that "Krieser relied on speculative opinions of market value that lacked any basis in an 'assuredly reliable methodology' other than personal expertise or 'ipse dixit' (i.e., 'an assertion made but not proved'). *Klein* v. *Norwalk Hospital*, 299 Conn. 241, 263, [9 A.3d 364] (2010) ['[w]ithout . . . meaningful indicia of reliability, [the expert's] conclusion was without basis in an assuredly reliable methodology; without any stated support for its reliability other than his own personal expertise, it was nothing more than his ipse dixit']."[14] According to the town, "[b]ecause the [used fixture] dealers' asking prices are themselves unreliable and speculative, they render unreliable Krieser's so-called 'combined factor' and his entire valuation" such

[14] In advancing this argument, the town points to *Robinson* v. *Westport*, 222 Conn. 402, 610 A.2d 611 (1992), in which our Supreme Court stated that "[p]urely imaginative or speculative value should not be considered" when valuing property. (Internal quotation marks omitted.) Id., 409.

The issue in *Robinson*, however, related to determining the highest and best use of real property in order to calculate the just compensation owed to a property owner whose land had been taken by eminent domain. Id., 403. In such cases, "[t]he amount that constitutes just compensation is the market value of the condemned property when put to its highest and best use at the time of the taking." Id., 405. Our Supreme Court held that a landowner "must provide the trier with sufficient evidence from which it could conclude that it is reasonably probable that the land to be taken would, but for the taking, be devoted to the proposed use" at the time of taking. (Internal quotation marks omitted.) Id., 409. Moreover, "[t]he uses to be considered must be so reasonably probable as to have an effect on the present market value of the land. Purely imaginative or speculative value should not be considered." (Emphasis omitted; internal quotation marks omitted.) Id. Therefore, the phrase "purely imaginative or speculative" related to whether a landowner's proposed highest and best use of property was reasonably probable such that a valuation method that depended on that use was appropriate.

In the present case, the town maintained that the highest and best use of the property was continued use as retail fixtures in the plaintiff's store. The court concluded that it was determining the true and actual value of the plaintiff's fixtures "as installed . . . at this store." The only question at issue was how to calculate the appropriate depreciation in value of the fixtures over time. For the reasons stated, we conclude that the methodology used by Krieser to calculate the depreciation in value of the fixtures was not speculative or purely imaginary.

that his testimony and report regarding valuation were inadmissible. We are not persuaded.

It is well established that "[t]he opinions of experts must be based upon facts which have been proved, assumed, or observed, and which are sufficient to form a basis for an intelligent opinion. . . . Opinion evidence should be accompanied by a statement of the facts on which it is based, and as a general rule, an expert must state facts from which the [fact finder] may draw [its] conclusions. Conversely, a witness qualified as an expert may not only testify as to the conclusions based upon his skill and knowledge, but also as to the facts from which such conclusions are drawn. . . . [W]here the factual foundation for an expert opinion is not fully disclosed, it cannot be assailed upon appeal if accepted by the [fact finder] as sufficient in weight and credibility to support the verdict. . . .

"The fact that an expert opinion is drawn from sources not in themselves admissible does not render the opinion inadmissible, provided the sources are fairly reliable and the witness has sufficient experience to evaluate the information. . . . This is so because of the sanction given by the witness's experience and expertise. . . . An expert may give an opinion based on sources not in themselves admissible in evidence, provided (1) the facts or data not in evidence are of a type reasonably relied on by experts in the particular field, and (2) the expert is available for cross-examination concerning his or her opinion." (Internal quotation marks omitted.) *Birkhamshaw* v. *Socha*, 156 Conn. App. 453, 483–84, 115 A.3d 1, cert. denied, 317 Conn. 913, 116 A.3d 812 (2015); see also *DiNapoli* v. *Regenstein*, 175 Conn. App. 383, 393–94, 167 A.3d 1041 (2017). Moreover, "an expert's opinion is not rendered inadmissible merely because the opinion is based on inadmissible hearsay, so long as the opinion is based on trustworthy information and the expert had sufficient experience to

evaluate that information so as to come to a conclusion which the trial court might well hold worthy of consideration . . . ." (Internal quotation marks omitted.) *Birkhamshaw* v. *Socha*, supra, 485.

In the present case, Krieser testified that the dealers he interviewed owned companies that "purchased and sold used [fixtures] on a daily basis and that was their sole business." He further testified that the dealers, based on their multiple years of experience, the fixtures they had sold in the past, and the function of the plaintiff's fixtures, provided him with a range of asking prices for which they would sell the plaintiff's fixtures to various retail establishments. Krieser then used his "best appraisal judgment" to evaluate the dealers' responses and produced a "credible number" for the value of the fixture in the used fixture marketplace for each year. The town cross-examined Krieser at length concerning the dealers and their asking prices on which Krieser relied. Any weaknesses that such questions may have exposed in Krieser's testimony were fodder for the court's consideration in evaluating his testimony. See, e.g., *Banco Popular North America* v. *du'Glace, LLC*, 146 Conn. App. 651, 660, 79 A.3d 123 (2013) (irregularities within expert appraiser's valuation methodology that were deemed fodder for cross-examination, went to weight, not admissibility, of appraisal report and expert's testimony).

Significantly, Krieser testified that his appraisal report was produced pursuant to the Uniform Standards of Professional Appraisal Practice and that his valuation approach was approved by the American Society of Appraisers. Krieser also testified that, according to the American Society of Appraisers, the best way to determine an aggregate obsolescence factor—and, thus, an overall depreciation factor—is to determine what the

used market is bearing for a particular asset.[15] Krieser expressly testified that interviewing dealers is a customary method appraisers use to establish what the market is bearing for a certain asset: "[U]nlike real estate valuation where you've got a really good public database of information for sales, you don't have that for personal property. So . . . one of the processes we use are what we call dealer opinions of value and that is, again, something that is taught by the American Society of Appraisers as a credible and a good appraisal practice to use for valuing assets like this." Notably, the town did not present any evidence contradicting Krieser's statement that interviewing dealers is a customary practice in the valuation of personal property.

Furthermore, Krieser testified that "[a]ll of the dealers that [he] used had significant experience in buying and selling used [fixtures]" and that he "deemed these dealers to be credible and reliable for several reasons. First of all, when we started this process with [the plaintiff] back in 2009, 2010, one of the first things I did was I discussed with another appraiser, who was much more my senior [and] had done a lot of work in the retail world, who[m] they used for their sources, and all three of these sources were sources that they had used in the past and that they had deemed credible

[15] "The Court: Why did you—that's the point, a point here, anyway. Why did you think that [speaking to dealers to obtain a depreciation factor] was the way to go with the—again, we have the trend factor, cost approach showing that the property increased in value from X to Y, but again, in the same nine years, there would be some falloff because they're now in fair condition, why was the way to determine what that falloff would be based upon the used furniture market?

* * *

"[Krieser]: . . . One of the things that the American Society of Appraisers teaches in their book is what we call an aggregate obsolescence factor which is taking your cost approach and just simplistically taking your cost approach using a market analysis to calculate or quantify that difference or the economic obsolescence. So, the best—the best indicator of economic obsolescence is what the used market is bearing for that particular asset."

and so, therefore, I took that as one indication that they were credible.

"The second thing that I did is I did have a discussion with each one of them about their experience, how many years they've been in business, you know, what kind of shop they had, that kind of thing and from those discussions and the fact that they became recommended from a very experienced appraiser friend of mine that they were credible and reliable sources and that they did know the market very well."

Given this testimony, and the fact that the town had the opportunity on cross-examination to challenge Krieser's reliance on such information, it was not an abuse of discretion for the court, as the sole arbiter of the credibility of the witnesses; see *Nutmeg Housing Development Corp.* v. *Colchester*, supra, 324 Conn. 10; to find that (1) the dealers were sufficiently reliable, (2) data stemming from interviews with such dealers is customarily relied on by experts in the personal property appraisal field, and (3) Krieser had sufficient experience to evaluate the information. Accordingly, the fact that Krieser's depreciation factor utilized the dealers' asking prices does not render his opinion speculative and inadmissible. See *Digital 60 & 80 Merritt, LLC* v. *Board of Assessment Appeals*, 211 Conn. App. 559, 604, 274 A.3d 952 (noting that valuation "is a matter of opinion based on all the evidence and, at best, is one of approximation" (internal quotation marks omitted)), cert. denied, 343 Conn. 926, 275 A.3d 1212 (2022).

For the foregoing reasons, we conclude that the court did not abuse its discretion by admitting and relying on Krieser's valuation opinions because it reasonably could conclude that those opinions were not speculative or unreliable and that any uncertainties in the essential facts on which Krieser's opinions were predicated

went to the weight and not the admissibility of those opinions.

II

The town next claims that the court made clearly erroneous findings that (1) the plaintiff established aggrievement by proving that the town's valuations were excessive and (2) Krieser's values adjusted upward by 20 percent reflected the true and actual value of the plaintiff's property. The plaintiff disagrees and argues that the court's valuations were not clearly erroneous as they are supported by the evidence in the record. We agree with the plaintiff.

As discussed previously in this opinion, the plaintiff brought its tax appeal pursuant to § 12-117a, "which allows taxpayers to appeal the decisions of municipal boards of [assessment appeals] to the Superior Court [and] provide[s] a method by which an owner of property may directly call in question the valuation placed by assessors upon his property. . . . In a § 12-117a appeal, the trial court performs a two step function. The burden, in the first instance, is upon the plaintiff to show that he has, in fact, been aggrieved by the action of the board in that his property has been overassessed. . . . In this regard, [m]ere overvaluation is sufficient to justify redress under [§ 12-117a], and the court is not limited to a review of whether an assessment has been unreasonable or discriminatory or has resulted in substantial overvaluation. . . . Whether a property has been overvalued for tax assessment purposes is a question of fact for the trier. . . . The trier arrives at his own conclusions as to the value of land by weighing the opinion of the appraisers, the claims of the parties in light of all the circumstances in evidence bearing on value, and his own general knowledge of the elements going to establish value including his own view of the property. . . .

"Only after the court determines that the taxpayer has met his burden of proving that the assessor's valuation was excessive and that the refusal of the board of [assessment appeals] to alter the assessment was improper, however, may the court then proceed to the second step in a § 12-117a appeal and exercise its equitable power to grant such relief as to justice and equity appertains . . . . If a taxpayer is found to be aggrieved by the decision of the board of [assessment appeals], the court tries the matter de novo and the ultimate question is the ascertainment of the true and actual value of the applicant's property." (Internal quotation marks omitted.) *Walgreen Eastern Co.* v. *West Hartford*, 329 Conn. 484, 491–92, 187 A.3d 388 (2018).

"We are bound by the trial court's findings of fact unless those findings are clearly erroneous, but we invoke a plenary review of any legal conclusions. We must, therefore, decide whether the conclusions are legally and logically correct, and find support in the record." (Internal quotation marks omitted.) *Kohl's Dept. Stores, Inc.* v. *Rocky Hill*, supra, 195 Conn. App. 837.

A

The town first claims that, assuming that Krieser's valuation opinions were admissible, they were not sufficient to prove aggrievement because they did not take into account the installation and transportation costs of the plaintiff's fixtures, as required by § 12-63 (b) (2). The town contends that "[t]his deficiency . . . was not a mere issue of credibility to be weighed but, rather, an outright failure of proof. . . . Thus, even if Krieser's opinions were admissible . . . they could not prove aggrievement. The trial court should not have gone any further to 'correct' the town's values. See [*Kohl's Dept. Stores, Inc.* v. *Rocky Hill*, supra, 195 Conn. App. 838] (stating that, if plaintiff fails to prove overvaluation, 'the

trial proceeds no further, and the town's assessment stands')." (Emphasis omitted.) We are not persuaded.

"In a tax appeal taken from the trial court to the Appellate Court or to [our Supreme Court], the question of overvaluation usually is a factual one subject to the clearly erroneous standard of review. . . . Under this deferential standard, [w]e do not examine the record to determine whether the trier of fact could have reached a conclusion other than the one reached. Rather, we focus on the conclusion of the trial court, as well as the method by which it arrived at that conclusion, to determine whether it is legally correct and factually supported. . . . Additionally, [i]t is well established that [i]n a case tried before a court, the trial judge is the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony. . . . The credibility and the weight of expert testimony is judged by the same standard, and the trial court is privileged to adopt whatever testimony [it] reasonably believes to be credible. . . . On appeal, we do not retry the facts or pass on the credibility of witnesses. . . . Simply put, a trial court is afforded wide discretion in making factual findings . . . ." (Internal quotation marks omitted.) *Walgreen Eastern Co.* v. *West Hartford*, supra, 329 Conn. 493.

In the present case, the court "relied on [Krieser's] expert testimony, concluding that the town's formula in this instance was too limiting in finding true value." Accordingly, it found that the plaintiff had "made a prima facie case that the town's valuation should be adjusted" and "that the analysis of . . . Krieser demonstrate[d] that the town's valuation is in need of adjustment." Although the court noted that it was not accepting Krieser's opinion in its entirety, in part because he failed to properly account for the costs of installation and transportation, it nonetheless concluded, based on its evaluation of all of the evidence,

that, even when properly accounting for such costs, the town's methodology overstated the value of the plaintiff's fixtures and needed to be adjusted.

The trial court, as the fact finder, is privileged to accept, in whole or in part, *whatever* testimony it reasonably believes to be credible. See *Walgreen Eastern Co.* v. *West Hartford*, supra, 329 Conn. 493; *Digital 60 & 80 Merritt, LLC* v. *Board of Assessment Appeals*, supra, 211 Conn. App. 578. There is no requirement that a court disregard the entirety of an expert's testimony if it finds only a portion of it not to be credible. See *Nutmeg Housing Development Corp.* v. *Colchester*, supra, 324 Conn. 10 ("the trial court is privileged to adopt whatever testimony [it] reasonably believes to be credible" (internal quotation marks omitted)); *Xerox Corp.* v. *Board of Tax Review*, 175 Conn. 301, 306, 397 A.2d 1367 (1978) ("No one appraisal method was controlling on [the court]. . . . [It] had the right to accept so much of the testimony of the experts and the recognized appraisal methods which they employed as [it] found applicable." (Internal quotation marks omitted.)); *Grolier, Inc.* v. *Danbury*, 82 Conn. App. 77, 80, 842 A.2d 621 (2004) ("[w]hen the court acts as the fact finder, it may accept or reject evidence regarding valuation as it deems appropriate"). Accordingly, the court was permitted to find Krieser's testimony and appraisal reports credible notwithstanding its agreement with the town that Krieser's valuation did not properly account for the fixtures' installation and transportation costs. See, e.g., *Banco Popular North America* v. *du'Glace, LLC*, supra, 146 Conn. App. 660 (irregularities in expert appraiser's valuation methodology went to weight, not admissibility, of appraisal report and expert testimony).

Moreover, there is sufficient evidence in the record to support the court's finding that the town had overvalued the plaintiff's property. In particular, Krieser explained why the town's application of the depreciation tables

set forth in § 12-63 (b) did not result in the calculation of the true and actual value of the plaintiff's fixtures. Krieser testified that his "main comment about the town's tables is that they're a static table. They use the same table year after year without—as far as I—and, again, I don't know how often they're actually reviewed, but looking at the marketplace—it is my opinion [based on] looking at the marketplace, that the tables that the town has proffered do not appropriately consider economic obsolescence." Furthermore, as set forth in part I of this opinion, Krieser testified as to his opinion of the true and actual value of the fixtures and thoroughly explained his methodology for concluding that the town's values were overstated.

Given Krieser's testimony, it was reasonable for the court to conclude that the town's use of the § 12-63 (b) (6) uniform depreciation schedule did not appropriately factor in the economic obsolescence of retail fixtures, thus overvaluing them, even after correcting Krieser's opinion for deficiencies like not properly accounting for transportation and installation expenses.

Consequently, we conclude that the court's finding that the plaintiff had sufficiently demonstrated aggrievement was not clearly erroneous because there was evidence to support a conclusion that the town overvalued the plaintiff's retail fixtures.

B

The town further argues that the court's findings of true and actual value of the fixtures were clearly erroneous because no "reliable expert evidence existed at all to support the trial court's arbitrary 20 percent increase in Krieser's figures to reach [the true and actual] value." In particular, the town contends that, "[a]lthough a trial court may weigh and accept expert evidence before it, the court may not *supply* expert evidence that does

not exist . . . ." (Emphasis in original.) Again, we are not persuaded.

Because the town claims that there was no evidence to support the court's 20 percent adjustment to Krieser's valuations, we apply the clearly erroneous standard of review. *Digital 60 & 80 Merritt, LLC* v. *Board of Assessment Appeals*, supra, 211 Conn. App. 601 n.23 (applying clearly erroneous standard to case in which court was confronted with conflicting methods and calculations of appropriate capitalization rate and gave credence to one over other as trier of fact).

The court concluded "that the analysis of . . . Krieser demonstrates that the town's valuation is in need of adjustment. . . . The court does not fully adopt Krieser's conclusions, however. The town has correctly noted the following: To a degree, the [fixtures do] not appear in fair condition. The town's photographic exhibits support a conclusion of good condition. The plaintiff's expert relied too heavily on values set by used furniture dealers. Finally, the plaintiff has not fully taken into account transportation and installation costs.

"The major issue in this case is the factor of depreciation. Use of [§ 12-63 (b) (6)] limits the rate of depreciation and obsolescence, while Krieser's analysis causes a more rapid depreciation. The court has taken these criticisms into account. Based on the court's review of the record, the court makes an [upward] adjustment of 20 percent to Krieser's valuation." (Citation omitted.) The town argues that, because there was no evidence that tied the problems the court identified in Krieser's analysis to the 20 percent adjustment the court applied, its use of that adjustment was clearly erroneous.

"Valuation is a matter of fact to be determined by the trier's independent judgment. . . . In actions requiring such a valuation of property, the trial court is charged with the duty of making an independent

valuation of the property involved. . . . [N]o one method of valuation is controlling and . . . the [court] may select the one most appropriate in the case before [it]. . . . Moreover, a variety of factors may be considered by the trial court in assessing the value of such property. . . . [T]he trier arrives at his own conclusions by weighing the opinions of the appraisers, the claims of the parties, and his own general knowledge of the elements going to establish value, and then employs the most appropriate method of determining valuation. . . . The trial court has broad discretion in reaching such conclusion, and [its] determination is reviewable only if [it] misapplies or gives an improper effect to any test or consideration which it was [its] duty to regard." (Internal quotation marks omitted.) *Abington, LLC* v. *Avon*, 101 Conn. App. 709, 715, 922 A.2d 1148 (2007); see also *Walgreen Eastern Co.* v. *West Hartford*, supra, 329 Conn. 492; *Sheridan* v. *Killingly*, 278 Conn. 252, 259, 897 A.2d 90 (2006).

A review of the record reveals that, in arriving at its conclusions as to the values of the fixtures, the court carefully weighed the opinions of the appraisers, the claims of the parties, and its own general knowledge of the elements relevant to establishing value. Specifically, the court thoroughly considered the testimony and written reports of both the plaintiff and the town's appraisers and ultimately determined that, although Krieser sufficiently demonstrated that the town had overvalued the plaintiff's property, his valuation method "did not fully take into account certain matters as outlined by the [town]." In particular, the court acknowledged that the property was in "good" rather than in "fair" condition, Krieser "relied too heavily on values set by used furniture dealers," and Krieser had not fully accounted for transportation and installation costs of the fixtures.

Although the court did not specify the factors it considered in making its 20 percent upward adjustment, it

did not need to do so. Because no one method of valuation is controlling, the court need not specify the valuation method used; see *Digital 60 & 80 Merritt, LLC* v. *Board of Assessment Appeals*, supra, 211 Conn. App. 604; and the court is not required to set forth specific factors that were considered in arriving at that determination. The trial court's decision is reviewable only if it is apparent that it misapplied, overlooked, or gave a wrong or improper effect to any test or consideration that it was that court's duty to regard. See *Sheridan* v. *Killingly*, supra, 278 Conn. 259.

Contrary to the town's contention, adjusting Krieser's valuation by 20 percent to arrive at the true and actual value of the fixtures is not "supply[ing] expert evidence that does not exist," nor is it misapplying, overlooking, or giving a wrong or improper effect to any test or consideration that it was the court's duty to regard. (Emphasis omitted.) Rather, the 20 percent adjustment is simply an exercise of the court's broad discretion in coming to an independent conclusion as to the value of the property. There is nothing in our law indicating that a court's conclusion as to valuation must be within parameters as set out by expert testimony. The court may accept or reject, in whole or in part, the testimony of experts and the appraisal methods employed by those experts. See *First Bethel Associates* v. *Bethel*, 231 Conn. 731, 741, 651 A.2d 1279 (1995) ("[a] trial court is vested with broad discretion in municipal tax appeals to determine true and actual value, and has the right to accept so much of the expert testimony and the recognized appraisal methods which are employed as it finds applicable" (internal quotation marks omitted)).

Moreover, when confronted with competing expert valuations a court can select a compromise figure and is not required to explain how it arrived at that figure. This court's decision in *Mirlis* v. *Yeshiva of New Haven, Inc.*, 205 Conn. App. 206, 257 A.3d 390, cert. denied,

338 Conn. 903, 258 A.3d 91 (2021), is instructive. In *Mirlis*, there was a dispute as to the value of the defendant's real property. Id., 208. "The court held an evidentiary hearing on the valuation dispute, at which each party submitted the testimony and written report of their respective appraisers. Both expert appraisers testified that they had used the sales comparison approach to determine the property's fair market value. Utilizing that approach, the defendant's appraiser, Patrick Wellspeak, initially estimated the value of the property to be $500,000 in light of comparable sales. Wellspeak then explained that he deducted $110,000 from that estimate due to 'environmental issues' on the property, which resulted in a fair market value of $390,000. [He] conceded that his conclusions with respect to those issues were predicated on a report . . . [that] identified environmental issues that allegedly existed on the property. . . .

"The plaintiff's appraiser, Patrick Craffey, concluded that the fair market value of the property in light of comparable sales was $960,000. [He] testified that he first 'became aware' of [the environmental] report after he had performed his appraisal and explained that the report did not change his conclusions as to the value of the property, as his appraisal was 'made irrespective of any environmental contamination.'

"In its subsequent memorandum of decision, the court began by noting that, in reaching its conclusions, it had 'carefully and fully considered and weighed all of the evidence received at the hearing; evaluated the credibility of the witnesses; assessed the weight, if any, to be given specific evidence and measured the probative force of conflicting evidence; reviewed all exhibits, relevant statutes, and case law; and has drawn such inferences from the evidence, or facts established by the evidence, that it deems reasonable and logical.' The court noted that both appraisers had utilized the sales

comparison method to determine fair market value and had agreed that the highest and best use of the property was as a school. The court further found that the parties' respective appraisers, 'while employing the same . . . method for valuation . . . took different approaches in doing so. . . . [T]he parties each took issue with the properties chosen by the other appraiser in determining the comparative sales.' The court also noted that, unlike Craffey, Wellspeak had considered 'environmental impact on the fair market value.'

"The court emphasized that '[t]he ultimate opinions regarding valuation were at considerable variance. Both parties take issue with the comparable sales considered by the other, and each takes issue with the other's treatment of environmental concerns.' The court continued: 'When confronted with conflicting evidence as to valuation, the trier may properly conclude that under all the circumstances a compromise figure most accurately reflects fair market value.' The court then found, in light of 'all of the evidence presented,' that the fair market value of the property was $620,000." (Emphasis omitted.) Id., 208–10.

On appeal, the defendant claimed that "the court [had] improperly determined the fair market value of the property, contending that 'no evidence' supported its valuation." Id., 210. This court disagreed, explaining that, "[w]hen confronted with conflicting evidence as to valuation, the trier may properly conclude that under all the circumstances a compromise figure most accurately reflects fair market value. [*New Haven Savings Bank* v. *West Haven Sound Development*, 190 Conn. 60, 70, 459 A.2d 999 (1983)]. The court further held that such an approach, which was clearly an effort to give due regard to all circumstances, was reasonable. Id.; accord *Whitney Center*, *Inc.* v. *Hamden*, 4 Conn. App. 426, 429–30, 494 A.2d 624 (1985) (applying *New Haven Savings Bank* and concluding that trial court properly

determined that this is a case where under all the circumstances a compromise figure will most accurately reflect the fair market value)." (Internal quotation marks omitted.) *Mirlis* v. *Yeshiva of New Haven, Inc.*, supra, 205 Conn. App. 211–12. Ultimately, this court held that the record contained "ample documentary and testimonial evidence regarding the valuation of the property" and that "in light of the significant disagreements between the expert appraisers offered by the parties, the court reasonably could conclude that a compromise figure best reflected the fair market value of the property." Id., 212.

Similarly, in the present case, the court was presented with conflicting expert testimony concerning the proper valuation of the plaintiff's fixtures. The experts disagreed on the overall methodology to be used to value the plaintiff's fixtures and on the proper depreciation factor to be applied, with Krieser testifying that his combined cost and market based approach—which used a unique, market based depreciation factor he calculated—was the appropriate valuation method, and Topliff testifying that a modified cost approach that utilized the § 12-63 (b) (6) statutory depreciation schedule was the correct method.[16] Further, the court heard conflicting expert testimony as to the condition of the plaintiff's fixtures. Krieser testified that the fixtures were in "fair" condition while Kosofsky testified that

[16] Interestingly, the court heard testimony that *both* the town and Krieser failed to properly account for the installation and transportation costs of the plaintiff's fixtures in their valuations. Krieser testified that, in calculating the fixtures' true and actual values, he was operating under the assumption that the transportation and installation costs inherent in the plaintiff's overall acquisition costs depreciate at the same rate as the cost of the fixture itself. In addition, Topliff, explained that, similar to Krieser, he accepted the plaintiff's declaration of personal property as accurately reporting the fixtures' original acquisition costs, including transportation and installation costs, and simply applied the § 12-63 (b) (6) statutory depreciation schedule to those costs as appropriate depending on the year in which the fixtures were purchased and installed.

the fixtures were in "good" condition. Notably, Krieser acknowledged on recross-examination that fixtures in good condition would be valued more than those in fair condition.[17]

On the basis of the evidence it heard, the court was able to determine the relative importance of those parts of Krieser's analysis with which it disagreed to Krieser's valuation conclusions and determined that those faults, when taken together, required a 20 percent upward adjustment of Krieser's ultimate valuation conclusions. In other words, the court accepted and rejected portions of each expert's testimony in an effort to account for the conflicting evidence presented.

Contrary to the contention of the town, we cannot say that the court's upward adjustment is clearly erroneous. The record before us contains ample documentary and testimonial evidence regarding the valuation of the property in question. Moreover, in light of the disagreements between the expert appraisers offered by the parties, the court reasonably could conclude that a compromise figure best reflected the true and actual value of the fixtures. We conclude that such an approach, which was an effort to give due regard to all circumstances, was reasonable. See *Whitney Center*, *Inc.* v. *Hamden*, supra, 4 Conn. App. 429–30 (affirming trial court's approach in reaching compromise valuation figure as it was effort to give due regard to all circumstances); see also *Hartford* v. *CBV Parking Hartford, LLC*, 330 Conn. 200, 211, 192 A.3d 406 (2018) ("the trial court can make an independent determination of value and fair compensation in light of all the circumstances and is not bound by the valuations or valuation methods used by the appraisers"); *Abington, LLC* v. *Avon*, supra,

[17] Krieser's report indicated that a fixture that was in "good" condition had a depreciation factor of 38 percent, i.e., it had lost 62 percent of its value. Meanwhile, a fixture that was in "fair" condition had a depreciation factor of 33 percent, i.e., it had lost 67 percent of its value.

101 Conn. App. 715, 720 (trial court has duty of making independent determination of true and actual value of property by weighing opinions of appraisers, claims of parties in light of circumstances in evidence bearing on value, its own general knowledge of elements going to establish value, and employing most appropriate method of valuation).

Finally, the court was not required to make its adjustment with exacting precision. See *Redding Life Care, LLC* v. *Redding*, 308 Conn. 87, 110, 61 A.3d 461 (2013) ("[t]he process of estimating the value of property for taxation is, at best, one of approximation and judgment, and there is a margin for a difference of opinion" (internal quotation marks omitted)); *Digital 60 & 80 Merritt, LLC* v. *Board of Assessment Appeals*, supra, 211 Conn. App. 604 (same); *Housing Authority* v. *CB Alexander Real Estate, LLC*, 107 Conn. App. 167, 180, 944 A.2d 1010 (2008) (valuation of property "is a matter of opinion based on all the evidence and, at best, is one of approximation" (internal quotation marks omitted)). We cannot say that the court's use of a 20 percent upward adjustment to Krieser's values did not represent at least a reasonable approximation of the value of the plaintiff's property.

In short, the court was presented with detailed expert testimony and reached a logical conclusion as to the value of the property based on the testimony it credited. In light of our examination of the evidence in the record, we conclude that the court's application of a 20 percent upward adjustment to Krieser's valuations was not clearly erroneous.

The judgment is affirmed.

In this opinion the other judges concurred.

ANTWAN SEASE *v.* COMMISSIONER OF CORRECTION (AC 44160)

Cradle, Clark and Flynn, Js.

Syllabus

The petitioner sought a writ of habeas corpus after having been convicted of felony murder, robbery in the first degree and conspiracy to commit robbery in the first degree in connection with a shooting. The petitioner had approached a car in a parking lot where he fatally shot one individual, and his coconspirator, Q, robbed another individual. Q later entered into a cooperation agreement with the state under which he agreed to testify truthfully at the petitioner's criminal trial. A presentence investigation report prepared by the Office of Adult Probation disclosed that the petitioner had an extensive mental health history, including diagnoses of schizophrenia and psychotic disorder, and had been prescribed a variety of psychiatric medications. In a prior habeas proceeding, the petitioner claimed, among other things, that his trial counsel had rendered ineffective assistance by failing to adequately investigate the petitioner's mental health history and to present any mitigation evidence resulting therefrom at the petitioner's sentencing. The court determined that the petitioner had failed to establish that he was prejudiced, under the second prong of *Strickland* v. *Washington* (466 U.S. 668), as a result of his trial counsel's performance with respect to sentencing. The court denied the petitioner's habeas petition and, thereafter, denied his petition for certification to appeal, after which he appealed to this court. On appeal, this court concluded that the habeas court had abused its discretion in denying the petitioner certification to appeal and rejected the habeas court's determination that he failed to prove that he was prejudiced with respect to his counsel's performance at sentencing. However, because the habeas court did not address whether counsel's performance at sentencing was deficient under the first prong of *Strickland*, this court retained jurisdiction over the petitioner's appeal and remanded the case to the habeas court to make findings from the record and, based on those findings, to determine whether counsel's performance at sentencing was deficient. On remand, the habeas court concluded that counsel had not rendered deficient performance at the sentencing proceeding, reasoning that counsel's decision not to investigate the petitioner's mental health background beyond that discussed in the presentence investigation report did not fall below the constitutional standard of reasonableness. *Held*:

1. The habeas court on remand improperly concluded that the petitioner's trial counsel did not render deficient performance in failing to investigate and to focus on the petitioner's mental health background at sentencing,

as none of the court's justifications for counsel's inactions was objectively reasonable: the court's reliance on the decision of the prosecutor at the sentencing proceeding not to dispute the petitioner's mental health background was improper, as the prosecutor's decision did not necessarily mean that he or the Office of Adult Probation had acted as an advocate for the petitioner at sentencing, the prosecutor in his remarks having referred only to potential mental health issues, and the presentence investigation report having recommended that the petitioner receive a lengthy sentence, and the prosecutor's decision did not relieve the petitioner's trial counsel of his duty to present mitigation evidence at sentencing as an advocate on behalf of the petitioner; moreover, although the habeas court implied that it was necessary that there be some evidence in the record that mental health issues caused the petitioner's actions in order for counsel to have a duty to investigate the petitioner's mental health background, and that such evidence was lacking, the applicable rule of practice (§ 43-13) and American Bar Association guidelines suggest that such a duty exists and that it continues after conviction, prior to sentencing and after counsel receives the presentence investigation report; furthermore, to the extent that the court stated that trial counsel was in a tenuous position because the petitioner had argued his innocence at sentencing prior to counsel's comments, that factual interpretation was clearly erroneous, as the petitioner's allocution occurred after counsel's remarks, nothing in the record suggested that counsel knew what the petitioner would say after the conclusion of counsel's remarks, and such reasoning did not justify counsel's decision to limit his comments at sentencing as to the petitioner's mental health history; accordingly, in light of the quantum of information available to counsel prior to sentencing, this court could not contemplate any objectively reasonable, strategic justification for counsel's admitted failure to conduct an investigation into the petitioner's mental health history, which was not consistent with established, prevailing professional norms and entitled the petitioner to have his sentences vacated and to have a new sentencing hearing.

2. The habeas court did not abuse its discretion in denying the petitioner certification to appeal as to his claim that his criminal trial counsel rendered deficient performance by failing to challenge the admission of certain uncharged misconduct testimony, the petitioner having failed to show that there were issues that were debatable among reasonable jurists that a court could resolve differently or that were adequate to deserve encouragement to proceed further: the petitioner could not prove that he was prejudiced by testimony from Q's mother that he previously had knocked her daughter's teeth out, there having been no reasonable probability that the result of his criminal trial would have been different without the admission of that testimony; moreover, Q's mother did not testify as to whether the petitioner had participated in the robbery and shooting, and, even if her testimony had been excluded,

the jury had before it sufficient evidence of the petitioner's involvement in the robbery and shooting.

3. The petitioner could not prevail on his claim that the habeas court had abused its discretion in denying him certification to appeal as to his assertion that the state violated his right to due process by knowingly presenting false testimony from Q: there was no merit to the petitioner's contentions that the prosecutor's testimony at the habeas trial demonstrated that the prosecutor had expected that Q would testify falsely but presented Q's testimony anyway because it inculpated the petitioner and that the true nature of Q's cooperation agreement with the state was not to obtain truthful testimony but to secure favorable testimony that could corroborate the petitioner's involvement in the robbery and shooting, as the court's finding that Q's testimony that the agreement required him to testify truthfully was consistent with the written agreement's requirement that Q provide complete, truthful and accurate information and testimony, and, although Q was impeachable as to certain aspects of his testimony, that did not render false his testimony that the cooperation agreement required truthful testimony; moreover, Q's testimony was not false or misleading for purposes of governing due process principles, as the inconsistent statements he previously had given to the police concerned the nature of his involvement in the incident at issue, rather than that of the petitioner, and Q was vigorously cross-examined about those inconsistencies, which were for the jury to resolve; furthermore, this court declined the petitioner's invitation to exercise its supervisory authority over the administration of justice to vacate his conviction, as this was not a rare situation in which traditional protections were inadequate to ensure the fair and just administration of the courts.

Submitted on briefs December 12, 2022—officially released May 23, 2023

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Newson*, *J.*; judgment denying the petition; thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court, *Clark* and *Flynn*, *Js.*, with *Cradle*, *J.*, dissenting, which remanded the case for further factual findings; subsequently, the court, *Newson*, *J.*, made certain factual findings; thereafter, the court, *Newson*, *J.*, issued an articulation of its decision. *Appeal dismissed in part*; *reversed in part*; *judgment directed.*

Vishal K. Garg, assigned counsel, filed a brief for the appellant (petitioner).

Sharmese L. Hodge, state's attorney, *James A. Killen*, senior assistant state's attorney, *James M. Ralls*, assistant state's attorney, and *Jo Anne Sulik*, senior assistant state's attorney, filed a brief for the appellee (respondent).

Opinion

FLYNN, J. This habeas appeal returns to us following our decision in *Sease* v. *Commissioner of Correction*, 212 Conn. App. 99, 274 A.3d 129 (2022) (*Sease I*), in which we remanded the matter to the habeas court to make certain factual findings and determinations. The habeas court initially had addressed only the prejudice prong of *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and did not decide whether trial counsel's performance at sentencing was constitutionally deficient under the first prong of *Strickland*.[1] In *Sease I*, we determined that the habeas court improperly concluded that the petitioner, Antwan Sease, had failed to prove prejudice under the second prong of *Strickland* with respect to his claim of ineffective assistance of counsel at sentencing.[2] *Sease* v. *Commissioner of Correction*, supra, 107–15. Because *Strickland* requires a prevailing habeas petitioner to prove both deficient performance and resulting prejudice; *Strickland* v. *Washington*, supra, 687; we

[1] Because *Strickland* requires a petitioner to prove both constitutionally deficient performance and resulting prejudice in order to prevail on a claim of ineffective assistance of counsel, the court's determination of no prejudice was fatal to the petitioner's claim and, accordingly, the court was not required to also address the performance prong of *Strickland*. See, e.g., *Echeverria* v. *Commissioner of Correction*, 193 Conn. App. 1, 9–10, 218 A.3d 1116, cert. denied, 333 Conn. 947, 219 A.3d 376 (2019).

[2] In so deciding, we first determined that the court had abused its discretion in denying certification to appeal as to the petitioner's claim of ineffective assistance of counsel at sentencing. See *Sease* v. *Commissioner of Correction*, supra, 212 Conn. App. 104.

remanded the matter to the habeas court for the making of underlying factual findings from the record and, based on those findings, for a determination under the first prong of *Strickland*, which requires a showing of constitutionally deficient performance. *Sease* v. *Commissioner of Correction*, supra, 117. We left undecided in *Sease I* the petitioner's remaining claims, which were that the court abused its discretion in denying certification to appeal as to the petitioner's claims that the habeas court improperly concluded that trial counsel did not render ineffective assistance of counsel by failing to challenge certain uncharged misconduct testimony and that the state violated the petitioner's right to due process by the knowing presentation of false testimony.[3] Our remand order in *Sease I* followed our Supreme Court's decision in *Barlow* v. *Commissioner of Correction*, 328 Conn. 610, 182 A.3d 78 (2018), which held that "one way a reviewing court may remand a case to the original trial judge for additional proceedings without either triggering [General Statutes] § 51-183c or a dispute over its application is by not disturbing the original judgment in any way and *making clear that the remand is for the purpose of further factual findings*. . . . Accordingly, should additional findings be necessary from an existing record in order to enable the expeditious resolution of a case, even subsequent to the publication of an opinion, the reviewing court may retain jurisdiction over the appeal by means of a rescript that does not disturb the underlying judgment

[3] In its initial memorandum of decision, the habeas court denied the following claims of the petitioner, which are relevant to this appeal: ineffective assistance of trial counsel due to a failure to investigate the petitioner's mental health background and failure to focus further on that background as mitigation evidence at sentencing; ineffective assistance of trial counsel due to a failure to cross-examine, impeach and otherwise challenge certain uncharged misconduct testimony; and a violation of the petitioner's federal right to due process as a result of the state's knowing presentation of false testimony. The habeas court denied the petitioner's request for certification to appeal.

pending the remand and subsequent appellate proceedings." (Citations omitted; emphasis added; footnote omitted; internal quotation marks omitted.) Id., 614–15.

On September 21, 2022, the habeas court, on remand, issued a memorandum of decision in which it determined that trial counsel's failure to focus further on or to engage in further independent investigation of the petitioner's mental health background with respect to the sentencing hearing did not fall below the constitutional standard of reasonableness.

Having made no determination in *Sease I* as to whether the petitioner ultimately prevailed on his claim of ineffective assistance of counsel at sentencing and having left undecided the petitioner's additional appellate claims, we must now resolve, after remand, the following claims of the petitioner. The petitioner claims that the habeas court improperly (1) determined on remand that his trial counsel's failure to investigate his mental health background prior to sentencing and his failure to focus further on that background during sentencing arguments did not fall below the exercise of reasonable professional judgment under the first prong of *Strickland*, (2) rejected his claim that trial counsel rendered ineffective assistance by failing to challenge uncharged misconduct testimony by a state's witness, and (3) rejected his claim that the state violated his right to due process by the knowing presentation of false testimony. The habeas court denied the petitioner's petition for certification to appeal, and he claims that the court abused its discretion in so deciding. We agree with only the petitioner's claim that the court improperly determined that his trial counsel had not rendered constitutionally deficient performance at sentencing, and we disagree with the petitioner's other claims. Accordingly, we reverse the judgment of the habeas court only with respect to the petitioner's claim of ineffective assistance of counsel at sentencing,

vacate the petitioner's sentences, and order a new sentencing hearing.

Before turning to the petitioner's claims, we briefly summarize the underlying facts, which the jury reasonably could have found and were the subject of his direct appeal to this court. See *State* v. *Sease*, 147 Conn. App. 805, 83 A.3d 1206, cert. denied, 311 Conn. 932, 87 A.3d 581 (2014). On October 3, 2009, the petitioner and his coconspirator, Quan Morgan (Quan), met at the residence of Quan's mother, Shirley Williams, and proceeded to leave on foot under the guise of getting something to eat for Courtney Morgan, who was Williams' daughter, the petitioner's girlfriend, and Quan's sister. Id., 807. At approximately 2:30 a.m., the petitioner and Quan, each armed with a .38 caliber handgun that the petitioner had provided, walked to the rear of Club Vibz in Hartford and robbed two men in the presence of several witnesses. Id., 807–808. The petitioner walked up to a car in which the victim, Haslam, was seated and, after telling Haslam to " 'empty your [f—] pockets,' " fatally shot Haslam in the chest. Id., 808. Quan, a cooperating witness for the state, was the only witness to identify the petitioner as the second perpetrator involved in the Club Vibz incident. Following a jury trial, the petitioner was acquitted of murder in violation of General Statutes § 53a-54a. He was convicted of felony murder in violation of General Statutes § 53a-54c, robbery in the first degree in violation of General Statutes § 53a-134 (a) (2), and conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-134 (a) (2) and 53a-48. The petitioner was sentenced to thirty years' incarceration for felony murder, twenty years' incarceration for robbery, and ten years' incarceration for conspiracy to commit robbery, which sentences were to run consecutively to each other, for a total effective sentence of sixty years' incarceration.

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

I

The petitioner argues in his supplemental brief[4] to this court that the habeas court improperly determined on remand that his trial counsel's failure to investigate his mental health background and failure to focus further on that background during his sentencing arguments did not fall below the exercise of reasonable professional judgment under the first prong of *Strickland*. We agree with the petitioner.

We note that, because the habeas court denied the petitioner's request for certification to appeal, our first step ordinarily would be to analyze whether the petitioner satisfied the first hurdle of demonstrating that the court abused its discretion in denying such certification. See, e.g., *Johnson* v. *Commissioner of Correction*, 285 Conn. 556, 564, 941 A.2d 248 (2008). Under the unusual procedural posture of the present case, however, we already have determined in *Sease I* that the habeas court abused its discretion in denying the petitioner's petition for certification to appeal with respect to his claim that his trial counsel rendered ineffective assistance at sentencing. *Sease* v. *Commissioner of Correction*, supra, 212 Conn. App. 104. In so determining, we reasoned that "[t]he record in the present case reveals an unusually troubled, traumatic, and extensive mental health history, significant parts of which were not also in the presentence investigation report. The petitioner had both audio and visual hallucinations throughout his life, was professionally diagnosed with schizophrenia, psychotic disorder, and post-traumatic stress disorder,

[4] Following the habeas court's decision on remand, we ordered the parties to file supplemental briefs addressing the habeas court's factual findings and determination as to the first prong of *Strickland* regarding trial counsel's performance at sentencing.

and he was prescribed a variety of psychiatric medications including Risperdal, Ritalin, Risperidone, and Trazodone. . . . His ineffective assistance of counsel claim involves issues that are debatable among jurists of reason, are such that a court could resolve the issues in a different manner and raise questions that deserve encouragement to proceed further." Id.

We now turn to the merits of the petitioner's claim, our review of which is guided by the following standards. "Our standard of review of a habeas court's judgment on ineffective assistance of counsel claims is well settled. In a habeas appeal, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous, but our review of whether the facts as found by the habeas court constituted a violation of the petitioner's constitutional right to effective assistance of counsel is plenary." (Internal quotation marks omitted.) *Soto* v. *Commissioner of Correction*, 215 Conn. App. 113, 119, 281 A.3d 1189 (2022).

"A convicted [petitioner's] claim that counsel's assistance was so defective as to require reversal of a conviction [or sentence] . . . has two components. First, the [petitioner] must show that counsel's performance was deficient. . . . Second, the [petitioner] must show that the deficient performance prejudiced the defense. . . . Unless a [petitioner] makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable." *Strickland* v. *Washington*, supra, 466 U.S. 687.

Because the petitioner's claim concerns trial counsel's performance, the following additional standards are relevant. "In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. Prevailing norms of practice as reflected

in American Bar Association standards and the like . . . are guides to determining what is reasonable. . . . [T]o satisfy the performance prong [of the *Strickland* test], a [petitioner] must demonstrate that counsel made errors so serious that counsel was not functioning as the counsel guaranteed . . . by the [s]ixth [a]mendment." (Citations omitted; internal quotation marks omitted.) *Gaines* v. *Commissioner of Correction*, 306 Conn. 664, 679–80, 51 A.3d 948 (2012). "Judicial scrutiny of counsel's performance must be highly deferential. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." (Emphasis omitted; internal quotation marks omitted.) *Jordan* v. *Commissioner of Correction*, 341 Conn. 279, 288, 267 A.3d 120 (2021), quoting *Strickland* v. *Washington*, supra, 466 U.S. 689. In reconstructing the circumstances, "a reviewing court is required not simply to give [the trial attorney] the benefit of the doubt . . . but to affirmatively entertain the range of possible reasons . . . counsel may have had for proceeding as [he] did . . . ." (Internal quotation marks omitted.) *Spearman* v. *Commissioner of Correction*, 164 Conn. App. 530, 539, 138 A.3d 378, cert. denied, 321 Conn. 923, 138 A.3d 284 (2016), quoting *Michael T.* v. *Commissioner of Correction*, 319 Conn. 623, 632, 126 A.3d 558 (2015), quoting *Cullen* v. *Pinholster*, 563 U.S. 170, 196, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011).[5]

[5] In *Spearman* v. *Commissioner of Correction*, supra, 164 Conn. App. 539–40 n.5, this court noted that "[t]he admonition in *Strickland* to avoid reliance on hindsight cuts both ways, however, as we also cannot rely on

Accordingly, our review of the petitioner's claim requires us, first, affirmatively to contemplate the possible strategic reasons that might have supported trial counsel's decisions concerning the sentencing hearing and, second, to consider whether those reasons were objectively reasonable. See *Jordan* v. *Commissioner of Correction*, supra, 341 Conn. 291–92 ("our plenary review requires us, first, affirmatively to contemplate the possible strategic reasons that might have supported [trial counsel's] decisions . . . and, second, to consider whether those reasons were objectively reasonable").

A criminal defendant's right to constitutionally effective assistance of legal counsel is a constitutional right guaranteed by the sixth and fourteenth amendments to the United States constitution and article first, § 8, of the Connecticut constitution. See, e.g., *Gonzalez* v. *Commissioner of Correction*, 308 Conn. 463, 470, 68 A.3d 624, cert. denied sub nom. *Dzurenda* v. *Gonzalez*, 571 U.S. 1045, 134 S. Ct. 639, 187 L. Ed. 2d 445 (2013). A claim of ineffective assistance of counsel at sentencing is not designed to protect a petitioner from an erroneous conviction but, instead, protects his or her right to have constitutionally effective counsel at sentencing. Ultimately, the sentence to be imposed by the trial judge is largely within that judge's discretion. The difficulty in measuring whether the constitutional right to have effective counsel both properly investigate a petitioner's psychiatric history and argue such history in mitigation is not to be deemed hollow simply because it is difficult to measure whether the failure to do so affected

hindsight to justify the choices made by an attorney. . . . Thus, as articulated by the United States Supreme Court, courts may [neither] indulge post hoc rationalization for counsel's decision making that contradicts the available evidence of counsel's actions . . . [nor] may they insist counsel confirm every aspect of the strategic basis for his or her actions." (Citations omitted; internal quotation marks omitted.)

the sentence imposed. This is so even though the precise effect of the failure to do so cannot be ascertained.

As a preliminary matter, we note that, in *Sease I*, we determined that the habeas court improperly concluded that the petitioner had failed to prove prejudice under the second prong of *Strickland*, "remanded [the case] to the habeas court for the making of underlying factual findings from the record and based on those findings for a determination of whether the petitioner has shown that his counsel's representation of him at sentencing constituted constitutionally deficient performance under the first prong of *Strickland*," and retained jurisdiction over the appeal. See *Sease* v. *Commissioner of Correction*, supra, 212 Conn. App. 117.

On remand, the habeas court concluded that trial counsel's investigation prior to sentencing and performance at the sentencing hearing did not fall below the constitutional standard of reasonableness. The court stated that "[m]ost working regularly in the criminal dockets would agree, without need for citation, that the vast majority of defendants have some level of legitimate mental health in their background. The question for defense counsel is often, 'how much mileage' [he or she] can gain out of it as a factor in defending their client. The next reasonable question a defense attorney must ask themselves is how directly or indirectly can counsel connect the mental health issues to the case at hand. While the fact that the petitioner in the present case had a prior mental health history was not contested by anyone, there was also zero evidence in the record that his mental health issues played the slightest hand in the petitioner's actions." The court noted that, at the sentencing hearing, the state conceded the petitioner's mental health background and that, "[d]espite the state's concession, defense counsel did reiterate the broad facts related to the petitioner's mental health issues." The court noted that trial counsel argued at

the sentencing hearing, "Judge, the reason he's here is because, as [the state] even alluded to, society sort of let him go. I mean, he had mental problems. He was hiding in a bathroom, he witnesses [his uncle kill the uncle's girlfriend], he was abused, his mother had problems with substance abuse . . . ." The court further reasoned, "[t]o put it generally, this court is being asked to decide whether counsel's failure to investigate the [petitioner's] mental health background and to further focus on that background during his sentencing arguments fell below 'the exercise of reasonable professional judgment' within a case where [1] there was no dispute from the state to the petitioner's personal or mental health background as reported in the [presentence investigation] report, and [2] where there was no actual evidence in the record that the petitioner's mental health had any relation to the crimes for which he was sentenced; and [3] where the [petitioner], just prior to counsel's sentencing comments, argued his innocence."

The habeas court went on to state: "Counsel's decision on what he argued during the petitioner's sentencing cannot be viewed in a vacuum. It must be viewed in the context that his client always maintained his innocence of the acts in question, *even* reiterating his innocence (i.e., lack of acceptance of responsibility) just before defense counsel was to make his sentencing arguments. Arguing a client's mental health generally connotes some concession that the client *did* engage in particular conduct *because of* or that it was *caused by* the mental health related issues, but this was an issue—his own responsibility for the conduct—the petitioner disputed to the very end of his sentencing. Further, as testified to by defense counsel at the habeas trial, the petitioner's mental health was never raised to him as a potential factor for any of the conduct alleged. In other words, defense counsel was in the tenuous

position of accepting that his client was asserting his factual innocence throughout the entirety of the representation and being questioned for failing to frame arguments seeking leniency from the court that would generally appear to be saying, 'he did these things *because of* his mental health.' . . . Based on the foregoing, and under the circumstances as they occurred in the present case, counsel's failure to focus further on, or to engage in further independent investigation of, the petitioner's mental health background for sentencing did not fall below the constitutional standard of reasonableness." (Citations omitted; emphasis omitted; footnotes omitted.)

Upon our receipt of the habeas court's memorandum of decision after remand, we ordered the parties to "file supplemental briefs . . . addressing the September 21, 2022 memorandum of decision of the habeas court, *Newson*, *J.*, in response to this court's remand order, including: (1) whether the habeas court sufficiently complied with this court's order to make 'factual findings from the record'; and (2) whether the habeas court properly determined that trial counsel's representation of the petitioner at sentencing did not constitute constitutionally deficient performance under the first prong of *Strickland*."

In his supplemental brief, the petitioner argues that the habeas court did not sufficiently comply with this court's remand because it made factual findings based on "vague generalities," and sought "to have the court affirm its judgment by ignoring the actual evidence presented at trial." The petitioner contends that this court, nevertheless, can address the merits of the argument presented in his supplemental brief because the undisputed facts and uncontroverted evidence establish as a matter of law that trial counsel's performance at sentencing was deficient under the first prong of *Strickland*. The respondent, the Commissioner of Correction,

argues in his supplemental brief that the habeas court sufficiently complied with our remand order and that the court's decision on remand contains sufficient implicit and explicit factual findings to permit review and resolution of the question of whether the petitioner satisfied his burden pursuant to the first prong of *Strickland*. The respondent further argues that the habeas court properly determined that trial counsel's representation at sentencing did not constitute constitutionally deficient performance under the first prong of *Strickland*. We agree with the parties that we can review the issues briefed by the parties. The decision of the habeas court, including its explicit and implicit findings and conclusions, and the record provide a sufficient basis from which we can analyze whether the court properly determined on remand that trial counsel's performance at sentencing was not constitutionally deficient.

It is evident from the court's decision on remand that it determined that the petitioner did not overcome the presumption that his trial counsel's challenged inaction be considered sound strategy at sentencing. Although our examination of the possible strategic reasons for counsel's inaction is not limited to those contemplated by the habeas court, we determine, in the exercise of our plenary review, that none of the court's possible strategic justifications for trial counsel's inactions are objectively reasonable and also note that one such reason is based on the habeas court's clearly erroneous factual interpretation of the record. The possible strategic justifications provided by the habeas court for trial counsel's conduct are that the prosecutor did not dispute the petitioner's mental health background as reported in the presentence investigation report; there was no evidence that the petitioner's mental health played any role in his actions during the Club Vibz incident; and trial counsel was in a tenuous position in that the petitioner had argued his innocence just prior

to trial counsel's remarks at sentencing. We examine each possible justification in turn.

We begin with the court's point that the prosecutor did not dispute the petitioner's mental health background as reported in the presentence investigation report. First, if a prosecutor does not dispute the mental health background in the presentence investigation report, that does not necessarily mean that the petitioner had an advocate at sentencing who presented mitigating evidence as to his mental health history. This is so because the prosecutor, clearly, is not an advocate for the petitioner; his defense counsel is. Second, although the prosecutor in the present case commented at sentencing that he had "some sympathy" for the petitioner after reading the presentence investigation report, he further stated that the petitioner's exposure to violence, "potential mental health issues," questionable support system, and abuse "didn't mitigate the severity of this offense." Indeed, the prosecutor referred only to "potential" mental health issues in his sentencing comments, when the presentence investigation report showed *actual* professionally diagnosed schizophrenia, psychotic disorder, and post-traumatic stress disorder, for which the petitioner was prescribed a variety of psychiatric medications. The prosecutor argued that the court "has the potential essentially to impose a life sentence" upon the petitioner. Additionally, the presentence investigation report was compiled not by an advocate for the petitioner, but by the Office of Adult Probation, which recommended at the conclusion of the presentence investigation report that the petitioner receive "a lengthy period of incarceration." It was within the duty and the province of trial counsel to present mitigating evidence at sentencing as an advocate on behalf of the petitioner.

The court's next point was that there was "zero evidence in the record that [the petitioner's] mental health

issues played the slightest hand in the petitioner's actions." There would not necessarily be such evidence in the record, as trial counsel's theory of defense focused on identification.[6] This identification defense was understandable given that Quan was the only witness who identified the petitioner as the shooter. We reject, however, the premise implicit in the habeas court's conclusion that there must necessarily be some evidence that mental illness caused the petitioner to act as he did in order for defense counsel to have a duty to investigate the mental health history and/or argue it to the court in mitigation at sentencing. The habeas court cited no authority for its premise nor are we aware of any. Indeed, our rules of practice and the American Bar Association guidelines suggest there is such a duty and that it continues after conviction, prior to sentencing, and after receipt of the presentence investigation report. See *Sease* v. *Commissioner of Correction*, supra, 212 Conn. App. 106–107; see also Practice Book § 43-13.

Sentencing arguments are not as restricted as the habeas court suggested. In a law review article, John B. Meixner, Jr., notes that past scholarly works focused on sentencing mitigation in the capital context and examines how mitigation works in cases outside of that context. J. Meixner, Jr., "Modern Sentencing Mitigation," 116 Nw. U. L. Rev. 1395, 1414–16 (2022). Meixner noted that all potential mitigating factors "either mitigate based on the 'nature and circumstances of the offense' or the 'history and characteristics of the defendant.' " Id., 1417. Meixner termed the latter type of mitigation as " 'personal mitigation' because the focus is

[6] Nonetheless, we note that the petitioner's mental health background in this case could be viewed as mitigation evidence impacting the petitioner's culpability. Regardless, however, of whether such mitigation evidence is categorized as relating to the petitioner's culpability based on his cognitive ability or whether it goes to personal mitigation, thereby focusing on the petitioner's individual circumstances rather than the offense, his mental health history constitutes mitigating evidence.

on the individual person rather than the offense." Id. What Meixner referred to as a "personal mitigation" factor is incorporated into Practice Book § 43-13, which is entitled "Familiarization with Report by Defense Counsel," and provides: "Defense counsel shall familiarize himself or herself with the contents of the presentence or alternate incarceration assessment report or both, including any evaluative summary, and any special medical or psychiatric reports pertaining to the client." It is evident from the wording of § 43-13 that a defense counsel's duty to familiarize himself with any special mental health records of his client is not limited to mental health conditions that influenced in whole or in part a criminal defendant's actions at the time of the crime but that such duty extends to personal mitigation factors, including, in the present case, the petitioner's troubled and traumatic past and professionally diagnosed mental illnesses, and to any special medical or psychiatric reports. It is also evident from the wording of this rule that this obligation continues even after receipt of the Office of Adult Probation's presentence investigation report. See Practice Book § 43-13.

The court's final point was that trial counsel was in a "tenuous position" because, prior to trial counsel's remarks at sentencing, the petitioner had argued his innocence. To the extent that the court's reasoning could be construed to mean that trial counsel was in a tenuous position because the petitioner maintained his innocence throughout the criminal trial, such reasoning does not provide a reasonable strategic justification for limiting sentencing comments as to the petitioner's mental health history. By this logic, most defense counsel, whose clients were convicted following a trial, would have a strategic justification for limiting sentencing remarks relating to a defendant's mental health history, as a criminal defendant exercises his constitutional right to a trial precisely because he *maintains*

his innocence. In *Donald* v. *Commissioner of Correction*, 216 Conn. App. 63, 284 A.3d 665 (2022), cert. denied, 346 Conn. 911, 289 A.3d 596 (2023), the petitioner had maintained his innocence throughout the criminal proceedings against him, but the presentence investigation report nevertheless put counsel on notice of the need to gather additional records. Because counsel did not do so, this court determined that counsel's performance was deficient, explaining that, "[a]lthough the petitioner's relationship with trial counsel had broken down by the time of sentencing, that did not relieve counsel of his obligation to gather mitigating information from and about the petitioner prior to that time, or to present such information in support of a plea for leniency on the petitioner's behalf at his sentencing hearing." Id., 102.

To the extent that the court states that trial counsel was in a tenuous position because the petitioner argued his innocence at the sentencing hearing prior to trial counsel's sentencing comments, the court's factual interpretation of the record in this regard is clearly erroneous.[7] The petitioner's allocution, in which he maintained his innocence, occurred *after* trial counsel's remarks at sentencing, and not before. At the start of the sentencing hearing, the petitioner detailed the errors he thought were committed by his trial counsel and stated that he wanted to discharge counsel and represent himself at sentencing but ultimately changed his mind and proceeded with counsel. It was only *after* trial counsel made his comments at sentencing that the petitioner stated that he was "being convicted for

[7] "[A] finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Heywood* v. *Commissioner of Correction*, 211 Conn. App. 102, 115, 271 A.3d 1086, cert. denied sub nom. *Tajay H.* v. *Commissioner of Correction*, 343 Conn. 914, 274 A.3d 866 (2022).

something [he] didn't do." Nothing in the record suggests that trial counsel knew what the petitioner would say after counsel concluded his remarks to the sentencing court. Additionally, in trial counsel's comments at sentencing, he stated that whether he believed the petitioner to be innocent did not matter because the jury had found him guilty. Trial counsel began his comments at sentencing by expressing that "it may not appear to be that he is, but I think he's sorry. I think he's going to tell you he's sorry at the appropriate time. [The victim] is not here, and no matter what I say, on behalf of my client we apologize to the family." Trial counsel, whose theory of the defense was centered on identification, further stated at sentencing that he did not think that the petitioner was the shooter, but that "it doesn't matter what I think, but the jury found that he was the shooter. . . . They did convict him. And they convicted him, I believe, because they felt he was there." Second, as we previously stated, sentencing arguments concerning a defendant's mental health background as mitigation are not restricted to arguments concerning culpability but can include arguments wherein mental health concerns constitute a personal mitigation factor, which focuses on the individual defendant rather than on the offense.

For the foregoing reasons, none of the habeas court's proffered strategic justifications for counsel's conduct concerning the sentencing hearing was objectively reasonable. However, our focus in the present case is not just on evaluating whether trial counsel's decision not to focus further on the petitioner's mental health background at sentencing was objectively reasonable but is also directed at determining whether the investigation supporting trial counsel's decision not to introduce further mitigating evidence at sentencing was itself objectively reasonable. See, e.g., *Wiggins* v. *Smith*, 539 U.S. 510, 522–23, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003).

"[I]n *Wiggins* . . . the United States Supreme Court held that although defense counsel was aware of certain aspects of the defendant's background, counsel's failure to compile a complete social history of the defendant was objectively unreasonable and, thus, counsel rendered deficient performance by failing to make a fully informed decision when deciding against presenting such mitigation evidence." (Internal quotation marks omitted.) *Donald* v. *Commissioner of Correction*, supra, 216 Conn. App. 100–101 n.15. "[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. . . . That is, counsel's decision to forgo or truncate an investigation must be directly assessed for reasonableness in all the circumstances . . . . In assessing the reasonableness of an attorney's investigation . . . a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further. . . . In addition, in contrast to our evaluation of the constitutional adequacy of counsel's strategic decisions, which are entitled to deference, when the issue is whether the investigation supporting counsel's [strategic] decision to proceed in a certain manner was itself reasonable . . . we must conduct an objective review of [the reasonableness of counsel's] performance . . . . Thus, deference to counsel's strategic decisions does not excuse an inadequate investigation . . . ." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Skakel* v. *Commissioner of Correction*, 329 Conn. 1, 32, 188 A.3d 1 (2018), cert. denied sub nom. *Connecticut* v. *Skakel*, U.S. , 139 S. Ct. 788, 202 L. Ed. 2d 569 (2019).

On remand, the habeas court determined that, "under the circumstances as they occurred in the present case, counsel's failure . . . to engage in further independent investigation of . . . the petitioner's mental health background for sentencing did not fall below an objective standard of reasonableness." In resolving the petitioner's *Strickland* claim, we affirmatively contemplate the possible strategic reasons that might have supported trial counsel's decisions limiting his investigation, and, second, we consider whether those reasons were objectively reasonable. See *Jordan* v. *Commissioner of Correction*, supra, 341 Conn. 291–92. Trial counsel's statements at the sentencing hearing indicate that he was unaware of some of the petitioner's mental health history; he commented: "But you know, anybody that reads this presentence report has got to come away and say, well, he didn't have much of a chance, did he? . . . And some of the things in this report, Your Honor, I was unaware of. I was unaware that . . . some of the mental problems that he had that are mentioned. In talking to him over the last year or so, I did go to see him three or four times, Your Honor, at the jail. And sometimes—you know, I'm not sure if we were on the same wavelength. You know, I would talk to him, and we would—so, we got through, and I'm not a psychiatrist and I'm not a doctor. You know, I talk to people all the time. Like I say, I was unaware of some of the things that came out of this [presentence investigation report], but looking back now, what I read, I could filter it through and put it together in my equation of when I talked to him and some of the things that we talked about or some of the times we talked. Sometimes, you know, I wasn't reaching him, and now I know that maybe there was a reason I wasn't able to reach him. But I'd ask the court to be merciful. I know it's hard, but I think he deserves some mercy, Your Honor." The petitioner's trial counsel did not go further into the petitioner's history and treatment for mental illness.

Trial counsel testified as follows at the habeas trial concerning whether he had conducted an investigation into the petitioner's mental health prior to sentencing:

"Q. And did anything in your interactions with the petitioner make you think that mental health may have been an issue?

"A. I'm not a mental health expert. You know, I—I mean, I don't judge people, and I don't judge their, you know, their sanity. I thought he was competent. Other than that, if he had any deficiencies, I was either unaware of them or not knowledgeable enough to discern them. But I thought he was capable of understanding the charges against him, and he was able to cooperate with me in the defense."

* * *

"Q. Okay. And did you conduct any kind of investigation into any kind of mental health issues that may have been present for the petitioner prior to his sentencing?

"A. No.

"Q. Okay. And why wouldn't you have done that?

"A. Well, I mean I didn't see him [as] being a mental status that like you're suggesting."

Trial counsel further testified that he could not think of a situation in which an investigation between the verdict and sentencing would be necessary.

Our review of the record reveals that trial counsel commented at the sentencing hearing that he previously was unaware of some of the contents of the presentence investigation report[8] and admitted at the habeas trial

[8] When asked on direct examination at the habeas trial if he had reviewed the presentence investigation report prior to the sentencing hearing, trial counsel responded, "I believe so."

that, prior to sentencing, he had not conducted an investigation into the petitioner's mental health because he did not discern that mental health concerns may have impacted the petitioner. Our analysis of whether trial counsel's actions in failing to investigate are objectively reasonable is guided by prevailing professional norms. See, e.g., *Gaines* v. *Commissioner of Correction*, supra, 306 Conn. 679–80. "Although the reasonableness of any particular investigation necessarily depends on the unique facts of any given case . . . counsel has certain baseline investigative responsibilities . . . ." (Citation omitted.) *Skakel* v. *Commissioner of Correction*, supra, 329 Conn. 33. Prevailing norms, as described in our rules of practice and by the American Bar Association guidelines, suggest that there is a duty to investigate the mental health history of an accused, that such duty continues in the time frame after conviction and prior to sentencing following receipt of the presentence investigation report. As we pointed out in *Sease I*: "Practice Book § 43-13 requires that a defense counsel familiarize himself not only with the contents of the presentence investigation report, but also with 'any special medical or psychiatric reports pertaining to the client.' Prevailing norms of practice as reflected in the American Bar Association Standards are guides for determining what is reasonable. We, therefore, look to the following American Bar Association Standards for defense counsel at sentencing. 'Early in the representation, and throughout the pendency of the case, defense counsel should consider potential issues that might affect sentencing. Defense counsel should become familiar with the client's background . . . .' A.B.A. Standards for Criminal Justice: Defense Function (4th Ed. 2017) standard 4-8.3 (a) . . . 'Defense counsel should present all arguments or evidence which will assist the court or its agents in reaching a sentencing disposition favorable to the accused.' Id., standard 4-8.3 (c). 'Defense counsel

should gather and submit to the presentence officers, prosecution, and court as much mitigating information relevant to sentencing as reasonably possible . . . .' Id., standard 4-8.3 (d). 'If a presentence report is made available to defense counsel, counsel should seek to verify the information contained in it, and should supplement or challenge it if necessary. . . . In many cases, defense counsel should independently investigate the facts relevant to sentencing, rather than relying on the court's presentence report . . . .' Id., standard 4-8.3 (e)." (Citation omitted.) *Sease* v. *Commissioner of Correction*, supra, 212 Conn. App. 106–107.

Trial counsel's failure to conduct an investigation prior to sentencing in the context of the present case was not consistent with established prevailing professional norms. See *Meletrich* v. *Commissioner of Correction*, 332 Conn. 615, 627, 212 A.3d 678 (2019) ("a defendant must show that, considering all of the circumstances, counsel's representation fell below an objective standard of reasonableness as measured by prevailing professional norms" (internal quotation marks omitted)). Practice Book § 43-13 requires that trial counsel familiarize himself with any special medical or psychiatric reports pertaining to the petitioner, and the American Bar Association standards[9] suggest that he should have sought to verify the information in the presentence investigation report. Although trial counsel suggested in his testimony before the habeas court and his sentencing comments that he was not able to discern from his interactions with the petitioner that he may be impacted by mental health concerns, a review of the presentence investigation report, as is required by § 43-13, would have sufficiently alerted trial counsel to such possibility. The quantum of information available to trial counsel prior to sentencing reveals that, according

[9] Although the American Bar Association standards are not a bright-line rule, those standards inform our decision.

to the presentence investigation report, the petitioner had been diagnosed with several severe mental health concerns, and the last time the petitioner reported taking any medication was in early 2009, which was several months before the Club Vibz incident in October, 2009. This would reasonably raise the question of what effect the petitioner's lack of medication had on his hallucinations,[10] particularly in light of Quan's testimony at the petitioner's criminal trial that "in the mix of going to get something to eat, it was when [the petitioner] started talking to himself. He says, they got to be him, they got to be him. I asked him, what are you talking about," which suggests that perhaps the petitioner was hearing voices at the time of the Club Vibz incident. This information, which was known prior to the petitioner's sentencing hearing, would lead a reasonable attorney to investigate further.[11] However, trial counsel, by his own admission at the habeas trial, indicated that he did not conduct any investigation into the petitioner's mental health history prior to sentencing.

An investigation prior to sentencing reasonably would have revealed the following significant details of the petitioner's mental health history, which were included in the petitioner's mental health records and admitted as full exhibits at the habeas trial but were not part of the presentence investigation report. We detailed these discrepancies in *Sease I* as follows: "Unlike the summary description contained in the presentence investigation report, his mental health records

[10] The petitioner's mental health records revealed that his hallucinations and paranoia would return and increase when he ran out of medication.

[11] We note that, at the start of the sentencing hearing, the petitioner wanted to discharge counsel but changed his mind and decided to proceed with counsel. Any breakdown in the relationship between the petitioner and trial counsel by the time of sentencing did not relieve trial counsel of the obligation to gather mitigating information. See *Donald* v. *Commissioner of Correction*, supra, 216 Conn. App. 102.

provide illuminating details of his battle with mental health concerns. The presentence investigation report made no mention of the petitioner having experienced visual hallucinations in which he had visions of his deceased aunt speaking to him. In contrast, the mental health records described how he was disturbed by his visual hallucinations of his murdered aunt accusing him of causing her death and that he began hearing audio command hallucinations when he was eight years old, but that those hallucinations went away spontaneously only to reappear in 2005, when the petitioner was approximately sixteen years old. The presentence investigation report made no mention that the mental health records indicated that the petitioner began treating with a psychiatrist in 2006, when he was seventeen years old and in the ninth grade. Unlike the presentence report, the mental health records note that he had received special education services since he was in the fifth grade. The presentence investigation report under the heading 'Substance Abuse' mentioned the petitioner's use of alcohol and marijuana, but did not mention, as did his mental health records, that he smoked marijuana in an attempt to quiet his hallucinations. The presentence investigation report briefly mentioned that the petitioner experienced hallucinations and had attacked innocent people based on them, but the mental health records explained that the petitioner was arrested after obeying an audio command hallucination to assault a police officer, thereafter, attempted to set the jail in which he was held on fire, and, subsequently, after attempting suicide, was transferred to a psychiatric facility where he was given medication for sleep, but where he received no antipsychotic medication. The mental health records also provided the following details concerning the petitioner's hallucinations and paranoia, which were not mentioned in the presentence investigation report. These records indicated that prior

to seeking treatment from a psychiatrist in 2006, the petitioner hallucinated daily, experienced paranoia, and was frightened that people wanted to kill him. The mental health records further indicated that the petitioner stated during a 2006 visit with a psychiatrist that, since leaving jail, he felt that he could resist any command hallucinations that told him to do something dangerous to himself or others. Unlike the presentence investigation report, the progress notes detailed his battle with these symptoms and stated that, at various points during his treatment, the petitioner thought that the radio and television talked about him, was fearful that someone might want to harm him, wanted to stay in the apartment to avoid problems, and thought that one of his therapists was a witch who intended to steal his soul. The mental health records noted that the petitioner was paranoid, was not able to make eye contact comfortably, and seemed quite scared and distracted. The presentence investigation report mentioned that the petitioner had taken medication but did not detail the effect that medication had on his hallucinations. In contrast, the mental health records included an initial assessment from 2006 when the petitioner was seventeen years old as well as progress notes until June, 2009, a few months before the underlying crimes. The mental health records detail how, after gradually increasing the dosage of medication, the petitioner's audio hallucinations became muffled and described how once the petitioner began taking a specific dosage of medication, he experienced substantial improvement, began smiling, and had no residual hallucinations. The records further detail how the petitioner's hallucinations and paranoia returned and began increasing after he ran out of medication." S*ease* v. *Commissioner of Correction*, supra, 212 Conn. App. 111–13. Such details of the petitioner's unusually troubled, traumatic, and extensive mental health history contained in the petitioner's mental

health records but not in the presentence investigation report are "a classic kind of mitigating information that courts routinely consider in fashioning criminal sentences, which defense attorneys are duty bound to gather and present on behalf of their clients whenever it is reasonably available to them." *Donald* v. *Commissioner of Correction*, supra, 216 Conn. App. 100.

In light of the information available to counsel prior to sentencing and the prevailing professional norms, we cannot contemplate any objectively reasonable strategic justification for trial counsel's admitted failure to conduct an investigation into the petitioner's mental health background prior to sentencing. As a result of the objectively unreasonable limits on trial counsel's investigation, his decision not to present further mental health history as mitigation at sentencing is rendered uninformed.[12] See *Skakel* v. *Commissioner of Correction*, supra, 329 Conn. 32–35 ("[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. . . . [W]hen counsel's failure to proceed with an investigation is due not to professional or strategic judgment but, instead, results from oversight, inattention or lack of thoroughness and preparation, no deference or presumption of reasonableness is warranted." (Citations omitted; internal quotation marks omitted.)). Under the unusual circumstances of the present case, we can discern no reasonable tactical justification for

[12] Trial counsel testified at the habeas trial that he did not have any strategic basis for failing to present evidence in mitigation at sentencing, if he had any, that the petitioner had been diagnosed with post-traumatic stress disorder. When further questioned whether there was a strategic basis to not present evidence of the petitioner's mental health history with schizophrenia as mitigation at sentencing, trial counsel responded that, "at sentencing, the judge had the same [presentence investigation report] I did, and if it reflected a mental health illness . . . I would know that the judge had that information in front of him just like I did. . . . So, I don't know how much I would stress it."

the course taken at sentencing. See, e.g., *Spearman* v. *Commissioner of Correction*, supra, 164 Conn. App. 540–41 ("[a]s a general rule, a habeas petitioner will be able to demonstrate that trial counsel's decisions were objectively unreasonable only if there [was] no . . . tactical justification for the course taken" (internal quotation marks omitted)). Accordingly, we conclude that the court improperly determined that trial counsel rendered constitutionally adequate performance at sentencing. In light of our determination in *Sease I*, that the petitioner had proven the prejudice prong of his claim of ineffective assistance of counsel at sentencing, and in light of our exercise of both clearly erroneous and plenary review where appropriate, the petitioner, having now prevailed on both prongs of *Strickland*, is entitled to a reversal of the judgment of the habeas court as to his claim of constitutionally ineffective assistance of trial counsel at sentencing and to have his sentences vacated and to have a new sentencing hearing. See *Davis* v. *Commissioner of Correction*, 319 Conn. 548, 568–69, 126 A.3d 538 (2015), cert. denied sub nom. *Semple* v. *Davis*, 578 U.S. 941, 136 S. Ct. 1676, 194 L. Ed. 2d 801 (2016). We now address the petitioner's remaining claims, which the petitioner raised in his initial appellate brief and which we did not address in *Sease I* and which, if sustained, would result in a reversal of the judgment of conviction. See *Copas* v. *Warden*, 30 Conn. App. 677, 686–88, 621 A.2d 1378, cert. denied, 226 Conn. 901, 625 A.2d 1374 (1993).

II

The petitioner next claims that the habeas court improperly denied his claim that his right to effective assistance of counsel was violated by trial counsel's failure to challenge uncharged misconduct testimony. We conclude that the court did not abuse its discretion in denying certification to appeal as to this issue.

"Faced with the habeas court's denial of certification to appeal, a petitioner's first burden is to demonstrate that the habeas court's ruling constituted an abuse of discretion. . . . A petitioner may establish an abuse of discretion by demonstrating that the issues are debatable among jurists of reason . . . [a] court could resolve the issues [in a different manner] . . . or . . . the questions are adequate to deserve encouragement to proceed further. . . . The required determination may be made on the basis of the record before the habeas court and the applicable legal principles." (Citations omitted; emphasis omitted; footnote omitted; internal quotation marks omitted.) *Johnson* v. *Commissioner of Correction*, supra, 285 Conn. 564, quoting *Simms* v. *Warden*, 230 Conn. 608, 612, 646 A.2d 126 (1994). "In determining whether the habeas court abused its discretion in denying the petitioner's request for certification, we necessarily must consider the merits of the petitioner's underlying claims to determine whether the habeas court reasonably determined that the petitioner's appeal was frivolous." *Taylor* v. *Commissioner of Correction*, 284 Conn. 433, 449, 936 A.2d 611 (2007).

Our consideration of the merits of this claim is guided by the factors set forth by the United States Supreme Court in *Strickland* v. *Washington*, supra, 466 U.S. 668. To prevail on a claim of ineffective assistance of counsel, a petitioner must show both that counsel's performance was constitutionally deficient and that the deficient performance resulted in prejudice. Id., 687.

The following additional facts are relevant. At the petitioner's criminal trial, Williams testified on direct examination that the petitioner showed up at her residence on the night in question and then left with Quan to get Courtney Morgan something to eat, but that, "[w]hen we first moved there, [the petitioner] wasn't coming around." When asked, "[w]as there a reason

why he wasn't coming around," Williams answered that she "wasn't speaking with [the petitioner] and didn't want to have anything to do with him because he knocked [her] daughter's teeth out." On cross-examination, Williams was asked: "[The petitioner] didn't necessarily see you, I couldn't quite hear what you said the reason was, but it doesn't matter. He didn't see you, but you were aware that he was coming by to see Courtney?" Williams responded, "No. What I said was, he would occasionally come by. He stopped coming by the house—I had him stop because of the situation that happened with him and my daughter, which he knocked her tooth out; so, I wasn't speaking to him and wasn't allowing him to come to the house, and then all of a sudden he started coming back to the house." Trial counsel did not object to or move to strike the uncharged misconduct testimony.[13]

In rejecting the petitioner's claim, the habeas court reasoned that the petitioner's failure to present testimony from Williams at the habeas trial was fatal to his claim that trial counsel was ineffective for failing to adequately cross-examine Williams as to the uncharged misconduct testimony. Although the court did not expressly state its reasoning for rejecting the portion of this claim in which the petitioner alleged that counsel rendered ineffective assistance for failing to "otherwise challenge" Williams' uncharged misconduct testimony, it denied this claim of ineffective assistance of counsel and the habeas petition in its entirety, thereby inherently rejecting the portion of the claim, the rejection

[13] Williams' testimony regarding the petitioner's prior misconduct was unrelated to the crimes charged and, essentially, constituted extraneous information to explain why she had stopped the petitioner from visiting her residence for a period of time. It was not admitted to prove knowledge, intent, motive, and common scheme or design, was not otherwise relevant or material and, therefore, was inadmissible. See *State* v. *Ellis*, 270 Conn. 337, 354–55, 852 A.2d 676 (2004); see also Conn. Code Evid. § 4-5.

of which is now being challenged on appeal.[14] See, e.g., *DeMattio* v. *Plunkett*, 199 Conn. App. 693, 716–17, 238 A.3d 24 (2020) (addressing claim on merits where trial court's decision revealed it did not expressly but, rather, inherently rejected argument).

The petitioner could not prove that the admission of the uncharged misconduct testimony prejudiced him within the meaning of the second prong of *Strickland*. To establish prejudice under *Strickland*, a petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland* v. *Washington*, supra, 466 U.S. 694. We conclude that there is no reasonable probability that, without the admission of this uncharged misconduct evidence, the result of the petitioner's criminal trial would have been different. Williams' testimony placed the petitioner at her residence before and after the incident at Club Vibz, but she did not testify as to whether the petitioner had participated in the shooting. Even if Williams' uncharged misconduct testimony had been excluded, the jury had before it sufficient evidence of the petitioner's involvement in the robbery and shooting of the victim and, therefore, it was not reasonably probable that the result of the trial would have been different. Because the petitioner failed to show that there are issues that are debatable among reasonable jurists, that a court could resolve differently or that are adequate to deserve encouragement to proceed further, we conclude that the court did not abuse its discretion in denying the petitioner certification to appeal as to this claim. See *Johnson* v. *Commissioner of Correction*, supra, 285 Conn. 564.

[14] In the operative habeas petition, the petitioner claimed, in relevant part, that his trial counsel rendered ineffective assistance because "he failed to adequately cross-examine, impeach, and otherwise challenge the testimony of . . . Williams."

III

The petitioner's final claim is that the court improperly denied his claim that the state violated his right to due process by knowingly presenting false testimony from his coconspirator, Quan. We conclude that the court did not abuse its discretion in denying certification to appeal as to this issue.

We address the merits of the petitioner's claim in order to determine whether the habeas court abused its discretion in denying the petitioner's request for certification to appeal. See *Taylor* v. *Commissioner of Correction*, supra, 284 Conn. 449. "[A] conviction obtained by the knowing use of perjured testimony is fundamentally unfair . . . and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. . . . This standard . . . applies whether the state solicited the false testimony or allowed it to go uncorrected . . . and is not substantively different from the test that permits the state to avoid having a conviction set aside, notwithstanding a violation of constitutional magnitude, upon a showing that the violation was harmless beyond a reasonable doubt." (Citations omitted; footnotes omitted; internal quotation marks omitted.) *Adams* v. *Commissioner of Correction*, 309 Conn. 359, 371–72, 71 A.3d 512 (2013). "Whether a prosecutor knowingly presented false or misleading testimony [in violation of a defendant's due process rights] presents a mixed question of law and fact, with the habeas court's factual findings subject to review for clear error and the legal conclusions that the court drew from those facts subject to de novo review." (Internal quotation marks omitted.) *Donald* v. *Commissioner of Correction*, supra, 216 Conn. App. 85, quoting *Greene* v. *Commissioner of Correction*, 330 Conn. 1, 14, 190 A.3d 851 (2018), cert. denied sub nom. *Greene* v. *Semple*, U.S. , 139 S. Ct. 1219, 203 L. Ed. 2d 238 (2019).

The following additional facts and procedural history are relevant. Trial counsel testified at the habeas trial that his theory of the defense focused on identification. Quan was the only witness who identified the petitioner as the second perpetrator involved in the Club Vibz incident. The state entered into a cooperation agreement with Quan wherein he pleaded guilty to felony murder, robbery in the first degree, and conspiracy to commit robbery in the first degree in connection with the incident at Club Vibz, and agreed to testify truthfully at the petitioner's trial in exchange for a promise that he would receive a sentence of no less than twenty-five years and no more than sixty years. The cooperation agreement was disclosed to the petitioner and his counsel.

At the petitioner's criminal trial, Quan testified on direct examination that he had pleaded guilty to felony murder, robbery in the first degree, and conspiracy to commit robbery relating to the Club Vibz incident and that he entered into a cooperation agreement with the state wherein he was required to "[t]ell the truth." Regarding the events leading up to and including the Club Vibz incident, Quan testified, in relevant part, on direct examination at the petitioner's criminal trial as follows. In the morning, the petitioner was at Williams' residence, where Courtney Morgan and Quan also resided. Quan and the petitioner left on foot to get Courtney Morgan something to eat, but the petitioner "started talking to himself," saying, "they got to be him, they got to be him." The petitioner and Quan walked to the parking lot at Club Vibz. According to Quan, the petitioner "speeds up, walks over to the car, leans over and says something to the guy and two seconds later he shoots him. But in the mix of that after he shoots the guy, I tell the other guy [Middleton] to turn around and get on the floor." Quan stated that he did not take anything from Middleton. Quan further testified that he

"knew who killed this guy . . . at Vibz," but that he "wasn't entirely true in the beginning" with the police because he "wasn't trying to be incarcerated." When asked on cross-examination whether, pursuant to the cooperation agreement, "you have to tell the truth," Quan responded in the affirmative. Quan was thoroughly cross-examined regarding the inconsistent versions of events that he had given to the police. Some of the inconsistencies highlighted during cross-examination were that Quan incorrectly told the police that he was not at the scene of the Club Vibz shooting and instead told the police he was at a gas station when he saw the petitioner fleeing the scene and, in another statement, said that he was stopped at a traffic signal with his son in the car in which they were riding when he saw the petitioner fleeing the scene. He also testified on cross-examination that he had incorrectly told the police that he did not have a gun on the night in question when, in fact, he did have a gun during the Club Vibz incident, and that he had incorrectly told the police that three gunshots were fired when, as he testified at the petitioner's criminal trial, only one gunshot had been fired. On cross-examination, Quan admitted to having been untruthful to the police and explained that he "didn't want to implicate myself at a crime scene to put myself in jail."

Reginald Early, a detective with the Hartford Police Department, who was the lead investigator in the Club Vibz shooting, testified at the petitioner's criminal trial that there was no forensic evidence tying the petitioner to the crimes and that Quan was the only witness to identify the petitioner as the second perpetrator. He further testified that, in the five statements that Quan had given to the police, some of the information he provided was untruthful and that "he left bits and pieces out, he always—he did that numerous times . . . ." At the habeas trial, Early testified that Quan initially told

the police that he had witnessed the petitioner commit the crimes and denied involvement but that he thought, based on the information Quan had provided, that Quan was more than simply a witness to the Club Vibz incident. He further testified that Quan gave additional statements, and that Early believed that Quan was "sometimes truthful, but he would stretch the truth when he had more involvement" and was "hesitant or reluctant about coming, you know, clean," but that each time he met with Quan, he "got a little bit more."

The petitioner argues that the state violated his right to due process when it knowingly presented false testimony from Quan. He contends that Quan's testimony at the petitioner's criminal trial was inconsistent with his prior statements to the police and that "[t]he written agreement was nothing more than a smoke screen that enhanced [Quan's] credibility in front of the jury by suggesting that the prosecution agreed with [Quan's] version of events. In reality, however, the prosecution cared only about whether [Quan] implicated the petitioner. [Quan's] favorable treatment was conditioned on implicating the petitioner, not on providing truthful testimony." In response to the respondent's contention that the petitioner failed to identify in his main appellate brief which part of Quan's testimony was false, the petitioner clarified in his reply brief that the portion of Quan's testimony claimed to be false was Quan's characterization of the cooperation agreement as having required him to provide truthful testimony. The petitioner argues in his reply brief that his "claim of false testimony does not rely on any precise inconsistency between [Quan's] testimony and his prior statements. Rather, the issue here is that the prosecuting authority expected that [Quan] would not testify truthfully but presented his testimony anyway because it implicated the petitioner." He contends that Attorney David Zagaja, who was the prosecutor in the petitioner's criminal trial,

"confirmed the true nature of the agreement" in his testimony at the habeas trial that "the prosecuting authority knew that [Quan] would testify falsely about what happened during the shooting." In support of his argument, the petitioner highlights the following italicized portion of the habeas trial testimony of Zagaja:

"Q. And then do you recall during the trial of [the petitioner] that [Quan] testified that nothing was taken from Mr. Middleton—

"A. Right—

"Q. —and that a robbery did not occur?

"A. Right.

"Q. Did you find that to be consistent with his previous statement that he had robbed that individual?

"A. No. And that's why I say, to the degree we use the word consistent, he was all over the place because, initially, he said he had nothing to do with any of the robbery.

"Q. Okay.

"A. But what I'm saying is, is I, obviously, had to objectively look at what he was offering and how it was presented in court *and my one objective was, can I use him to establish that the other player was the petitioner, and I believe he did.*

"Q. But part of the cooperation agreement that he signed was that he would be truthful in all testimony.

"A. Correct. But I knew going in that he gave two diametrically opposed versions, so I knew already that that was most probably never going to be nailed down—

"Q. So, really, the—

"A. —and I knew that—

"Q. —agreement wasn't necessarily for truthful testimony but more for favorable testimony.

"A. The testimony that would—that I could corroborate with other pieces of evidence.

"Q. *So, again, not necessarily truthful as he's giving a different version of events, but as long as it was favorable in* [*the petitioner's*] *case, he would still get the benefit of that agreement*?

"A. *My understanding was yes*." (Emphasis added.)

We disagree with the petitioner's contention that Quan's testimony that the cooperation agreement required him to testify truthfully was false or misleading. First, the petitioner's argument regarding Zagaja's testimony at the habeas trial is without merit. Although the portion of Zagaja's testimony highlighted by the petitioner might be subject to differing interpretations when considered only in isolation, when his testimony is viewed in context, it negates the petitioner's interpretation of Zagaja's habeas testimony, which is that the nature of the cooperation agreement was not to seek to have Quan testify truthfully but to secure favorable testimony. In other words, when Zagaja's testimony is viewed in context, it is clear that, although he was aware that Quan's testimony would be impeachable in certain aspects, namely, as to the prior inconsistent statements that he gave to the police, he was seeking truthful testimony from Quan that he could corroborate regarding the petitioner's involvement. Second, the habeas court did not agree with the petitioner's interpretation of Zagaja's testimony because it did not find that the cooperation agreement was a smoke screen. The court found, in the context of rejecting the petitioner's claim that the state failed to disclose an unwritten understanding it had with Quan,[15] that "the

[15] The petitioner emphasizes that he does not challenge on appeal the habeas court's rejection of his claim that the state failed to disclose an unwritten understanding between it and Quan.

petitioner has offered nothing more than innuendo and insinuation in support of his claim that the 'real' agreement was something other than what was documented in writing." This finding of the court, that the written agreement reflected the true agreement between the parties, is supported by evidence in the record. The cooperation agreement, which was admitted as a full exhibit at the habeas trial, provides that "[i]t is further understood and agreed that Quan Morgan at all times must give complete, truthful and accurate information and testimony," and this is consistent with Quan's testimony at the petitioner's criminal trial that the agreement required him to testify truthfully.

The court properly determined that Quan's testimony was not false or misleading for purposes of governing due process principles. It reasoned that "[t]his claim does not warrant substantive discussion. What the petitioner attempts to do here is to equate disputed testimony with objectively 'false' testimony. The dispute in this case was that [Quan] was the only perpetrator witnesses were able to identify, and [Quan] was the only person to identify the petitioner as the second perpetrator. However, [Quan] also gave numerous inconsistent statements to [the] police. These inconsistencies were presented to the jury, and it was exclusively the jury's province to determine whether [it] believed any part of what he said. . . . Finally, the record reflects [the petitioner's trial counsel] vigorously cross-examining [Quan] about his numerous inconsistent statements, and there is no claim that the [petitioner] was not provided with a copy of each of [Quan's] statements. Therefore, since defense counsel would have had actual notice of any alleged 'falsehoods' in [Quan's] statements, there can be no violation of due process based on the state's alleged failure to correct them." (Footnotes omitted.) Although Quan gave inconsistent statements to the police, those inconsistences

concerned the nature of *his* involvement in the Club Vibz incident, he was cross-examined regarding those inconsistencies, and it was up to the jury to resolve such inconsistencies. See *State* v. *Morgan*, 274 Conn. 790, 800, 877 A.2d 739 (2005) (evidentiary inconsistencies are for jury to resolve and it is within province of jury to believe all or only part of witness' testimony). Quan remained consistent in his statements in one important aspect: the petitioner's participation in the shooting at Club Vibz. That Quan was impeachable on certain other aspects of his testimony does not render false his testimony that the cooperation agreement required truthful testimony.

Additionally, the petitioner argues that we should exercise our supervisory powers over the administration of justice to vacate his conviction. We decline to do so. This is not a rare situation in which traditional protections are inadequate to ensure the fair and just administration of the courts. See, e.g., *State* v. *Edwards*, 314 Conn. 465, 498–99, 102 A.3d 52 (2014).

We conclude that the petitioner has failed to demonstrate that the resolution of his claim that the state violated his right to due process by the knowing presentation of false testimony is debatable among reasonable jurists, that a court could resolve the claim differently or that the question raised is adequate to deserve encouragement to proceed further. See, e.g., *Simms* v. *Warden*, supra, 230 Conn. 616. Accordingly, we conclude that the court did not abuse its discretion in denying the petition for certification to appeal as to this claim.

The judgment of the habeas court is reversed only with respect to the petitioner's claim of ineffective assistance of counsel at sentencing and the case is remanded to that court with direction to grant the petition for a writ of habeas corpus on that claim, to vacate the

petitioner's sentences, and to order a new sentencing hearing; the appeal is dismissed with respect to the petitioner's remaining claims.

In this opinion the other judges concurred.

REGINALD REESE *v.* COMMISSIONER OF CORRECTION (AC 44892)

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

Syllabus

The petitioner, who had been convicted of murder, sought a writ of habeas corpus, claiming, inter alia, prosecutorial impropriety and ineffective assistance of counsel. The habeas court dismissed three of the five counts of his third habeas petition on the basis of res judicata. Thereafter, the petitioner filed an amended petition, alleging ineffective assistance of his first habeas appellate counsel and of his counsel in his second habeas action. Following a trial, the habeas court denied both claims. Thereafter, the petitioner filed a petition for certification to appeal that raised only two issues, namely, whether the habeas court erred in denying his writ of habeas corpus after trial and "[a]ny and all errors or claims that might become evident" following a review of the record. The habeas court denied the petition for certification to appeal, and the petitioner appealed to this court, claiming that the habeas court abused its discretion in denying his petition for certification, that it improperly dismissed one count of his habeas petition on the basis of res judicata, and that it improperly denied his motion to sequester one of the witnesses of the respondent, the Commissioner of Correction, at the habeas trial. *Held* that this court declined to review the petitioner's claims that the habeas court improperly dismissed one count of the amended petition and improperly denied his motion to sequester a witness, as an appellate court can review only the merits of the claims specifically set forth in the petition for certification to appeal, and, because the petitioner failed to include the issues that he raised on appeal in his petition for certification, the habeas court did not have the opportunity to exercise its discretion to determine whether the claims the petitioner raises on appeal warrant appellate review; accordingly, this court could not conclude that the habeas court abused discretion that it was never asked to exercise, and, because such a determination was the first step in the habeas appeal following the denial of the petition for certification, the petitioner's claims necessarily failed and the appeal was dismissed.

Argued March 7—officially released May 23, 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, *Newson*, *J.*, granted the respondent's motion to dismiss certain of the petitioner's claims; thereafter, the case was tried to the court, *Chaplin*, *J.*; judgment denying the petition; subsequently the court, *Chaplin*, *J.*, denied the petition for certification to appeal, and the petitioner appealed to this court. *Appeal dismissed.*

Naomi T. Fetterman, assigned counsel, for the appellant (petitioner).

Sarah Hanna, former senior assistant state's attorney, with whom, on the brief, were *Joseph T. Corradino*, state's attorney, and *Susan Campbell*, assistant state's attorney, for the appellee (respondent).

Opinion

BRIGHT, C. J. The petitioner, Reginald Reese, following the habeas court's denial of his petition for certification, appeals from the habeas court's dismissal in part and denial in part of his petition for a writ of habeas corpus challenging his underlying criminal conviction of murder in violation of General Statutes § 53a-54a.[1] The petitioner claims that (1) the court, *Chaplin*, *J.*, abused its discretion in denying his petition for certification and erred in denying his motion to sequester a witness at the habeas trial, and (2) the court, *Newson*, *J.*, erred in dismissing one count of his amended petition based on the application of res judicata.

The respondent, the Commissioner of Correction, has not addressed the merits of the petitioner's claims. Instead, he argues that we must dismiss the appeal

[1] This court affirmed the petitioner's conviction. *State* v. *Reese*, 77 Conn. App. 152, 167, 822 A.2d 348, cert. denied, 265 Conn. 910, 831 A.2d 252 (2003).

because the petitioner, in his petition for certification, failed to raise the substantive issues he raises on appeal. The respondent argues that we are bound by our prior decisions, which hold that if the claims on appeal were not included in the petition for certification to appeal, the habeas court never had the opportunity to exercise its discretion to grant or deny the petition as to those claims, and, hence, the claims are not reviewable. See *Lewis* v. *Commissioner of Correction*, 211 Conn. App. 77, 91–94, 271 A.3d 1058, cert. denied, 343 Conn. 924, 275 A.3d 1213, cert. denied, U.S. , 143 S. Ct. 335, 214 L. Ed. 2d 150 (2022). We agree with the respondent and, accordingly, dismiss the appeal.

The following procedural history is relevant to our analysis. On December 11, 2018, the petitioner filed a five count, amended petition for a writ of habeas corpus in this, his third, habeas action. On February 5, 2019, pursuant to Practice Book § 23-29 (3), Judge Newson dismissed counts one (prosecutorial impropriety), two (ineffective assistance of trial counsel), and three (ineffective assistance of first habeas counsel) of the petitioner's amended petition on res judicata grounds. On November 26, 2019, the petitioner filed the operative fifth amended petition, in which he alleged ineffective assistance of his first habeas appellate counsel and ineffective assistance of his counsel in his second habeas action. Following a trial, Judge Chaplin issued a memorandum of decision on June 25, 2021, denying both claims. On June 30, 2021, the petitioner filed a petition for certification to appeal. In his petition, the petitioner sought to raise two issues on appeal: (1) "Whether the habeas court erred in denying the petitioner's writ of habeas corpus after trial"; and (2) "[a]ny and all errors or claims that may become evident upon review of the record, evidence, and/or transcript of the proceedings." The habeas court denied the petitioner's

petition for certification to appeal. This appeal followed.

On appeal, the petitioner raises two substantive claims: (1) Judge Newson improperly dismissed one count of his amended petition on the basis of res judicata and (2) Judge Chaplin improperly denied his motion to sequester one of the respondent's witnesses, Attorney C. Robert Satti, who prosecuted the petitioner in his underlying criminal trial and prosecuted one of the petitioner's witnesses at the habeas trial for committing perjury during the petitioner's criminal trial. The respondent argues that the petitioner's two claims are unreviewable because he did not identify them in his petition for certification. In response, the petitioner, after recognizing that decisions of this court require that any claims on appeal be presented first in a petition for certification, argues that "it can hardly be gainsaid that the claims of error [the petitioner] has enumerated in this appeal were not raised before, and decided by, the habeas court." He concludes by arguing that, "although the petition for certification to appeal that was filed in this case is broadly worded, the claims that [the petitioner] has pursued on appeal clearly fall within its penumbra. The habeas court's denial of the petition for certification in its entirety was a discretionary act, subject to review by this court. Further, and more importantly, the claims were fully litigated below, both by way of written motions and at oral argument. Consequently, there can be no contention that it would be an 'ambuscade' of the habeas court for this court to assess the claims on their merits." We are not persuaded by the petitioner's arguments.

General Statutes § 52-470 (g) provides: "No appeal from the judgment rendered in a habeas corpus proceeding brought by or on behalf of a person who has been convicted of a crime in order to obtain such person's release may be taken unless the appellant, within

ten days after the case is decided, petitions the judge before whom the case was tried or, if such judge is unavailable, a judge of the Superior Court designated by the Chief Court Administrator, to certify that a question is involved in the decision which ought to be reviewed by the court having jurisdiction and the judge so certifies." "[A] habeas petitioner whose petition for certification to appeal pursuant to § 52-470 (g) has been denied must make a two part showing to prevail on appeal. . . . First, the petitioner must demonstrate that the habeas court's ruling constituted an abuse of discretion. . . . Second, [i]f the petitioner succeeds in surmounting that hurdle, the petitioner must then demonstrate that the judgment of the habeas court should be reversed on its merits." (Citations omitted; internal quotation marks omitted.) *Goguen* v. *Commissioner of Correction*, 341 Conn. 508, 519–20, 267 A.3d 831 (2021). "If the statutory mandate of § 52-470 (g) is to retain any force at all . . . a petitioner whose petition for certification to appeal has been denied must at least expressly allege that the denial was an abuse of discretion to obtain appellate review. Allowing a petitioner to bypass completely any allegation that the habeas court abused its discretion would render a duly enacted statute meaningless, which we are not at liberty to do." Id., 525.

"An appellate court . . . reviews only the merits of the claims specifically set forth in the petition for certification. . . . This court has declined to review issues in a petitioner's habeas appeal in situations where the habeas court denied certification to appeal and the issues on appeal had not been raised in the petition for certification. . . .

"The standard of review of an appeal following the denial of a petition for certification to appeal from the judgment [disposing of] a petition for a writ of habeas corpus is not the appellate equivalent of a direct appeal

from a criminal conviction. Our limited task as a reviewing court is to determine whether the habeas court abused its discretion in concluding that the petitioner's appeal is frivolous. Thus, we review whether the issues for which certification to appeal was sought are debatable among jurists of reason, a court could resolve the issues differently or the issues are adequate to deserve encouragement to proceed further. . . . Because it is impossible to review an exercise of discretion that did not occur, we are confined to reviewing only those issues which were brought to the habeas court's attention in the petition for certification to appeal. . . .

"It is well established that a petitioner cannot demonstrate that the habeas court abused its discretion in denying a petition for certification to appeal if the issue raised on appeal was never raised before the court at the time that it considered the petition for certification to appeal as a ground on which certification should be granted." (Citations omitted; internal quotation marks omitted.) *Lewis* v. *Commissioner of Correction*, supra, 211 Conn. App. 92–93.

In the present case, the petitioner set forth two claims in his petition for certification: "[w]hether the habeas court erred in denying the petitioner's writ of habeas corpus after trial; and . . . [a]ny and all errors or claims that may become evident upon review of the record, evidence, and/or transcript of the proceedings." This petition is very similar to the petition for certification that the petitioner in *Lewis* filed, which we found insufficient to preserve the evidentiary claims, including the failure to sequester a witness, which the petitioner had briefed in that case. See *Lewis* v. *Commissioner of Correction*, supra, 211 Conn. App. 93–94. In *Lewis*, the petition for certification raised two issues for appeal: "Whether the petitioner's constitutional right to the effective assistance of appellate counsel was

violated; and . . . [s]uch other errors as are revealed upon a review of the transcripts and record." (Internal quotation marks omitted.) Id. As does the petitioner in the present case, the petitioner in *Lewis* argued that, despite any deficiencies in his petition for certification, this court should review the petitioner's claims on appeal because the habeas court "actually considered whether to deny his motion to sequester" and his other evidentiary claims. Id., 94. In rejecting the petitioner's argument, we noted: "The petitioner's argument misapprehends the consideration that is relevant to a petition for certification to appeal. Although the habeas court may have considered and exercised its discretion with respect to rulings it made during the habeas trial, the court did not have an opportunity to consider those issues in the context of a petition for certification to appeal because the petitioner failed to include them in his petition. The only issue the petitioner presented for consideration by the habeas court with respect to the petition for certification to appeal was whether its denial of the petitioner's claim that his appellate counsel was ineffective should be appealed." Id.

The same analysis applies in the present case, in which neither issue raised by the petitioner on appeal was addressed in his petition for certification. As in *Lewis*, merely alleging in the petition for certification that the court erred in denying his habeas petition and that the petitioner may raise other issues upon a review of the record did not give the court the opportunity to exercise its discretion as to the sequestration of Satti. See id. Similarly, alleging that the court improperly *denied* the habeas petition did not raise for the court's consideration whether the court improperly had *dismissed* one of the petitioner's claims on the basis of res judicata. In fact, although Judge Chaplin denied the habeas petition and the petition for certification, Judge Newson previously had granted the respondent's motion to dismiss certain of the petitioner's claims.

It would be unreasonable to expect Judge Chaplin to understand that the petition for certification that challenged his *denial* of the habeas petition also was directed to Judge Newson's earlier *dismissal* of some of his claims. Accordingly, because the petition for certification never asked the habeas court to determine whether the claims the petitioner raises on appeal warrant appellate review, we cannot conclude that the court abused discretion that it was never asked to exercise. See *Damato* v. *Commissioner of Correction*, 156 Conn. App. 165, 169, 113 A.3d 449 ("it is impossible to review an exercise of discretion that did not occur" (internal quotation marks omitted)), cert. denied, 317 Conn. 902, 114 A.3d 167 (2015). Furthermore, because such a determination is the first step in a habeas appeal following the denial of a petition for certification, the petitioner's claims necessarily fail.[2]

The appeal is dismissed.

In this opinion the other judges concurred.

[2] We note that, during oral argument before this court, counsel for the respondent acknowledged that the petitioner's claims on appeal are not frivolous. Assuming that is correct, had the petitioner raised his appellate claims in the petition for certification, the habeas court likely would have granted certification as to those claims. See *Simms* v. *Warden*, 230 Conn. 608, 616, 646 A.2d 126 (1994) (noting that issues that "are debatable among jurists of reason; that a court *could* resolve . . . [in a different manner]; or that . . . deserve encouragement to proceed further" are not frivolous (emphasis in original; internal quotation marks omitted)). Thus, we recognize, as stated by the petitioner's counsel during oral argument before this court, the possibility that the petitioner will institute a fourth habeas action alleging that his habeas counsel in this action provided ineffective assistance of counsel by filing a deficient petition for certification. Consequently, some might argue that our decision in the present case elevates form over substance and will result only in further litigation and a delay in addressing the petitioner's claims on their merits. Putting aside that we express no views as to the merits of such an ineffective assistance of counsel claim, we are constrained in our decision in the present case by our prior decisions and the plain and unambiguous language of § 52-470 (g). As our Supreme Court recognized in *Goguen* v. *Commissioner of Correction*, supra, 341 Conn. 519–20, § 52-470 (g) is not just a matter of form. If the statute is to have any meaning, a petitioner must comply with its requirements. Any streamlining of the procedure to pursue habeas appeals is thus an issue to be addressed by the legislature and not the courts.